

Missouri Attorney General's Opinions - 1937

Opinion	Date	Topic	Summary
1-37	Apr 23	CITIES OF THE FIRST CLASS. OFFICERS.	Vacancy in City Council, how filled, and reorganization pursuant to vacancy.
1-37	Apr 28	Mr. H.D. Allison	WITHDRAWN
1-37	June 1	BUILDING & LOAN.	Consent of Supervisor necessary in order to mature stock; a plan of maturing certificates which exacts a contribution from shareholders is legal if no advantage or disadvantage is taken of other shareholders.
1-37	June 24	SCHOOLS.	The School District is not liable for damages in case of personal injuries sustained by persons in the building.
1-37	Aug 16	ELECTIONS.	Laws should be construed to give effect to legislative intent as expressed in the whole legislative Act.
2-37	May 12	ASSESSORS.	Assessments in a county or city of the third class must conform in value.
3-37	Feb 25	MOTOR VEHICLES.	Reciprocity or comity between states is recognized by Section 7768, R. S. Mo. 1929, as it relates to licenses of motor vehicles.
3-37	Mar 12	OFFICERS. SHERIFFS. EXECUTIONS.	Incoming sheriff may complete sale of property under execution where outgoing sheriff has levied but not completed sale.
3-37	June 8	CONSOLIDATED SCHOOL DISTRICTS.	Back taxes collected after disorganization of consolidated school district should go to the original districts or to the districts formed in proportion to the area, assessment and the amount paid in by each district, or same may be settled by an interplea by each district for the amount contended for.
3-37	Dec 14	COUNTY COURT. DEPUTY COUNTY CLERK.	Does not have to assign its reasons in the record for its refusal to approve the County Clerk's appointment of a deputy county clerk.
4-37	Mar 2	CIRCUIT CLERKS.	Circuit clerks are entitled to fees earned although not collected during the year for which they are earned, but collected in subsequent years, for one year's service.
4-37	June 14	DOG RACES. POOL MAKING.	American Animal Auction—Violation of Section 4286.
4-37	July 2	COUNTY BUDGET LAW.	Surplus revenue of a subsequent year may be applied to a deficit of a prior year, but surplus revenue of a prior year may not be applied to a

			subsequent year's obligations while obligations of a year prior to the year for which there is a surplus are outstanding.
5-37	Feb 3	Hon. Latney Barnes	WITHDRAWN
5-37	Mar 1	COUNTY BUDGET ACT.	1. Any surplus remaining at close of fiscal year may be used to pay outstanding valid county warrants for previous years. 2. Warrants should be paid according to registration. 3. Section 14 of County Budget Act applies to counties of more than 50,000 population.
5-37	Mar 25	COUNTY BUDGET ACT.	Warrants in Class 6 may be used for taking care of a deficit in Class 4.
5-37	Nov 2	COUNTY BUDGET ACT.	The juvenile clerk can receive compensation during 1937 only from surplus funds from the other classes; the circuit clerk cannot withhold fees to compensate him as juvenile clerk.
5-37	Nov 16	TAXATION. SALES TAX.	Investigations and hearings by Auditor compelling production of books and papers. State Auditor in holding investigations and hearings may summon witnesses and require production of any books, papers or records of anyone having evidence needed in such hearing.
5-37	Dec 17	LIQUOR.	When and where anyone may sell intoxicating liquor in original package not to be consumed on premises.
6-37	Jan 6	INDICTMENT & INFORMATION.	Counts for felony and misdemeanor may not be joined.
6-37	June 28	POISON. PROSECUTING ATTORNEYS.	Prosecuting Attorneys are authorized to inspect poison register books.
6-37	July 23	BOARD OF ELECTION COMMISSIONERS. COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 450.	Present board of election commissioners has no authority to carry out provisions of House Bill No. 450, prior to effective date.
8-37	Mar 16	SHERIFF. CONSTABLE.	Power to execute state warrants.
8-37	Oct 26	DEPOSITORIES. COUNTY DEPOSITORIES. BANKS & BANKING.	Personal depository bond may be cancelled, by compliance with depository pledging assets in conformity with Laws of Mo. 1937.
9-37	Aug 5	STATE PURCHASING AGENT.	Has jurisdiction over purchases of raw material for the Department of Industries of the State Prison.

9-37	Aug 12	STATE PURCHASING AGENT.	Purchases of the University Co-operative Store of Columbia, Missouri, not within jurisdiction of State Purchasing Act of 1933.
9-37	Oct 5	PURCHASED AGENT ACT. APPROPRIATION ACT.	Construction of Section 48-A, House Bill 509. Cannot include general legislation.
9-37	Oct 6	COUNTY CLERKS.	Deputy Clerks' pay in Nodaway County.
9-37	Oct 18	STATE PURCHASING AGENT. CONSERVATION COMMISSION.	The State Purchasing Agent should purchase the supplies for the State Conservation Commission, except he has no authority to lease or purchase land for it.
9-37	Dec 20	STATE CONSERVATION COMMISSION. PRINTING.	The printing on behalf of the State Conservation Commission should be procured through the State Printing Commission.
10-37	Mar 10	INTOXICATING LIQUOR.	No provisions licensing persons for sale of intoxicating liquor and beer on boats or vessels.
10-37	Apr 15	SCHOOLS.	A school district situated in two or more counties or townships shall deposit bonds voted with the county or township in which schoolhouse is situated.
10-37	Apr 26	SCHOOLS.	Directors in consolidated School districts shall fill vacancy in accordance with Sec. 9290 R. S. Mo. 1929, when one candidate is elected and other candidates tie in votes, where two are to be elected.
10-37	May 24	CITIES OF THE FOURTH CLASS.	Board of Aldermen may pass motions or resolutions when a majority of the quorum of the Board concur.
11-37	Feb 10	Hon. Chas. D. Brandom	WITHDRAWN
11-37	Apr 29	Hon. F. M. Brady	WITHDRAWN
11-37	June 28	COUNTY BUDGET ACT. ROADS AND BRIDGES.	1. County Court cannot use funds of the county to build bridges in special road districts. 2. No funds budgeted under class 3 can be used for the repair, upkeep or building of bridges in special road districts.
11-37	Aug 10	TOWNSHIP ORGANIZATION. TOWNSHIP TRUSTEE. FEE & COMPENSATION.	Township Trustee entitled to 2% on first one thousand dollars and 1% on remainder.
11-37	Sept 15	CONTAGIOUS.	Liability of City of the Fourth Class. Section 9025, 1933 Session Acts,

		DISEASES.	does not shift such liability to the county in which such city may be located.
11-37	Oct 6	ASSESSORS.	Compensation for taking list and entering in assessment book of stock in banks.
11-37	Nov 22	Hon. F. M. Brady	WITHDRAWN
12-37	Feb 4	CRIMES AND PUNISHMENTS.	A prosecution under Section 4143, R. S. Mo. 1929, must show a willful and malicious intention to destroy landmarks.
12-37	May 25	CREDIT UNIONS.	Powers of Commissioner of Securities.
12-37	Aug 5	TRADE NAMES.	Secretary of State, Section 12449 may register brands on milk bottles or cans in the name of the assignee.
12-37	Sept 1	PENAL INSTITUTIONS.	Hopeless incorrigibles who disrupt the system and government of the State Industrial school may be returned to the sentencing court's jurisdiction for other orders.
12-37	Oct 6	CHAUFFEURS AND REGISTERED OPERATORS LICENSES.	Section 5, p. 372 of the Motor Vehicle Law of the Session Acts of 1937 must be followed in lieu of Sections 7765 and 7766 of the 1929 statutes, in the issuance of licenses to school bus and common carrier drivers.
12-37	Oct 12	TAXATION. SALES TAX-ONLY STATE PENAL INSTITUTIONS EXEMPT.	Only Penal Institutions supported by funds appropriated out of State Treasury exempt from provisions of the 2% Sales Tax Act.
12-37	Oct 18	PENAL INSTITUTIONS.	Idiots and insane inmates in the State Industrial School for girls may be returned to the sentencing court's jurisdiction and delivered to the sheriff for sanity proceedings.
13-37	Jan 14	RAILROADS. ASSESSORS.	Distributable property assessed by State Tax Commission; non-distributable property is local property and is assessed by the county assessor.
13-37	Mar 9	COUNTY COURT.	Franklin County Court has authority to convey tract of land for Memorial site to City of Union, Missouri.
13-37	June 29	GAME AND FISH DEPARTMENT.	Fees earned by the Commissioner before July 1, 1937, should be placed in the Game Protection Fund. Bills and accounts made prior to July 1st should be paid from the Game Protection Fund.
13-37	July 9	STATE PARKS.	Control and management of state parks, where vested.
13-37	Sept 3	GAMBLING. LOTTERY.	Bingo and corn games constitute gambling.
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13-37	Nov 13	COUNTY COLLECTOR. SALARIES AND FEES.	Increases in compensation, if any, given County Collectors by 1933 laws may be retained by them even after the taking away of additional duties as ex officio treasurers.
14-37	Aug 28	COUNTY BUDGET ACT.	County court must use surplus funds of the year 1935 after all classes of the budget act have been properly cared for, for the purpose of paying outstanding warrants of previous years.
14-37	Oct 2	TAXATION—COSTS.	Taxes more than five years delinquent may be deducted from criminal cost fees.
15-37	Nov 3	COUNTY BUDGET ACT.	County treasurer should preserve priority payment according to classes. Not necessary to retain funds in any one class to the detriment of other classes in advance of the time payments are due if the priority can be preserved; not necessary for County Treasurer to determine amount of salary court reporter should receive under Sec. 11720; County Treasurer incurs no liability under Sec. 8 of County Budget Act if warrant is legal on its face and comes within the terms of the Act.
16-37	Feb 24	CRIMINAL LAW.	(1) A person discharged by justice on preliminary examination for felony may be brought before another justice in the county and another preliminary held. (2) A person may be committed to the School for Feeble Minded whether under or over age.
16-37	Mar 17	MOTOR VEHICLE FUEL TAX.	Right of State Inspector to disregard corporate fiction in refusing to grant application for dealer's license.
16-37	Apr 20	GENERAL ASSEMBLY.	If a bill is reconsidered and is again voted upon and defeated the subject is finally disposed of, under Section 35, Article 4, of the Constitution of Missouri.
16-37	Apr 28	TAXATION.	Coal or other minerals in place subject to taxation as real estate, and when owned separately from surface estate must be separately assessed. Assessor should assess omitted property for all years it was omitted. County Board of Equalization can only assess omitted property for current year.
16-37	May 13	FISH AND GAME.	It is possible to charge a crime under Section 8265, Revised Statutes Missouri, 1929.
16-37	July 9	Hon. Richard Chamier	WITHDRAWN
16-37	Oct 4	LOTTERIES.	Cleo Colo Bottle Caps.
16-37	Oct 14	NEWSPAPERS.	Officers under Section 13774, R. S. 1929, are not compelled to accept bids from newspapers, but may accept bids in the interest of efficiency and economy and not violate any statute.
17-37	Jan 25	CITIES.	Under special Charter, Legislature cannot amend a charter of a city under special charter, but enactment of a law uniformly to apply to all

			cities under special charter permitting the levying and collecting of taxes.
17-37	May 10	INHERITANCE TAX.	1) A step child considered a stranger in blood. 2) A half-brother entitled to some exemptions as a brother of the whole blood.
17-37	July 27	SALES TAX. COUNTIES. LIABILITY FOR TAX FOR PURCHASES.	Counties not liable for sales tax for purchases for institutions for indigent poor.
18-37	Feb 15	INHERITANCE TAX.	I. Probate Court not entitled to Appraiser's fee. II. Nephews of an intestate decedent entitled to exemption of \$500.00 each.
18-37	May 12	ELECTIONS. BRIBERY.	Re prosecution for bribing voter in city election.
18-37	June 11	SCHOOLS.	Voters may dispose of property not needed for school purposes, or the Board of Directors may sell a schoolhouse or site by providing a new schoolhouse and site.
18-37	Oct 20	NEWSPAPERS.	Must be published in a regular, continuous and unbroken established mode for three years before legal notices are valid.
19-37	Nov 16	SOCIAL SECURITY.	Social Security Act does not repeal, expressly or impliedly, the Act creating Social Welfare Boards in counties having a city or cities of the first class.
20-37	Jan 11	Hon. Brevator R. Creech	WITHDRAWN
20-37	Jan 14	ROADS AND BRIDGES. SPECIAL BENEFIT ROAD DISTRICTS.	May contribute district funds to purchase of right-of-way within the district of roads, but may not do so outside of the district.
20-37	Mar 22	LABOR.	Commissioner of Labor can prosecute proprietor or owner of gasoline filling station under Section 13218, Revised Statutes Missouri 1929, for failure to pay inspection fee.
20-37	Apr 7	USURY.	Construction of Criminal Statute on Usury.
20-37	May 14	BUREAU OF LABOR.	Under Section 13210 R. S. Mo. 1929, beauty shops are not included therein.
20-37	Sept 10	PRIVATE ROADS.	County court may not issue warrant to the officer of the court directing him to build fence under Section 7850, R. S. Missouri, 1929.
21-37	Jan 29	Mr. T. W. Davis	WITHDRAWN
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21-37	Mar 10	LOTTERIES.	Theatre scheme similar to "Bank Night".
21-37	June 14	SCHOOLS.	Bond given by Treasurer of a consolidated school district cannot be paid by school district.
21-37	Sept 4	SCHOOLS.	What constitutes a quorum of the School Board. What notice of meeting necessary.
22-37	Feb 3	COUNTY COURTS.	1. An order of the county court exonerating county officials under an audit, from charges of fraud and embezzlement and stating the officers are not liable for any shortage is not an estoppel or res adjudicate which prevents actions if it is found such officers actually are indebted to the county court. 2. Sec. 11816 must be followed in the event the county officers owe money to the county. 3. Sec. 12165, Laws Mo. 1933, p. 356 contains amount allowed county clerk or other person designated to prepare financial statement.
22-37	Oct 21	CORONERS.	Inquest not to be held on Sunday. Fee for multiple death in one casualty is \$5.00.
23-37	Mar 13	OFFICERS.	Need not be a taxpayer to hold the office of alderman in a city of the fourth class.
23-37	Apr 8	CRIMINAL COSTS.	Neither State nor County liable for payment of costs where persons charged with felony have been discharged by Justice of the Peace or any other officers taking their examination.
23-37	Oct 11	MOTOR VEHICLE. DRIVER'S LICENSE.	C.C.C. enrollees driving government trucks do not have to have state driver's licenses.
23-37	Dec 16	COUNTY. TAXATION AND REVENUE.	(1) The question of whether property owned by the county is subject to execution is a question of fact in view of Section 1161, R. S. 1929. County Treasurer may make partial payment on warrant "next in line for payment" provided he can give proper credit and adjust his own records.
23-37	Dec 17	POOL AND BILLARD TABLES.	Persons, voluntary associations or incorporated bodies must obtain a license to keep and operate.
24-37	Mar 1	CHATTEL MORTGAGES.	Chattel mortgages that have been filed and not recorded may be subsequently withdrawn and duly recorded, according to law.
24-37	Mar 4	SHERIFF.	Entitled to a fee of five cents for "calling any actions" only when there is a cause actually pending before a court of record in which there is a party plaintiff and party defendant.
24-37	Mar 12	INHERITANCE TAX.	(1) Missouri Road Bonds subject to inheritance taxation in Missouri. (2) United States Treasury Bonds subject to inheritance taxation in Missouri.

			(3) War Risk Insurance not subject to inheritance taxation in Missouri.
24-37	May 21	COUNTY COLLECTORS.	Collectors cannot retain twenty-five per cent increase under Section 9935a, Laws of Mo. 1935, by reason of Section 8, Article XIV, Missouri Constitution.
24-37	Aug 11	DEPUTY AND ASSISTANT CIRCUIT CLERKS.	Their appointment and salaries under House Bill No. 177.
24-37	Dec 20	COUNTY COURTS.	Shall not, under Section 5, Class 3, estimate expenses to be less than last preceding even year in even years; likewise relates to odd years.
25-37	June 17	FOOD AND DRUGS.	The Food and Drug Commissioner cannot collect inspection fee on carbonic gas.
25-37	Oct 25	TAXATION.	City collector shall sell land for delinquent taxes of cities of the third class at court house door of the county.
25-37	Dec 17	PROBATE COURTS.	Right to compel claimant to give security for costs.
26-37	Apr 21	LEGISLATURE.	The Legislature has a right to pass a law which will become effective two years in the future.
26-37	June 21	BOARD OF PHARMACY.	May exercise its sound discretion as to whether applicant has passed a "satisfactory examination."
26-37	July 20	ELECTIONS.	C.S. for House Bill 234, repeals provisions of Article 17, Chapter 61, R.S. 1929, in so far as it applies to cities of 600,000 or more, and the judges and clerks appointed under said article and chapter are without office.
26-37	Oct 4	TAXATION.	Distribution of proceeds from sale under Senate Bill No. 94, 1933 Session Acts, where the amount received is less than the total amount of tax, penalties, interest and costs.
26-37	Oct 23	JUSTICE OF THE PEACE.	Public officer, who having in his possession public funds for which he has refused to make settlement, may not hold his office under reelection until he shall have made full settlement of such funds.
27-37	Jan 26	INSURANCE.	Northeast Missouri State Teachers College has authority to buy insurance for its protection and to pay for the same out of the incidental funds which are not appropriated by the Legislature.
27-37	Feb 9	COUNTY BUDGET ACT.	(1) Only insane persons in state hospitals can be estimated under Class I, unless the insane person be committed to the state sanatorium at Mt. Vernon. (2) Funds for purchasing right-of-ways and materials on WPA labor and state highways should be estimated in Class 5.
27-37	June 12	MUNICIPAL CORPORATIONS.	When taxes may be levied for relief purposes and disbursed by relief offices.

		COUNTIES.	
27-37	Aug 31	TAXATION & REVENUE.	Procedure of collector at second and third offering for sale. Collector of City of St. Louis may not subdivide state, city and school tax and enforce them independently.
27-37	Sept 24	SCHOOLS.	Members of school board employing themselves to render service or labor for a school district and receive compensation for same, violate the public policy of the State.
27-37	Nov 10	SALES TAX. CHARITABLE INSTITUTIONS. EDUCATION INSTITUTIONS. EXEMPTION.	Profit plan, in which deficits, if any, are paid by gifts from benevolent persons, and which receives all students applying, whether able to pay for such instruction or not, comes within class of public charitable institution and is exempt from provisions of 2% Sales Tax Act.
27-37	Nov 13	NEWSPAPERS.	When county is liable for the costs of printing election notices.
27-37	Nov 23	COUNTY COURT.	County Court has power and authority to redistrict county into two districts for County Court Judicial Districts.
27-37	Dec 15	SCHOOLS. SCHOOL BOARDS. SPECIAL ELECTIONS.	School Board may not call meeting for special election without petition being presented signed by a majority of qualified voters of the District.
28-37	Apr 9	FEES.	Receipts derived from an insurance policy by State Teachers College may be used to restore or build a building, and it is not necessary that the same be deposited with the State Treasurer.
28-37	Dec 4	SHERIFF. OFFICERS.	May file complaints on Sunday. May not hold a prisoner more than twenty hours without complaint being filed and warrant issued.
29-37	Sept 2	APPROPRIATION. CANCER COMMISSION.	Term "operation," as used in the appropriation act, authorizes expenditures of preliminary expenses.
30-37	Jan 30	DEPOSITORIES. BANKS & BANKING.	Banks may pledge their assets to secure public funds where authorized by statute. Depositories of county, cities of 3d Class, township, school districts & levee and drainage district discussed.
30-37	Aug 27		County court cannot, by order, voluntarily apply salaries and fees due county officials to the payment of delinquent taxes, on personal or real estate, which they may owe.
30-37	Oct 7	CHIROPRACTIC.	Qualifications for license.
31-37	June 3	OFFICERS. COMPENSATION.	Express provision for allowance of pay for words and figures does not permit the counting of punctuation marks and ditto marks.
31-37	Dec 29	GAMBLING.	Section 4287 R. S. Mo. 1929 and other gambling laws apply to private

		PRIVATE CLUBS.	clubs. Applicable to criminal law.
32-37	Apr 16	BOARD OF PHARMACY.	Board of Pharmacy may make rules and regulations not inconsistent with the provisions of the law, so as to determine one's qualifications for a license as a pharmacist or assistant pharmacist.
33-37	Oct 7	COUNTY TREASUER. BONDS: SURETY PREMIUM PAID OUT OF CLASSES 5 AND 6 UNDER BUDGET ACT.	Premium on surety bond may be paid by county if officer elects to give same, and county court approves.
34-37	Jan 14	BOARD OF HEALTH PHYSICIANS AND SURGEONS.	Persons licensed in foreign states are not permitted to come within this state and conduct examinations without first having applied for and received license to practice medicine and surgery within this state.
34-37	Jan 15	STATE BOARD OF HEALTH.	Board has authority to employ and fix compensation of employees and if a person renders service by virtue of such employment such person is entitled to back pay.
34-37	June 21	BOARD OF HEALTH.	Right to disclose results of examinations.
34-37	Sept 3	PHYSICIANS.	Board of Health may not admit applicant for registration by reciprocity who does not comply with statute and rules of board, as long as said rule remains in force.
34-37	Nov 17	TAXATION. SALES TAX. RELIGIOUS INSTITUTIONS.	Missouri Baptist General Association exempted from provisions of the two per cent sales tax act.
34-37	Nov 24	STATE BOARD OF HEALTH.	Certificates to practice cosmetology and hairdressing may be signed by any of the well-known methods of impressing a name on paper by another at the direction of the persons required to sign such certificates.
35-37	Jan 26	INHERITANCE TAX.	Taxability of moneys received as damages under Federal Employers' Liability Act.
35-37	Feb 10	PROSECUTING ATTORNEYS.	In interest of justice the Prosecuting Attorneys may proceed to prosecute by way of information, even when indictment be pending.
35-37	Mar 23	CORPORATIONS.	Officer liable criminally for violation of state law where officer participates in such violation or has prior knowledge thereof.
35-37	Mar 29	CHIROPRACTIC.	A person graduating prior to 1927 may take examination, if such, the time, completed the standard course instruction of three years of six months each.
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35-37	Apr 1	MOTOR VEHICLES.	The value of a motor vehicle stolen is not to be considered in determining the sentence of the one convicted of having stolen such motor vehicle.
35-37	Apr 6	TAXATION & REVENUE.	County Court need not readopt each year method theretofore adopted as to collection of revenue under Section 9787 R. S. 1929.
35-37	May 4	COUNTY COLLECTOR.	Rate of per cent for collection of taxes.
35-37	June 15	PROSECUTING ATTORNEY.	Eligibility to appoint as probation officers in counties less than 20,000.
35-37	June 18	ESCHEATS.	When payment may be made out of Escheats Fund.
35-37	June 22	TAXES.	House Bill No. 70, providing for the remission of taxes applies to personal and real taxes not reduced to judgment.
35-37	Aug 3	RATES. MOTOR CARRIERS. JOINT SERVICE.	Circumstances under which two carriers combining permitted routes are guilty of usurping unpermitted through routing.
35-37	Aug 24	COUNTY BUDGET ACT. HOUSE BILL 177. CIRCUIT CLERKS.	Shall only receive additional compensation out of excess which exists in any class at the close of the fiscal year; the transfer of the fund can be made under the authority of Sections 12167 and 12168, R. S. Mo. 1929.
35-37	Sept 23	TAXATION. SALES TAX.	The Robinson Clinic, Inc. not exempt from the provisions of the 2% Sales Tax Act.
35-37	Oct 16	COUNTY COLLECTOR.	Is entitled to be reimbursed by county court for postage expended during term if not barred by five year statute of limitations.
35-37	Dec 17	PUBLIC ADVERTISEMENTS. PROBATE COURT.	Publisher's Affidavit in records of Probate Court and Affidavit of Publication must not differ materially in form and must meet the requirements of Section 13775, Laws of Mo. 1937, p. 432.
37-37	May 8	MUNICIPALITIES.	Cities of the fourth class are prohibited from issuing warrants in excess of the amount on hand in the treasury, by Section 7015, R. S. 1929. A warrant so issued is void.
37-37	June 22	TAXATION.	House Bill No. 70 is applicable to taxes levied for drainage or levee purposes.
37-37	July 10	UNEMPLOYMENT COMPENSATION ACT.	Emergency clause Constitutional.
37-37	July 21	PAROLE BOARD.	Rights to enter into compact with other states.
37-37	July 26	CASEY BILL.	Constitutionality – emergency clause.
37-37	Oct 15	PENAL INSTITUTIONS.	Governor's power to pardon and parole.

37-37	Nov 15	PROBATE JUDGE.	Fee received for solemnizing marriages to be accounted for in annual settlement.
37-37	Nov 20	CRIMINAL LAW.	“Arson” as distinguished from willful burning property.
38-37	Jan 16	COUNTY COLLECTOR.	Must carry out the duties of county treasurer on and after January 1, 1937 and shall receive no additional compensation, in counties of less than 40,000 population.
38-37	July 16	SOCIAL SECURITY COMMISSION.	Construction of Sec. 10 – Moneys received from other sources.
38-37	July 27	SOCIAL SECURITY COMMISSION.	Refunds and recoveries received by commission to be deposited in State Treasury to credit of General Revenue Fund.
38-37	July 27	SOCIAL SECURITY. LEGISLATURE.	Appropriation for Child Welfare in House Bill No. 500 was mistake, and is a nullity.
38-37	July 28	APPROPRIATION ACTS.	Construction of Sections 53a and 53b of H.B. 509.
38-37	Aug 2	SOCIAL SECURITY COMMISSION.	Definition of “elective officer” as it is used in Section 9, C.S.S.B. 125.
38-37	Aug 4	STATE AUDITOR.	Duty to audit claims against Relief, Child Welfare and Administration fund, created in the Casey Bill.
38-37	Aug 6	CONTRACTS.	Senate Bill No. 182 has no application to existing contracts and those heretofore let.
38-37	Sept 23	COUNTY TREASURER. SALARY. BOND.	Compensation to be allowed him and separate bond required of him as custodian and disbursing officer of moneys of (1) schools; (2) Levee Districts under county court organization; and (3) Drainage Districts under county court organization.
38-37	Nov 30	STATE SOCIAL SECURITY COMMISSION.	Benefits accruing to an individual entitled thereto under the provisions of the act, after the date which the commission has determined such benefits shall be due and payable, and the individual dies, such benefits shall be administered as estates of other deceased persons.
38-37	Dec 16	TAXATION AND REVENUE. ASSESSORS.	Assessor’s compensation due payable upon completion of assessment and proper certification thereof.
39-37	Mar 22	INHERITANCE TAX.	(1) When interest and penalties may be abated. (2) Taxation of the interest of partner in partnership property.
39-37	May 22	CHILDREN.	Powers and duties of Superintendent of State Children’s Home, and Juvenile Courts, with respect to commitment of children to State Children’s Home.

39-37	Aug 4	PROSECUTING ATTORNEYS. SHERIFFS.	When said officers may be appointed to act as Probation Officer.
41-37	Jan 11		Nine questions regarding primary and general election laws of Missouri.
41-37	June 9	TAXATION.	Collection of taxes under House Bill 26.
41-37	July 29	COSTS. PROBATE COURTS.	Collectability of costs assessed against estates containing insufficient assets for their payment.
41-37	Nov 1	OFFICERS.	County Officers not entitled to salary increase during the official term pursuant to the new legislation purporting to increase salaries.
41-37	Dec 11	COUNTY BUDGET ACT.	The question as to who is the person keeping the principal financial records of the county and who is to be deemed the "Accounting officer" is a question of fact. The officer appointed "accounting officer" is not entitled to any additional compensation.
41-37	Dec 20	Mr. Maurice Hoffman	WITHDRAWN
42-37	Apr 3	COUNTY JUDGES. COMPENSATION.	Duty to repay money received as compensation in excess of that authorized by law.
42-37	Aug 27	TITLE.	Jurisdiction of Police Judge of city of third class, acting as ex-officio justice of the peace, as to crimes and misdemeanors is over only such offenses as may be committed within the city limits.
43-37	June 3	PRISON BOARD.	Wrecking of buildings housing prison industries in order that new ones may be erected by the State Building Commission does not violate statutes relating to operation of prison industries.
43-37	Aug 6	SALES TAX. TAXATION. COLLEGES AND EXEMPTIONS.	Educational institutions, principally supported by religious organizations, or by gifts or charities, are exempt from provisions of the 2% Sales Tax Act of 1937.
43-37	Aug 24	COUNTY COURTS.	(1) When erroneous disbursement of funds from road bonds made by the township board may be ratified and confirmed by the county court. (2) Proceeds of road bond issue may be legally expended for purchase of suitable equipment.
43-37	Aug 30	PARDON AND PAROLE.	Present board may investigate and make recommendations on each application for clemency, now pending before them, irrespective of release date, if done before new act is effective.
44-37	Sept 2	SCHOOL.	Eligibility of applicants – Missouri School for the Deaf.
45-37	Jan 28	INSANE PERSONS.	It is necessary to the validity of the court order committing an insane

			person to an asylum that said order show notice and that the same recite the alleged insane person appeared in person or by attorney.
45-37	Feb 11	FEES.	The Sheriff or Constable, serving warrant of commitment is entitled to the \$1.00 fee for committing a prisoner to jail.
45-37	Mar 31	ELEEMOSYNARY BOARD.	Person committed to insane institutions by the Judge of the Circuit Court under Section 8657, R.S. 1929, relating to insanity as a defense under a criminal charge, may be discharged by the Superintendent of the Hospital in the manner as provided in Section 8629, R.S. 1929.
45-37	May 3	ROADS AND BRIDGES.	Commissioners of Special Road Districts cannot act as road overseers or employ themselves and receive compensation for the same in the Special Road District.
45-37	May 14	COUNTY BUDGET ACT.	Sec. 2, page 341, Laws of Mo. 1933, not applicable to St. Louis County. County Budget Act takes precedence over all statutes when there is a conflict. County Court has power to transfer within the same fund any unencumbered appropriation balance. Second paragraph of Section 14 is unconstitutional.
45-37	June 10	DEPOSITORIES. ELEEMOSYNARY BOARD.	Depositories must be selected in the statutory manner, notwithstanding no interest payable after August 23, 1937, under Federal law and regulations.
45-37	June 11	GOVERNOR. BILL.	The Governor must return Bill presented to him where Legislature finally adjourns within ten days after such presentation.
45-37	Aug 23	PURCHASING AGENT. STATE.	May acquire land in the name of State of Missouri to the use and benefit of the Board of Managers of the Eleemosynary Institutions.
45-37	Aug 31	EASEMENTS.	Board of Managers of Eleemosynary Institutions cannot convey an easement without an act of the General Assembly authorizing same.
45-37	Oct 13	INSANE PERSONS.	Procedure and action under Sections 8644 to 8648, Laws of Mo. 1937, p. 510, are to be strictly construed. Procedure outlined.
45-37	Dec 1	ELEEMOSYNARY INSTITUTIONS. FUNDS.	Transfer of funds at end of biennium in accordance with the Laws of Missouri 1933, Section 1, page 415.
46-37	Mar 4	Hon. R. L. Jones	WITHDRAWN
46-37	Mar 16	SCHOOLS.	May not enact rules compelling the attendance of students at religious exercises.
46-37	Oct 5	COUNTY TREASURER. BONDS.	County Court may pay for surety bond if Treasurer elects to give same and Court consents thereto. Treasurer must give separate bonds for school moneys and county funds in statutory amounts.
46-37	Dec 28	INSANE.	Prosecuting attorneys of the county containing a population of less

			than one hundred thousand cannot be appointed by the county court to represent insane persons in an insanity hearing.
47-37	Aug 23	DRAINAGE DISTRICT.	County and township ex-officio collectors' compensation for collecting current and delinquent taxes.
47-37	Sept 8	ROADS AND BRIDGES.	Special Road Districts organized under Article 9, Chapter 42, R. S. Missouri 1929, may purchase right-of-way and convey same to state for highway purposes.
47-37	Sept 10	ROADS.	County may establish or widen public roads in excess of thirty feet.
47-37	Nov 9	CIRCUIT CLERK.	Entitled to a fee of 75 cents for writ directed to sheriff for summoning petit jury for regular term of circuit court.
48-37	Jan 21	AMENDMENT NO. 4 FISH AND GAME.	The Legislature may pass such laws as it may deem proper in aid of but not inconsistent with the provisions of Amendment No. 4.
48-37	Mar 9	BURIAL ASSOCIATIONS.	Legislature may enact law prohibiting payment of death benefits in anything other than cash under police power.
48-37	Apr 13	CHATTEL MORTGAGES. RECORDER OF DEEDS.	Instrument affecting title to real estate and personal property need not be filed in a separate book for the filing of chattel mortgages where such instruments have been duly recorded in a book as conveyances of land, but should index in a book used for indexing and filing all chattel mortgages, upon request of mortgagee or grantee.
48-37	July 23	Mr. J. E. Kelley	WITHDRAWN
49-37	Jan 6	Hon. Lloyd W. King	WITHDRAWN
49-37	Jan 8	MERCHANTS.	Persons preparing and serving meals in a dining room in connection with a hotel are not merchants.
49-37	Feb 11	SCHOOLS.	A new building may be erected on present site and not violate Sec. 9330, R. S. 1929. Words "addition" and "Supplemental" defined; notice to voters should be full enough to apprise them of the exact purpose for which the building is being erected.
49-37	May 24	PROPOSED SALES TAX ACT.	Senate Amendment No. 7 to Senate Committee Substitute for House Committee Substitute of House Bill No. 7, prohibits cities from passing a sales tax act; does not prevent cities from passing other forms of excise tax now in force or hereafter enacted.
49-37	June 14	SCHOOLS.	Change of boundary lines of school districts gives to the new school district all school property located therein.
49-37	June 15	MISSOURI DENTAL BOARD.	Present Members Remain in Office Until October 16, 1940.
49-37	Sept 24	STATE BOARD OF	No school of Cosmetology, Hairdressing or Manicuring may be

		HEALTH.	operated in this State without obtaining a certificate of registration.
49-37	Dec 17	FEES. PROBATE COURT.	Fees of probate judge up to the filing of inventory.
51-37	Jan 5	HIGHWAYS.	Salary may be paid from bond issue, absent bond provisions to the contrary, but township board cannot, directly or indirectly, employ president thereof as supervisor.
51-37	Mar 1	COUNTY TREASURER.	In counties having township organization when the treasurer-elect dies before qualifying for the office in April the person holding the office will continue to hold same until the next general election for electing a treasurer in said counties.
51-37	Mar 17	CONSTABLES.	Fee entitled for attending elections.
51-37	July 20	Miss Laura Layher, R.N.	WITHDRAWN
51-37	Aug 30	PROSECUTING ATTORNEYS. EXPENSES. SALES TAX COLLECTIONS	Expenses of the Prosecuting Attorneys in collection of sales tax not payable out of State funds.
51-37	Oct 8	Hon. Charles F. Lamkin, Jr.	WITHDRAWN
51-37	Nov 9	ANIMALS.	Free stock range. Interpretation of Section 12778, Revised Statutes Missouri 1929.
51-37	Nov 22	Hon. Leon B. Lake, D.O.	WITHDRAWN
51-37	Dec 16	CRIMINAL COSTS.	County must pay costs where defendant has been sentenced to a county jail sentence or by fine even when paroled.
52-37	Sept 13	COUNTY CLERK. FINANCIAL STATEMENT.	Can only receive compensation for making one copy of statement for the publisher.
53-37	Jan 7	INSURANCE. FIRE. SCHOOL DISTRICT.	District may insure in non-assessable reciprocal insurance.
53-37	Mar 8	DEFINITION OF A BONA FIDE TAXPAYER.	
53-37	Mar 9	TAXPAYER.	Eligibility to hold public office.

53-37	Apr 23	TAXATION.	Cities of the fourth class are given power to enforce collection of personal taxes by Sec. 6995, R. S. Mo. 1929.
54-37	Jan 14	SALARIES AND FEES. CIRCUIT CLERKS.	County Court is authorized to fix the number and compensation of deputies to the Circuit Clerk, and the Clerk must abide thereby.
54-37	Feb 24	OFFICERS. COUNTY COURTS.	Where no restrictive words are used in the statute providing for the holding over of an officer, such person holds over until his successor is duly appointed and qualified. The policy of selecting an individual by the court to any office within the county should be left to the discretion of the court.
54-37	June 8	SCHOOLS.	The erection of a second story on present school building is not a "repair" so as to require only majority vote of qualified voters, but must be given two-thirds majority by voters.
54-37	July 13	LOTTERIES.	"Annie-Oakley" Machines
54-37	Sept 18	TAX ON DOGS.	Construction Section 12874b, House Bill 149, 1937 Session Acts. Penalty on dogs running at large without payment of taxes not amended by House Bill 140.
54-37	Oct 18	COUNTY CLERK.	Deputies and Assistants. Method of Salary.
54-37	Dec 8	TAXATION.	(1) Co-tenants may redeem undivided interest in real estate or redeem entire interest and hold as trustee for the other co-tenant the interest such co-tenant formerly owned. (2) Mortgagee may, within statutory period, redeem from stranger purchasing certificate at tax sale. Record owner may within statutory period, redeem from mortgagee.
55-37	May 26	SCHOOLS.	An estimate may be withdrawn and another substituted if done before the first estimate has been acted upon.
56-37	Jan 15	CRIMES.	Escaping jail. Aiding prisoner to escape.
56-37	Feb 10	FALSE PRETENSES. FIVE DAYS NOTICE. INSUFFICIENT FUND CHECKS.	Five day notice statute, 4306 R. S. mo. 1929, applies to misdemeanors covered by 4305, and not to felonies covered by Section 4304.
56-37	Feb 25	COOPERATIVES.	Under Article 29 of Chapter 87, R. S. Mo. 1929, must be organized primarily for agriculture.
56-37	Apr 6	APPEALS.	From Justice Court to Circuit Court—Case to be tried De Novo.
56-37	June 4	BOND ELECTION.	Voters residing in a special road district which includes a part of a township may vote on bonds for township road purposes.
56-37	July 16	CO-OPERATIVE ASSNS.	Definition of words. Mercantile business or Co-operative plan.

56-37	Sept 3	GAMBLING.	Shooting gallery.
56-37	Oct 1	PRACTICE OF LAW.	Before State Boards; Blue Sky Commissioner, etc.
56-37	Oct 13	SECURITIES ACT.	Bond of dealer and salesmen.
57-37	Feb 4	SHERIFFS.	Liability of sheriff and sureties for embezzlement, and method of proceeding against same, particularly as to escheats. Time when breach of bond occurs where more than one sheriff involved.
57-37	Mar 30	TAXATION & REVENUE.	Power and authority of county court to compromise with tax attorneys in suits against railroad companies.
57-37	May 25	COUNTY TREASURER.	Not entitled to fees for drawing warrant for school fund loans.
57-37	July 19	CREAM STANDARDS.	Section 12406 fixes minimum standards for various grades of cream.
57-37	Aug 5	AGRICULTURE.	Fees under Section 12635, R. S. Mo. 1929, to be deposited in the State Treasury; no authority to pay U. S. Department of Agriculture any part of said fees.
57-37	Aug 9	AGRICULTURE.	Shipping point inspection. Cooperation with Department of Agriculture.
57-37	Sept 24	"CHANGE OF VENUE" IN CRIMINAL CASE BY STATE. PROSECUTING ATTORNEY.	State may ask for substitution of Judge in criminal case. Prosecuting Attorney not required to deposit \$10 docket fee for substitution of Judge.
57-37	Nov 23	CITIES.	Cities of the third class operating under an alternative form of government shall elect a Mayor and Council at the regular biennial municipal election.
57-37	Nov 30	TAXATION. SALE FOR TAXES. COLLECTOR AND DEPUTY. RIGHT TO PURCHASE.	Collector or his deputy prohibited from purchasing land sold for delinquent taxes.
57-37	Dec 16	SEED LAW.	Construction of Section 12609-b, Laws of Missouri 1937.
57-37	Dec 18	MOTOR VEHICLES.	Attempted sale of motor vehicle without transfer of certificate of title is a crime, subjecting both buyer and seller to prosecution.
57-37	Dec 20	FEES. COUNTY CLERKS.	County clerk accountable to State Auditor for the fees earned for use of seal in witnessing signatures for Warehouse License.
58-37	Mar 11	BUILDING & LOAN.	Supervisor must fix maximum for board and lodging; examiners exempt from provisions of the statute and are allowed maintenance while at headquarters if given to them by supervisor.
58-37	Apr 29	BUILDING & LOAN.	Supervisor may not give a copy of annual examination of building and

			loan associations to anyone other than the Governor.
58-37	June 3	BUILDING AND LOAN ASSOCIATIONS.	To segregate assets of an association it is not necessary to have a temporary receivership; supervisor may dismiss the temporary receivership proceeding; intervening shareholders would have right to protect their property only when the supervisor is engaged in wrongful acts or is guilty of fraud or collusion. Several methods proposed for obtaining voice of shareholders as to management of the associations. Permanent receivership cannot be dismissed by supervisor.
58-37	June 14	BUILDING AND LOAN.	If by-laws provide, free shares of stock may be accepted for real estate only.
58-37	July 6	BUILDING AND LOAN.	Associations with sufficient funds must pay members withdrawing; persons who buy stock with note which is non-participating are not members; persons who collect rents and sell land for Associations are employees and must give bond.
58-37	July 21	BUILDING AND LOAN.	Contingent fund required by Section 5602 may be designated as the Federal Insurance Reserve Account.
58-37	Aug 27	BUILDING & LOAN.	Semi-annual report if not published by September 6, 1937, does not have to be published.
58-37	Aug 28	BUILDING AND LOAN.	Administrators, Executors, Guardians, and Curators are not included in term "trustees of trust funds" in Laws of 1937 page 508.
58-37	Sept 10	SHERIFFS.	Deputies may not be paid a salary of \$50.00 per month out of county funds, by order of the county court, directly nor indirectly in Sullivan County.
58-37	Sept 23	SALARIES AND FEES. COUNTY COURTS.	Where the County Clerk performs services that are not officially his duty, the County Court is authorized to pay him therefor if the services so performed are reasonably necessary county duties.
59-37	Jan 7	SOCIAL SECURITY. UNEMPLOYMENT INSURANCE.	(1) Moneys paid by employers under a State unemployment insurance law are not necessarily "state funds" within the meaning of Art. IV, Sec. 43, Const. of Mo. (2) Such mandatory payment is not violative of the "due process" clause, and if a tax is for a public purpose.
59-37	Jan 26	COUNTY BUDGET ACT.	The money contracted by the county for lease on road machinery during the year 1936 must be paid out of the revenue of the year 1936.
59-37	Feb 4	JUSTICE COURTS.	Constable or justice as custodian of monies paid in connection with the litigation.
59-37	Aug 24	TAXATION AND REVENUE.	Under Section 9787 R. S. Mo. 1929, the county court can compel the assessor to carry out the provisions of said section and may use its

			own discretion concerning compensation.
60-37	Jan 11	COUNTY BUDGET ACT.	County Clerk incurs no liability by issuing warrants out of the 1937 revenue for 1936 expenditures, provided such warrants do not violate the priorities of the classes in section 2 of the County Budget Act. Warrants are invalid which are issued from the 1937 revenue for 1936 expenditures.
60-37	June 5	SOLDIERS' BONUSES.	Applications filed before December 31, 1936, payable immediately.
60-37	Oct 19	MOTOR VEHICLES.	Sale of defaced or altered serial number on automobile tires.
60-37	Oct 26	BONUS MONEY.	Mother of soldier is entitled to soldiers' bonus, when.
62-37	Jan 18	COUNTY BUDGET ACT.	Funds for purchasing road machinery cannot be taken from Class 3 under Budget Act.
62-37	Jan 20	CIRCUIT CLERKS AND RECORDERS.	Quarterly report to be filed with County Clerk.
62-37	Mar 9	COUNTY CLERK.	Not required or authorized to extend city or town taxes in tax books for state and county purposes.
62-37	June 14	INSANITY INQUISITION. PAUPER OATH.	Cost of same may be paid by county court if a person is declared insane and his estate is insufficient to pay cost. It is within discretion of court to allow a person to twice file and prosecute same suit as a poor person when first suit was dismissed.
62-37	Aug 6	SCHOOLS.	Property of railroads and similar utilities: Method of ascertaining the assessment next before the last assessment and the valuation of distributable property of utilities in a school district as being a basis for a school bond issue.
62-37	Aug 9	SHERIFF'S FEES. CRIMINAL COSTS.	County where proceedings originally instituted liable for costs for transportation of prisoner on account of insufficiency of county jail.
62-37	Aug 27	APPROPRIATION.	Approval by the Governor of appropriation bill makes funds immediately available.
62-37	Dec 2	DOG TAX.	Section 12881, R. S. Mo. 1929, providing for a local option dog tax is not affected by House Bill No. 140, 1937 Session Acts of Missouri.
63-37	Feb 8	CORPORATIONS.	Small loan companies not permitted to contract a charge for attorney fees and collection costs when making loans.
63-37	Feb 12	SMALL LOAN ACT. BANKS & BANKING.	Authorization for insurance plan for "Small Loan Companies" not approved. Sec. 5556, R. S. 1929, discussed.
63-37	Mar 22	INSANE PAUPERS.	County liable for support.
63-37	June 9	BANK. BANKING.	Records and files in possession of Commissioner of Finance for defunct banks, open for inspection of examiners of Federal Deposit Insurance

			Corporation.
63-37	June 15	SCHOOLS.	Board of Directors cannot do indirectly what it is prohibited from doing directly.
63-37	Dec 6	DEPOSITORIES. COUNTY DEPOSITORY. BANKS & BANKING.	Duty of County Court to select county depositories which will pledge its securities to protect the county funds. County Court should select depositories outside county if none in county will pledge assets.
63-37	Dec 15	COUNTY COLLECTOR.	Cannot collect partial payment of State, County and School taxes.
64-37	Jan 20	COUNTY COLLECTORS AND COUNTY ASSESSORS.	Entitled to stationery Record Books, Printed Receipts and Stamps from County Treasury.
64-37	Apr 28	ROADS AND BRIDGES. FUNDS.	If bonds are voted for road purposes such is put in a "road construction fund" and can be used for no other purpose whatever; moneys raised from taxes go into special fund to pay for bonds and interest and surplus may be disbursed by county court as it deems wise.
64-37	May 21	TAXATION.	County collector not required to determine legal question of status of redemptioner.
64-37	May 28	TAXATION.	When a landowner gives a license to a person to search and segregate minerals, the property right is taxable against the landowner.
64-37	June 8	MUNICIPAL CORPORATIONS.	Record necessary to incorporate cities of the fourth class.
64-37	June 21	ASSESSORS.	Compensation in counties containing less than 40,000.
65-37	Jan 22	RECORDER OF DEEDS.	Fee must be paid or tendered to recorder before instrument entitled to record; Recorder not liable on his bond for neglect unless fee is paid or tendered.
65-37	Feb 27	CRIMINAL COSTS.	Prosecuting Attorney not personally liable for costs in felonies and misdemeanors.
65-37	May 10	PEDDLERS. LICENSE.	Merchant who takes merchandise from one farm sale to another to sell at auction must have peddler's license.
65-37	June 5	TAXATION.	Initial Proceedings under Senate Bill 94 constitute first advertisement of sale.
65-37	June 17	COUNTY DEPOSITARIES.	Length of time funds may be held under Section 12188, R. S. Missouri, 1929.
65-37	July 15	UNEMPLOYMENT COMPENSATION	Subject to Purchasing Agent Act, Printing Commission, etc.

		COMMISSION.	
65-37	July 16	UNEMPLOYMENT COMPENSATION COMMISSION.	Authorized to bond employees.
65-37	Sept 22	TAXATION AND REVENUE.	A person selling at wholesale at a particular place is a merchant and must comply with Article 17, Chapter 59, R. S. Mo. 1929.
65-37	Nov 8	INTOXICATING LIQUOR. BOND.	Prosecuting Attorney may bring suit on liquor bond to recover fine adjudged against license.
67-37	Apr 19	Hon. Vincent D. Nicholson	WITHDRAWN
68-37	Jan 7		Mr. Anthony A. O'Hallaron
68-37	Jan 14	SCHOOLS.	Interest received from school loans cannot be reinvested but must be apportioned to school districts; county court cannot take second mortgages for security; property should be foreclosed in the event of default of interest payments with the exception that security may be taken in order to secure interest payments if the facts warrant such.
68-37	Mar 24	INSURANCE.	Amendment to Articles of Incorporation of Missouri Casualty Company approved.
68-37	Apr 16	INSURANCE.	Amendment to Declaration of State National Life Insurance Company valid.
68-37	July 19	INSURANCE.	Approval of Documents – Utilities Insurance Company.
68-37	Aug 21	Hon. Edwin C. Orr	WITHDRAWN
68-37	Sept 16	PROSECUTING ATTORNEY.	Is entitled to recover stenographic hire and the county court can pay the same from any surplus funds or out of Class 6, providing the prosecuting attorney has complied with the terms of the Budget Act in compiling estimate.
68-37	Oct 11	COUNTY COURTS.	Authorized, by order, to pay real estate commission for sale of lands repossessed by purchase under Section 9256, 1929 statutes, if they deem such order best for the interest of said school district or districts. Commission must be paid from the funds of such school district or districts.
68-37	Oct 14	INQUESTS AND CORONERS. CRIMINAL COSTS.	Cost incurred in inquest to be paid by county.
69-37	Aug 23	STATE BOARD OF HEALTH.	The Health Commissioner of the City of St. Louis is without authority to promulgate a rule requiring that the dead bodies of deceased persons

		CITY OF ST. LOUIS.	must be embalmed before removal from said city.
69-37	Sept 10	STATE BOARD OF HEALTH.	All applications for licenses to deal in narcotic drugs must be passed upon by the State Board of Health. Public officers and others constituting a governmental board accept office in view of additional burdens being placed upon them.
69-37	Oct 21	STATE BOARD OF HEALTH.	Persons included within the term "persons on Relief" as used in Sec. 9060, Laws 1937, p. 356 as relates to fees of registrar.
70-37	Apr 19	MUNICIPALITIES.	Not subject to inspection as provided in Section 13120 R. S. 1929.
70-37	Apr 29	TOWNSHIPS.	Township Clerks not entitled to receive a fee on account which may be filed in his office, which is to be laid before the township board for allowance.
70-37	June 7	JURY COMMISSIONERS, IN COUNTIES FROM 400,000 TO 800,000 INHABITANTS. SALARY & COMPENSATION.	Jury commissioners entitled to have salary restored under Senate Bill No. 12.
70-37	July 17	TAXATION.	Collector can refund penalties paid by taxpayers under House Bill No. 70 after effective date of said Bill.
70-37	Aug 26	ASSISTANT COUNTY HIGHWAY ENGINEER.	Should be paid out of Class 4 of the county budget.
70-37	Sept 1	TAXATION.	Section 9951 Laws of Missouri 1933, page 428, relating to sale of property for delinquent taxes is applicable to Jackson County, Missouri.
70-37	Oct 7	SPECIAL ROAD DISTRICTS.	Funds of a special road district, when the district comprises territory in two or more counties, may be used in any part of the district regardless of mileage or amount of funds derived from any county.
70-37	Oct 23	Hon. Tom Phelps	WITHDRAWN
71-37	Feb 24	Mr. Russell N. Pickett	WITHDRAWN
71-37	Apr 26	SCHOOLS.	School house may not be sold until another house is provided.
71-37	Oct 11	SHERIFF.	Is entitled only to ten cents a mile as mileage when he takes two patients to a State Hospital.
71-37	Dec 14	COUNTY CLERK.	Under the statutes is entitled to retain only \$1700.00 per annum for himself. On failure to pay maximum amount deputies or assistants may receive under the statute, Clerk cannot retain difference for himself.
73-37	Feb 17	WATERS.	State lines, as well as other lines bounded by a river change with the

		BOUNDARIES. STATES.	gradual changing or the course of the river, but do not change if the change is sudden and by avulsion.
73-37	Apr 2	Hon. Virgil L. Rathbun	WITHDRAWN
74-37	Mar 23	LOTTERIES.	Hollywood and similar theatre schemes.
74-37	Sept 7	AMENDMENT NUMBER FOUR. CONSERVATION COMMISSION.	Has power both by Amendment Number Four and Section 8211, R. S. 1929, to confer honorary commissions on persons and require such persons to enter into a reasonable bond.
75-37	July 23	DENTISTS.	Contents of window and door plate notices.
75-37	Sept 6	Mr. John L. Rice	WITHDRAWN
76-37	Jan 13	FICTITIOUS NAME.	Use of fictitious name as a violation of criminal law.
76-37	Jan 25	COUNTY CLERK.	Compensation of County Clerk and Deputies in Osage County and how paid.
76-37	Jan 29	COLLECTORS. BONDS.	Drainage district bonds are payable in the order of their presentation, absent showing that the taxing power has been exhausted.
76-37	Feb 16	SCHOOLS.	School fund provided for by Sections 6 and 7 of Article XI of the Constitution, cannot be used for any purpose other than support of free public schools and the State University.
76-37	Mar 31	ANIMALS.	Under Section 12862, R. S. Mo. 1929, a person has the authority to kill dogs in the act of maiming or seizing hogs. He does not have authority to kill the dogs on the premises of the owner of the dogs.
76-37	Oct 19	COUNTY DEPOSITORIES. SECURITIES- COLLATERAL.	Securities as set forth in Section 11469-Laws of 1937, page 521, eligible to secure county deposits. Farm mortgages not proper collateral to secure county deposits.
76-37	Oct 19	PROSECUTING ATTORNEY. RECORDS ALL DESTROYED IN CRIMINAL CASE. WHAT ACTION TAKEN.	Where all records of conviction and sentence destroyed, prosecuting attorney should renew prosecution.
76-37	Oct 30	SUPERINTENDENT OF INSURANCE- APPROVAL.	Articles of incorporation of National Protective Insurance Company under Sections 5759-5760, R. S. Mo. 1929.
76-37	Dec 1	INSURANCE.	Stipulated premium plan companies must comply with Senate Bill No. 126.

77-37	Apr 15	TAXATION.	Property purchased with funds received under World War Compensation Act subject to State and County Taxation.
77-37	July 1	TOWNSHIPS.	May not issue bonds for road purposes when there is a special road district organized which includes the whole or any part of said township within its boundaries, and has road bonds outstanding and unpaid.
78-37	Aug 28	PENAL INSTITUTIONS.	Sentences are to run concurrently from the date rendered unless the sentencing court directs sentence to commence at a future time.
78-37	Nov 5	Mrs. Anice Sanders	WITHDRAWN
78-37	Dec 28	HABEAS CORPUS. PENAL INSTITUTIONS.	Writ served on person in custody must deliver the body and may be reimbursed by Legislative appropriation for necessary expenses.
80-37	June 12	MOTOR VEHICLES. DRIVERS LICENSE LAW.	A private person who transports school children to and from school without compensation does not “operate” school bus.
81-37	Apr 30	INHERITANCE TAX.	Consideration affecting transfer in contemplation of death.
81-37	July 16	ESCHEAT FUNDS.	All funds remaining unpaid and unclaimed in the hands of executor or administrator shall, upon order of the court in which a final settlement is made, be paid into the treasury within one year.
82-37	Feb 27	GENERAL ASSEMBLY.	Power of Legislature to employ additional employees to assist Investigating Committee under House Resolution No. 60
82-37	Mar 5	DEPOSITORIES. COUNTY DEPOSITORIES.	Bond must be given to secure the full amount of the “total annual revenue” of the county. County treasurer liable for funds deposited in an unlawful county depository.
82-37	Mar 17	TOWNSHIP ELECTIONS.	Ballots need not conform with Sec. 10300, R. S. 1929, as amended, pertaining to General Elections.
82-37	Apr 1	Hon. John E. Short	WITHDRAWN
82-37	July 16	TAXATION & REVENUE. INCOME TAX.	Corporations do not have to file tax returns if they have no income. Individuals do not have to file tax returns unless income exceeds \$1,000.00 in case of a single person, or \$2,000.00 for head of family or married.
82-37	Aug 17	COUNTY COURT.	Does not have authority to divert funds derived by levies of special road district for purpose other than that for which same were levied. Special road district may recover from county funds to which it was entitled under Sec. 8042, R. S. Mo. 1929, When.
82-37	Aug 25	COUNTY COURT.	Under Section 9868, R. S. Mo. 1929, additional levy can be placed on the collector’s books and collected in the year 1937.

82-37	Dec 6	ELECTIONS.	Board in Kansas City may not pay additional assistants more than that fixed by statute.
82-37	Dec 8	BOARD OF ELECTION COMMISSIONERS.	Shall select names of judges and clerks at least 60 days prior to the city election to be held on March 29, 1938.
83-37	Jan 8	MOTOR VEHICLE.	Persons charged with the larceny of a motor vehicle or any part thereof, when found guilty, the punishment shall be assessed in accordance with the provisions of the Motor Vehicle Act.
83-37	Jan 8	BOARD OF HEALTH. SOLDIERS AND SAILORS. RECORDS.	A fee of 50 cents must be charged for certified copies of birth or death records, except soldiers and sailors, when certain facts exist, are entitled to same free of charge.
83-37	Jan 13	OFFICES.	Superintendent of Trachoma Hospital at Rolla may accept employment as examiner for insurance company and Missouri Commission for the Blind if such does not interfere with his duties as Superintendent.
83-37	Feb 2	COLLECTOR. EX OFFICIO TREASURER.	Required to give a new bond after January 1, 1937.
83-37	Feb 26	COUNTY TREASURER EX OFFICIO COLLECTOR.	Not entitled to percentage fee for disbursement of school moneys referred to in Section 9266 R. S. Mo. 1929.
83-37	Mar 22	AMENDMENT NO. 4. HOUSE BILL NO. 218.	Rabbits are not protected at the present time, but if House Bill No. 218 is enacted by the Legislature the Conservation Commission, as set up in Amendment No. 4 will have the control and regulation of rabbits to the extent that said Bill confers authority on the Commission.
83-37	Mar 23	CHECKS OR DRAFTS.	Insufficient fund checks. Applicability of Section 4305 R. S. Mo. 1929.
83-37	Apr 1	ELECTIONS.	The office of Collector of cities of the fourth class is an elective office. When an office does not appear on the ballot the electors may write in the name of a qualified person to fill that office.
83-37	Apr 2	BARBER BOARD.	The moral character of an applicant for a barber's certificate is within the discretion of the board of examiners, conviction of a crime may be taken in consideration in determining same.
83-37	Apr 2	INHERITANCE TAXES.	Non-resident beneficiaries have the same exemption as resident beneficiaries.
83-37	Apr 20	INTER-STATE COMPACTS.	House Bill 459 not in conflict with Constitution of Missouri and United States.
83-37	May 4	ADMINISTRATION.	Estates of persons presumed to be dead must be administered according to the terms of the statutes.

83-37	May 5	TAXATION AND REVENUE.	Liability of employees of Federal Reserve Banks for Missouri Income Taxes.
83-37	May 7	Hon. Wayne V. Slankard	WITHDRAWN
83-37	May 24	LIQUOR.	Appropriation for Department of Liquor Control cannot be used to pay expenses of witnesses subpoenaed by the State or Liquor Control.
83-37	June 9	CORONER.	Duty of attending physician to notify coroner upon death of person from injuries received by violence.
83-37	June 15	Hon. Forrest Smith	WITHDRAWN
83-37	June 17	BONDS. OFFICERS.	Collector who fails to certify delinquent state income taxpayers within thirty days after delinquency is liable on his official bond.
83-37	June 18	TAXATION – INCOME TAXES.	Liability of employees of railroad federal equity receiver or trustee under Section 77 of the National Bankruptcy Act.
83-37	July 14	COUNTY SURVEYOR.	Entitled to salary as Surveyor and as ex officio County Engineer.
83-37	July 14	SALES TAX: SECTIONS 13, 24 AND 25, SALES TAX ACT OF 1937.	In case the State Auditor extends time for making any return or paying any tax required by this Act, such taxpayer is relieved of the payment of the interest prescribed by Section 24 and is entitled to deduct the 3% of the tax as provided by Section 25 of the Act.
83-37	Aug 13	COUNTY COLLECTORS.	County Collectors liable on official bonds, where they fail or refuse to publish a list of delinquent lands for sale.
83-37	Sept 4	PROSECUTING ATTORNEY.	(1) May make and swear to complaint for a felony under Section 3467, R. S. 1929. (2) No civil liability on prosecuting attorney in event of failure of prosecution by acquittal, dismissal or otherwise.
83-37	Sept 23	TAXATIONS. SALES TAX.	Fees and charges paid for privilege of fishing are not subject to the provisions of the 2% Sales Tax Act.
83-37	Nov 4	NURSERY STOCK.	Subject to inspection, when.
83-37	Nov 5	MISSOURI ATHLETIC COMMISSION.	Commission has no jurisdiction over boxing events held at Jefferson Barracks.
83-37	Dec 2	MOTOR VEHICLE FUEL TAX. GASOLINE.	No refund of tax on gasoline exported in tanks of automobiles.
83-37	Dec 31	STATE BOARDS.	Right of State Auditor to issue warrants for rent and stenographic help for the following Boards: Nurse Examiners, Optometry, Osteopathy,

			Barbers, Embalming, Chiropractic Examiners, Dental Examiners, Accountancy and Pharmacy.
84-37	Sept 10	TAXATIONS. SALES. TAX.	Rural Electrification Co-Operative Associations to pay the sales tax for electric current and energy purchased from the seller of such current.
85-37	Feb 5	AMENDMENT NO. 4.	(1) The amendment does not empower the Conservation Commission to make its own laws independent of the Legislature. (2) A statute enacted by the Legislature empowering the Conservation Commission to make its own laws would not be valid. (3) Amendment does not authorize Commission to determine who shall buy licenses to hunt, etc. And four other questions.
85-37	Feb 20	SUPERVISOR OF BUILDING AND LOAN ASSOCIATIONS.	(1) A person appointed by the Governor to fill vacancy in office of Supervisor of Building and Loan Associations has authority to discharge the duties of Supervisor prior to confirmation by the Senate. (2) Removal of supervisor disqualifies him to act as Receiver. Supervisor appointed to fill vacancy should proceed to have himself appointed receiver in all cases pending in court and court should appoint him as such receiver.
85-37	Apr 5	MOTOR VEHICLES.	Commissioner of Motor Vehicles may show tonnage capacity on license plates for commercial vehicles.
85-37	Apr 29	GOVERNOR.	Senate Bill No. 5 which attempts to create a Revision Commission is unconstitutional for four reasons.
85-37	May 18	BUILDING & LOAN.	Proposed merger of Benefit with North American Association approved.
85-37	May 25	BOARD OF PERMANENT SEAT OF GOVERNMENT.	May hang in the Capitol plaster cast models of Victor Holm's Missouri Monument in the Vicksburg National Park, one panel showing the Union Army in battle and one showing the Confederate Army in battle, if said panels harmonize with the uses, style and construction of the State Capitol.
85-37	July 3	DRAINAGE DISTRICTS.	Collection of costs in suits for delinquent drainage taxes.
85-37	July 15	SALES TAX AND REVENUE.	Consular officers and their employees, nationals of other foreign governments, not liable for payment of a sales tax.
85-37	July 26	SALARIES AND FEES. OFFICERS.	Probate Judges compensation is based on fees collected rather than on fees earned.
85-37	July 30	MOTOR VEHICLES.	Non-residents who purchase motor vehicles in Missouri may be issued certificate of ownership.
85-37	Aug 27	BOARD OF PHARMACY.	If April examination is declared void, applicants found guilty of no wrong should be given opportunity to retake examination prior to

			September 6th, 1937.
85-37	Sept 9	AMENDMENT NUMBER FOUR. CONSERVATION COMMISSION.	All counties now having in force the provisions of Section 8246, relating to a closed season on quail will continue to have closed season until the expiration of the time as mentioned in said section.
85-37	Sept 22	GOVERNOR.	The Governor of the State of Missouri cannot sign and enter into a compact with other states without legislative authority.
85-37	Oct 28	COUNTY TREASURER.	The County is not liable for the compensation of the county treasurer prior to his appointment by the Governor.
85-37	Nov 8	Hon. Lloyd C. Stark	WITHDRAWN
85-37	Nov 24	MOTOR VEHICLES.	Commissioner of Motor Vehicles may, in his discretion, with the approval of the State Highway Engineer, issue overweight permits in accordance with the terms of the statute.
85-37	Dec 16	MOTOR VEHICLES.	What constitutes "public" or "common carrier" within the meaning of Section 5, Laws of 1937, page 372.
85-37	Dec 29	STATE INSTITUTION INSURANCE.	Insurance may be carried on properties of state institutions if authorized by statute and if legislature makes appropriations for payment of premiums.
86-37	Apr 9	MOTOR VEHICLES.	If plates are lost or destroyed by seizure or otherwise duplicates must be issued.
86-37	May 7	COUNTY SURVEYOR.	If surveyor refuses or neglects to give bond within the time prescribed in section 11572, then, by the terms of section 11574, a vacancy may be declared and filled by the Governor under section 10216.
86-37	May 8	TAXATION.	County Collector unauthorized to collect delinquent real estate taxes due cities of the fourth class, is without authority to sell property to enforce such collections, and is entitled to no commission on any such taxes collected.
86-37	June 29	MOTOR VEHICLES.	All operators of motor vehicles being operated within this state, whose height, width and length exceeds the inhibitions of the statute by reason of the use of clearance lights and rear vision mirrors, must obtain special permits therefor.
86-37	Aug 6	CIRCUIT CLERKS-FEES & SALARIES. CLERK OF JUVENILE COURT-SALARY. HOUSE BILL 177.	1. Emergency clause not effective under H.B. 177. 2. Clerk permitted change from fee basis to salary, during term, without violating Sec. 8, Art. XIV, Mo. Const. 3. Clerk of Juvenile Court entitled to salary during his present term.
86-37	Aug 17	LOTTERIES.	"Surprise Night" and similar theatre schemes.

86-37	Nov 12	VENDING MACHINES.	May be a lottery or slot machine depending upon the value of the tokens given as prizes.
87-37	Jan 20	DEEDS OF TRUST AND MORTGAGES.	Person must release within thirty days after date of payment of deed of trust or mortgage, after request; and failing to do so penalty attaches.
87-37	Mar 12	PRIVATE SCHOOLS.	A school incorporated under the provisions of Article X, of Chapter 32, of R. S. Mo. 1929, is entitled to hold property for corporate purposes up to an amount as indicated in Section 9743, R. S. Mo. 1929, and such property shall be tax exempt.
88-37	Jan 25	PUBLIC ADMINISTRATOR.	Term of office. Eligibility to office not affected by time of filing surety bond.
88-37	Sept 22	COUNTY CLERKS.	County Courts cannot persist in keeping a county clerk on a fee basis until the expiration of the term for which the county clerk was elected.
89-37	Mar 5	COUNTY HIGHWAY COMMISSION. COUNTY HIGHWAY ENGINEER. COUNTY COURTS.	Expenses, mileage and per diem for traveling outside the county. Right to per diem for same day as County Court and County Board of Equalization.
89-37	May 13	OLD AGE ASSISTANCE.	House Concurrent Resolution No. 16 in Senate Journal, p. 580, as it applies to Old Age Assistance and the Old Age Assistance Department.
90-37	Apr 29	ANIMALS—STALLIONS.	Owner of stallion has lien on foal for one year.
90-37	Apr 29	CITY COLLECTOR.	When special election may be called to fill office; authority to reduce compensation.
94-37	Apr 22	COSTS.	Jury costs, under Section 8774, after a mistrial and a compromise between the parties in which each agrees to pay half, should be six dollars for each party.
94-37	Aug 6	INHERITANCE TAX.	Missouri estate tax on property belonging to non-resident is equal to 80% of the Federal estate tax imposed on said property.
94-37	Nov 10	ROADS AND BRIDGES.	Warrants may be issued and registered up to amount of anticipated revenue, but not in excess.
96-37	Aug 3	Mr. J. T. White	WITHDRAWN
97-37	Jan 4	TAXATION.	Personal property of Naval Reservists subject to property tax.
97-37	Jan 4	TAXATION.	Certificate holder only entitled to receive amount of certificate plus subsequent taxes paid.
97-37	Jan 13	SHERIFFS.	Contracting with sheriff's brother to feed prisoners at County Jail would

			not be a violation of the Nepotism Act.
97-37	Jan 27	RECORDER.	Recorded instruments may be destroyed without liability on the part of the Recorder.
97-37	Mar 10	COUNTY HIGHWAY ENGINEER.	Compensation and when same may be withheld.
97-37	Mar 23	COUNTY BUDGET ACT.	Contracts made with an Engineer for determining data for roads and bridges, if the compensation is fixed according to the amount of data prepared and he is to be paid after completion of the work his compensation should be paid out of the revenue for the year in which the work is completed.
97-37	Apr 20	SCHOOLS.	District of residence need not pay any of the first \$50.00 of high school tuition for its pupils.
97-37	Apr 30	TOWNSHIP TREASURER.	The township ex officio treasurer of township is not entitled to commission on money belonging to office which he turns over to his successor.
97-37	May 6	TAXATION. BUILDING & LOAN.	Building and Loan association cannot be compelled by county board of equalization to give list of shareholders; shareholders must return list of shares and actual cash value thereof; shares upon which there is a loan need not be returned on the assessment list.
97-37	May 18	DRAINAGE & LEVEE DISTRICTS. LEVEE & DRAINAGE DISTRICTS. COUNTY TREASURER. TAXATION AND REVENUE. COUNTY TREASURER'S FEES.	Fees due county treasurer for disbursing levee funds organized under county courts.
97-37	May 25	ASSESSOR.	Under Section 12357 is to receive four cents for the complete blank and not for each separate item filled out in said blank.
97-37	June 7	COLLECTORS.	Rule for determining the classification under Section 9935. Taxes levied for special road district to be included in classification.
97-37	June 11	CRIMINAL COST.	Neither State, County or Prosecuting Attorney's Office are liable for cost when a person charged with a felony on complaint of prosecuting attorney, is discharged by examining official, or at request of Prosecuting Attorney.
97-37	July 27	TAXATION- ABANDONED	Mode of collecting tax on same.

		RAILROAD RIGHT-OF-WAY.	
97-37	Aug 10	COUNTY COURT. ROAD BONDS.	Section 7963, R. S. Mo. 1929, requires proceeds of road bonds to be turned over to the township treasurer and disbursed by him on order of county court.
97-37	Aug 16	JUSTICES OF THE PEACE.	Powers to grant stays or execution can commute fines to imprisonment.
97-37	Sept 3	TAXATION.	County Collector has the right to accept payment for less than all taxes, interest and penalties due and delinquent on land being advertised for the third sale.
97-37	Sept 4	PRIVATE CORPORATIONS.	Subject to prosecution for violations of the criminal law.
97-37	Sept 14	TAXATION.	Sales of delinquent lots and lands may be held at any courthouse located in the county if notice provides for same; if notice does not provide then sale to be held at county seat courthouse.
97-37	Sept 17	TAXATION.	Procedure to be followed in sale of land for delinquent taxes under Jones-Munger Law in view of remission statutes.
97-37	Oct 9	PROSECUTING ATTORNEYS.	It is not the duty of the prosecuting attorney to bring suits in behalf of the parents of students against the school district.
97-37	Oct 11	MOTOR VEHICLES. DRIVER'S LICENSE ACT.	Requires an operator to take out only one driver's license.
97-37	Nov 12	TAXATION & REVENUE.	Jones-Munger Bill. Purchaser of any title or interest or real estate by proper conveyance would have the same right of redemption as former owner.
97-37	Nov 12	TAXATION.	Poll taxes for 1937 to be collected; Section 8181 relating to poll tax in Special Road Districts not repealed.
97-37	Nov 13	CATTLE AND HOGS. INSPECTION OF.	Duty of brand inspector to inspect.
97-37	Nov 22	Hon. W. P. Wilkerson	WITHDRAWN
97-37	Dec 21	CRIMINAL PROCEDURE. COURTS.	Special judge selected by Prosecuting Attorney and Defendant to try criminal case, cannot parole convicted defendant.
97-37	Dec 31	FEES. RECORDER AND CIRCUIT CLERK.	Recorder and Circuit Clerk shall collect and account for fees for taking acknowledgments and affidavits.
97-37			

98-37	Feb 5	FICTITIOUS NAME.	Use of fictitious name as a violation of criminal law.
98-37	Feb 20	Hon. Conn Withers	WITHDRAWN
97-37	Apr 23	ESCHEATS FUND.	Payment to Nonresident.
98-37	Sept 9	Hon. Conn Withers	WITHDRAWN
98-37	Oct 18	PLAN OF SCREEN.	A lottery in violation of Section 4314 R. S. Missouri 1929.
98-37	Nov 17	FUNDS.	Transfer of funds at end of biennium in accordance with the Laws of Missouri 1933, Section 1, page 415.
98-37	Dec 20	COLLECTOR'S BONDS. BONDS.	County Court may pay premium on collector's bond, if collector elects to give surety bond and county court consents to the giving of same.
98-37	Dec 22	SHERIFFS.	Fees in reference to non est returns on search and seizure warrants.
99-37	Jan 8	CEMETERIES. TAXATION.	Land owned by cemetery company and not used for burial purposes is subject to taxation.
99-37	Jan 21	COUNTY COURTS.	May employ and dismiss assistants under Section 8020, R. S. Mo. 1929.
99-37	Mar 27	HABITUAL CRIMINAL ACT.	Sections 4461 and 4462, R. S. 1929. Principal charge may be based on a "mixed felony" and be punished under "Habitual Criminal Act."
99-37	Apr 13	ROADS AND BRIDGES.	County Court may not appoint road overseer under Section 7870 for special road districts created under Section 8061, R. S. Mo. 1929.
99-37	May 24	LOTTERY.	"Win-O" game operated by theatre is a lottery.
99-37	Oct 13	JONES-MUNGER LAW. PUBLICATION.	It is not necessary under Section 9952b, 1935 Session Acts for the Collector to make any certification to be embodied in the publication.
99-37	Nov 4	ELECTIONS.	St. Louis election board authorized to appoint deputy commissioners for purposes of registration.
99-37	Nov 22	BOARD OF ELECTION COMMISSIONERS.	That part of Section 36 which provides that the information required to be typewritten on affidavit forms is to be taken from registration book is directory.
100-37	June 16	FEES. SHERIFFS.	For summoning petit jury and for apprehension of fugitives.

CITIES OF THE FIRST CLASS--OFFICERS: Vacancy in City Council, how filled, and reorganization pursuant to vacancy.

April 23, 1937.

4-23



Mr. Sam Alberts
City Councilman
City of St. Joseph
Ninth and Felix Street
St. Joseph, Missouri

Dear Sir:

We acknowledge your request for an opinion dated April 19, 1937, which reads as follows:

"I wish to ask your opinion with reference to a question that came up to-day at our Council Meeting.

"If the president of the Council tenders his resignation to the other members of the Council, what is the procedure in electing a new president? Does the present President Pro tem, succeed in that office, or is it necessary to hold another election?"

The Courts will take judicial knowledge that St. Joseph is a city of the first class.

Section 6114 R. S. Mo. 1929, provides in part:

"* * * * The members of the common council shall select one of their number as president, who shall serve as such president for a term of two years, and who shall preside over the meetings of the common council, and shall vote as other members. In case of the president's absence or inability to act, the common council shall select a president pro tem., who, during the continuance of the president's absence or inability to act, shall exercise all the rights and powers devolving upon the president. * * * *."

Section 6171, R. S. Mo. 1929, provides in part:

"The mayor and common council shall have power within the city, by ordinance, not inconsistent with the Constitution or any laws of this state or of this article: * * * *.

"XXXIX. To regulate the election of all elective officers and provide for removing from office all persons holding office under the provisions of this article, where such election and removal is not otherwise provided for by this article.

Article XIV, Section 5 of the Missouri Constitution provides:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

CONCLUSION.

This department is of the opinion that under the Missouri Constitution any person holding the office of city councilman, for the city of St. Joseph, holds the same subject to the right to resign. Where a resignation is tendered by a city councilman, it can be accepted only by a City Ordinance as provided in Section 6171, supra. Where resignation is thus accepted there is a vacancy in said office. Where the officer resigning be the president of the City Council, then the office of president of the City Council becomes vacant, by said resignation. While the Legislature intended the president pro tem to act in the president's absence, or inability, there was no intention for him to become president of the council pursuant to a vacancy in office, or the Legislature would have so stated.

Mr. Sam Alberts

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April 23, 1937.

Under the Statutes the president is to be chosen at an election by the members of the council, and the office of president is not filled by operation of the law. Where there is a vacancy in said office, a majority vote of the members will elect the new president, and until the president be elected the president pro tem would continue as the presiding officer.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

WOS:H

BUILDING & LOAN: Consent of Supervisor necessary in order to mature stock; a plan of maturing certificates which exacts a contribution from shareholders is legal if no advantage or disadvantage is taken of other shareholders.

June 1, 1937

6-3

Honorable Joe C. Acuff
Chief Clerk
Bureau of Building & Loan
Supervision
Jefferson City, Missouri



Dear Mr. Acuff:

This is to acknowledge your letter as follows:

"We are in receipt of a request, by the Santa Fe Savings and Loan Association, Kansas City, Missouri, for our approval on the maturity of several shares of stock of that association. Their method of maturity as set forth in the request is to ask a contribution, by the shareholder, in the form of a lump sum in lieu of extended monthly payments. In this manner, they declare the stock matured at the par value as stated on the certificate issued at a date earlier than the earnings of the association justify.

"In other words, on the back of the certificates issued by this association, there was a schedule printed estimating maturity of this particular stock in 120 months. The 120 months period has now expired but the earnings of the association have not been sufficient, totaled with the dues

Honorable Joe C. Acuff

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June 1, 1937.

paid in, to reach the par value of the certificate. Therefore, the association is requesting that the shares be matured at the book value but rather than show maturity at an amount less than the par value is asking for a contribution to make up the difference.

"In studying the law regarding maturities, I find that it does not specifically state that the maturity value must necessarily be the par value stated on the certificate. The question arises in my mind is whether it is possible to mature stock at book value rather than par value and if so, should it be declared matured at the book value rather than asking for an additional contribution in order to maintain maturity at the par value stated on the certificate.

"I have before me a method of maturing stock in such a manner as set forth by the Santa Fe Savings and Loan Association in a letter, which I am inclosing, to one of their shareholders.

"Inasmuch as both the association and the shareholder herein mentioned are anxious to receive an immediate reply we respectfully request that you let us have a written opinion at your earliest convenience.

"Please return the inclosures with your opinion so that we may restore them to our files."

Honorable Joe C. Acuff

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June 1, 1937.

The inclosures appended to your letter show that the Santa Fe Savings and Loan Association is seeking to mature stock by exacting a contribution from each shareholder on each share of stock. In other words, the dues paid, plus the profits, will not mature the stock at its book or maturity value unless a contribution is exacted in order to bring the share of stock to its book value or its maturity value. The method of obtaining the contribution from the shareholders being that the certificate of stock is endorsed and forwarded to the Association, at which time a check is delivered to the shareholder for the amount of the contribution, signed by the Association. This check is then endorsed by the shareholder and returned to the Association. When this contribution check is received by the Association then a second check is forwarded to the shareholder, which will be the book value or stated maturity value of the stock, less the amount of the first check. The enclosure appended to your letter explains in detail the method as follows:

"The way we have to mature these is as follows: On or after April 10th you endorse your certificate on the back on the lower right hand line, and send it in to us. We then send you a check for \$110.00 which you will endorse and return to us. As soon as this is received we will send you the check for \$390.00 to complete the transaction."

The above procedure will mature \$500.00 worth of certificates.

A Building and Loan Association is a creature of statute, and is governed in its operation by the statutes and its by-laws. Bertche vs. Loan & Investment Association of Missouri, 147 Mo. 343.

June 1, 1937.

We do not know what the by-laws of the Santa Fe Savings and Loan Association provide relative to the maturity of shares by contribution from shareholders. Suffice it to say, however, that the by-laws would have to provide for maturity of certificates in the manner sought. The applicable statutory provisions relating to maturity of certificates is found in Section 5603, Laws of Missouri, 1931, (p.154). We quote the statute as follows:

"Each shareholder shall pay to said corporation at or before each stated meeting of the directors or at such time as may be provided in the by-laws as a contribution to the capital thereof the sum fixed as dues for each and every share held by him, until each share shall, under the provisions of this article, reach the ultimate value thereof: * * * and provided further, that when any shares of stock of an association have, in the opinion of the board of directors reached their ultimate value, such fact shall be reported to the supervisor of building and loan associations; and no stock shall be matured or money paid thereon except with the consent and approval of said supervisor of building and loan associations."

Nowhere in the statute is the word "maturity" defined. The only reference being that the by-laws fix the amount to be paid as dues by the shareholders until such shares reach the ultimate value.

"The term 'maturity' when used in connection with contracts generally is interpreted to refer to the time when its conditions and obligations are to be completely fulfilled. * * * Patterson vs. Reddish, 56 Cal. A.917, 201."

In *Bertche vs. Loan & Investment Association of Missouri*, the Supreme Court, en banc, in discussing the maturity or par of shares, said the following: (p.357)

"The law governing the formation of building and loan associations contemplates a scheme for paying the capital stock in installments, so long as such periodical payments, taken in connection with its other income arising from fines, dues, interest and profits, are necessary in order to bring the stock up to par."

Therefore for the purpose of Building and Loan Associations a share of stock will be deemed to have matured or to have reached its ultimate value when the dues paid in, plus profits, amounts to the stated par value. The Court has repeatedly held that an Association cannot fix a definite or arbitrary period in which to mature shares of stock for the reason that a Building and Loan Association is a mutual concern, and that the maturing of the shares of stock occurs when dues, plus profits, cause the stock to reach its ultimate stated value. In other words, an Association cannot guarantee that a share of stock will mature in so many months. *Bertche vs Loan & Investment Association of Missouri*, supra; *Fisher vs. Patton*, 134 Mo. 32.

The method of maturing a share of stock proposed by the Santa Fe Savings & Loan Association is not objectionable if such method does not deprive other shareholders of any substantial rights. In other words, if the proposed method inures to the advantage or disadvantage of other shareholders, then, of course, the maturing of the particular shares in the manner and method proposed would be ultra vires and void.

In *Fisher vs. Patton*, supra, the Supreme Court, en banc, had the following to say concerning fictitious credits in order to mature stock: (p.53)

"The action of defendants in an attempt to show a value of \$200 in cash on the books of the association for each share by a fictitious credit of \$42 thereon, which is assumed to be present because the average of premiums amount to that sum, can not be upheld as against plaintiff. The statement of July, 1894, shows that the shares were worth \$158 in cash and only by this fictitious credit could the amount of \$200 be reached. Such a calculation deprives plaintiff of a substantial right. It deprives him of his property and impairs the obligation of his contract."

In *Bertche vs Loan & Investment Association of Missouri*, supra, the Court said: (p.360)

"The association being organized under a mutual plan must treat all of its members equally, and any contract whereby one stockholder obtains greater share of profits than another would be violative of the principle of mutuality between the stockholders. The plainest principles of justice and honesty clearly forbid that one class of stockholders equally meritorious should be compelled to suffer that others may profit thereby."

From the above and foregoing it is our opinion that as the consent and approval of the Supervisor of Building & Loan Associations is necessary in order for stock to be matured or money paid thereon that if the

Honorable Joe C. Acuff

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June 1, 1937.

plan of maturity proposed does not deprive any other shareholder of any substantial right, then the Supervisor would be within his rights to approve the maturity of shares of stock as proposed by the Santa Fe Savings & Loan Association. However, before the Supervisor can approve such a plan, the plan of maturity must be provided in the by-laws so that other shareholders' certificates will be matured in like manner.

We are returning the inclosures.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

JLH/R

SCHCOLS: The School District is not liable for damages in case of personal injuries sustained by persons in the building.

June 24, 1937

6-25

FILED

Mr. C. K. Allen
Secretary, Consolidated
School District No. 6,
Rothville, Missouri

Dear Sir:

Your request for an opinion, dated June 22nd and addressed to General McKittrick, has been handed to me for reply.

The contents of your letter is as follows:

"We, being servants of the public, Members of the Board of Consolidated School District #6, Chariton County, Missouri, are in need of some legal advice. We can think of no better place to turn for it than to a Chariton County man, who is also a servant of the Public in the Higher Ranks.

"Our School Building was planned by a licensed architect, who specialized in plans for school buildings, in 1924, and the plans were approved by the State Department of Education, and the building has been in use for something like thirteen years. It was built facing the south and there has the front entrance. There are two rear entrances on the north. On the east side at the northeast corner was built an outside stairway to the furnace room and coal bin, the opening to this stairway being at the northeast corner of the building with an iron railing around all but the entrance to the stairway.

"This Spring at a Music Festival participated in by a number of the County High Schools, one of the high school girls from a neighboring Town, about the hour of 10:00 P. M., went out one of the rear doors to consult with the bus driver. She then started around the east side of the building to get in a car that was waiting for her. In going around this corner of the building she entered the stairway and fell to the bottom of same, breaking her leg. She spent a considerable time in the Hospital, but is recovering and will eventually be as good as new it seems. Her Father is now asking that the School Board pay him a sum of \$800.00 to compensate him for the money expense incident to this accident.

"While we are very sympathetic with both the Girl and her Parents, we cannot see that the School District is liable, as it seems apparent to us that this building was planned and built about as other buildings that have outside stairways, and that the accident came about by the thoughtlessness of the Girl in not being more careful in strange surroundings.

"What is your opinion? Would this School Board have any right to settle with this party, using the taxpayers money that has been collected for school purposes?

"May we hear from you at an early date, and we assure you that we sincerely appreciate your service in this connection."

Mr. C. K. Allen

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June 24, 1937.

We appreciate the full and complete facts with which you have favored us. The incident which you relate is very unfortunate for the young lady who was injured, and in rendering you this opinion we are not unmindful that it is a sad incident, and merits the sympathy of every one. However, as your letter presents purely legal questions and requests our conclusion regarding the same, we must treat it from the standpoint of what is commonly termed 'cold law'.

The Supreme Court of the State of Missouri in the decision of Cochran vs. Wilson, 287 Mo. 210, had before it a situation almost identical with the one you present. The decision reviews all cases in which a similar principle is involved. We quote extensively from the same, l.c. 218:

"This board is a quasi-corporation and bears a like relation to the State or its educational system to that sustained by a school district. (Art. XIII, chap. 106, R. S. 1909; Art. XVI, chap. 102, R. S. 1919.) Even more definite in terms and comprehensive in scope than the laws defining the corporate existence of ordinary school districts is that in relation to such a district as is authorized to be created in a city of 500,000 inhabitants or over, or that at bar. (Secs. 11030 et seq., R. S. 1909; Secs. 11456 et seq., R. S. 1919.) The reasons prompting legislative action in the creation of school districts has been judicially defined many times, nowhere perhaps more fully or clearly than in *Freel vs. School of Crawfordsville*, 142 Ind. 27, in which recovery was sought by a laborer in a suit against a school district for injuries while working on a school building. A demurrer to the petition was sustained and there was judgment

for the defendant. This was affirmed on an appeal to the Supreme Court. In discussing the quasi-corporate capacity of the district as a ground of non-liability, at page 28, the court said, in effect:

"They are involuntary corporations, organized, not for the purpose of profit or gain, but solely for the public benefit, and have only such limited powers as were deemed necessary for that purpose. Such corporations are but the agents of the State for the sole purpose of administering the state system of public education. It is the duty of the school trustees of a township, town, or city, to take charge of the educational affairs of their respective localities, and, among other things, to build and keep in repair public school buildings. In performing the duties required of them, they exercise merely a public function and agency for the public good, for which they receive no private or corporate benefit. School corporations, therefore, are covered by the same law in respect to their liability to individuals for the negligence of their officers or agents, as are counties and townships. It is well established that where subdivisions of the State are organized solely for a public purpose by a general law, no action lies against them for an injury received by a person on account of the negligence of the officers of such subdivision, unless a right of action is expressly given by statute. Such subdivisions, then, as counties, townships, and school corpora-

tions, are instrumentalities of government and exercise authority given by the State and are no more liable for the acts or omissions of their officers than the State.

"The question as to the liability of quasi-corporations for the negligence of their directors, officers or employees has, in regard to other than school districts been frequently considered by this court. In *Reardon v. St. Louis County*, 36 Mo. 555, an action was brought by a widow against the county for the death of her husband alleged to have been caused by the negligence of the county in failing to keep a bridge in repair. A demurrer was sustained to the petition and upon appeal to this court the judgment was affirmed."

1. c. 222:

"On the ground, therefore, of its legal character alone as a quasi-corporation the Board of Education is not answerable in this connection for the negligence charged.

"Independent, however, of the foregoing, another reason exists for the non-liability of the Board of Education in a proceeding of this character. Public education is a governmental function. This is clearly recognized in our organic law, which declares that a general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years. (Art. XI. sec. 1, Const. Mo.)

"Prompted by this provision, the General Assembly has legislated liberally concerning public schools and especially so in the statute creating the Board of Education of the City of St. Louis (Art. XIII, chap. 106, supra,) which is clothed with the supervision, control and management not only of the public schools but of the school property of said city, and to effect the purpose of its creation such powers have been conferred and duties enjoined upon it as the Legislature in its wisdom deemed necessary. In defining the corporate character of the Board of Education this court has said: "The School Board of St. Louis is an instrumentality created by the laws of the State to administer the trust created and assumed by the State for the education of the children of the State. (State ex rel. O'Connell v. Board, 112 Mo., 1.c.218.)

"Speaking of school districts generally, we said in the later case of State ex rel. School District v. Gordon, 231 Mo. 547, 1.c. 574: 'But a school district is but the arm and instrumentality of the State for one single and noble purpose, namely, to educate the children of the district, a purpose dignified by solemn recognition in our Constitution.

"These conclusions are sufficiently indicative of school districts to authorize their classification as instrumentalities engaged in the performance of governmental functions and hence subject to the same rules as to nonliability for negligence as other subdivisions of the State charged with the performance of like duties.

"In *Murtaugh v. St. Louis*, 44 Mo. 479, the plaintiff sought to hold the city liable for injuries alleged to have been received by him through the negligence of employees while he was a patient at the city hospital. In holding the city not liable this court thus stated the rule: "The general result of these adjudications seems to be this: where the officer or servant of a municipal corporation in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues from the negligence or misfeasance of such officer or servant, the corporation is liable, as in the case of private corporations or parties; but when the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, then the corporation is not liable for the consequences of such acts or omissions on the part of the officers and servants."

"In *Ulrich v. St. Louis*, 112 Mo. 138, this court held that since the maintenance of the city workhouse was in pursuance of the governmental functions of the city of St. Louis it was not liable for injuries received by a prisoner therein, although caused by the negligence of the city's employees. In ruling upon this question the court said: 'The rule of law is well settled in this State that a municipal corporation is not answerable in damages for the negligent acts of its officers in the execution of such powers as are conferred on the corporation or its officers for the public good. (*Murtaugh v. City*, 44 Mo. 479; *Armstrong v. City*, 79 Mo. 319; *Kiley v. City*, 87 Mo. 103; *Carrington v. City*, 89 Mo. 208; *Keating v. City*, 84 Mo. 415; 2 *Dillon on Municipal Corporations* (4 Ed.), sec. 965a.)' "

1. c. 224:

"If the operation of a city hospital, the maintenance of a workhouse or the collection of garbage are properly referable to the governmental functions of a city, no argument is required to establish the fact that the education of youth partakes of the same, although it may be of a higher character, and that the instrumentality, namely, a board of education, through which this function is exercised is consequently immune from actions for damages on account of negligence. Cases from courts of last resort elsewhere give added force to this conclusion. (Hill v. Boston, 122 Mass. 344; Wixon v. Newport, 13 R. I. 454; Folk v. Milwaukee. 108 Wis. 359.)"

* * * * *

"Another equally cogent reason why the Board of Education cannot be required to respond to an action of the character of that at bar is the nature of the fund entrusted to its care and distribution. School funds are collected from the public to be held in trust by boards of education for a specific purpose. That purpose is education. An attempt, therefore, to otherwise apply or expend these funds is without legislative sanction and finds no favor with the courts. Cases in which hospitals have been held exempt from actions for damages for negligence on account of their character as charitable institutions may not inappropriately be cited in this connection."

Mr. C. K. Allen

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June 24, 1937

The above quoted decision was followed approvingly by the Supreme Court in the recent cases of Pearson vs. Kansas City, 331 Mo. 885, l.c. 891, and Eads vs. Young Women's Christian Association, 325 Mo. 577, l. c. 590.

As the decision in the case of Cochran vs. Wilson quoted, supra, is decisive in the matter and has been followed continuously, we shall not burden this opinion with further quotations from cases.

CONCLUSION.

We are of the opinion that due to the fact that school districts are not liable for damages or torts, in the instant case which you present, there is no liability on the part of the Board of the Consolidated School District No. 6, Chariton County, Missouri, for the unfortunate accident which happened to the young lady during the Music Festival, and that you have no authority as members of the Board to settle this claim with the funds of the school district.

Respectfully submitted,

OLLIVER NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

ON/R

ELECTIONS: Laws should be construed to give effect to legislative intent as expressed in the whole legislative Act.

August 16, 1937.

8/16



Honorable H. D. Allison
County Clerk
Buchanan County
St. Joseph, Missouri

Dear Sir:

I acknowledge your request for an opinion dated August 16, 1937, which reads:

"Please give me an official opinion in the following matter:

"House Bill 301, passed by the 1937 General Assembly, provides for permanent registration for the City of St. Joseph. In this tentative legislative scheme of Section 3, as set out on page 4, lines 24 and 25, is provided the phrase "registration number", in suggesting the form of the printed registration sheet. The phrase "registration number" appears at no other place in the Act, but the phrase "voter's number" does appear in the Act in other places. For the election officers to supply a fictitious registration number for a voter, said number to appear on the registration sheet serves no practical purpose in the scheme of permanent registration for St. Joseph, Missouri.

"It is reasonable to believe that it was the intention of the Legislature to require election officials to show on the registration sheet, at the time of the elector's voting, an appropriate voting number in the order in which he voted, in order that his particular ballot can be checked against the statutory registration sheet in the event of a contested election, or in the event that a statutory election

officer is called upon to determine whether or not at a particular election the registered elector did or did not exercise his statutory voting prerogative.

"The time for printing the statutory registration sheets is so limited that it requires an immediate opinion on this following question:

"Would it be legal and in compliance with House Bill 301 if the phrase "registration number" be interpreted to read "voter's number" when printing the form of registration sheets to be used by the officer of election? The phrase "voter's number" appears in Section 5, page 6 at line 12, and for all practical purposes the phrase "registration number" should be interpreted to mean "voter's number".

"It is to be noted that Section 13, lines 19 and 20 authorize the County Clerk to use any practicable method in setting up a workable system of permanent registration in St. Joseph, Missouri.

59 C. J. p. 943, Section 563, citing Missouri cases, has this to say about statutory construction:

"The purpose of all rules or maxims as to the construction or interpretation of statutes is to discover the true intention of the law, they are useful only in cases of doubt they are never to be used to create doubt but only to remove it, and cannot be invoked to defeat or destroy natural justice or substantial equities. Although it has been said that the rules of construction of statutes are sub-

stantially the same as for the construction of contracts or other written instruments, a statute is to be construed according to the rules for the construction of statutes and not according to those for the construction of contracts. Generally a statute will not be construed unless its proper construction is involved in the case. For the purpose of construction resort may be had not only to the language and arrangement of the statute, but also to the intention of the legislature, the object to be secured, and to such extrinsic matters as the circumstances attending its passage, the sense in which it was understood by contemporaries, and its relation to other laws. An intricate and complicated statute should be construed with caution, and nothing decided beyond what is necessary to a determination of the particular case. A rational, rather than an arbitrary, construction is to be accorded all statutes. The court must consider the rule of public policy that all laws shall be certain in their terms and application."

CONCLUSION.

In House Bill 301 you have the Legislature using the phrase "registration number" and the phrase "voter's number" in the same sense in the same legislative Act.

The object to be obtained in House Bill 301 is a workable scheme of permanent registration, and the legislative intent was to provide a practicable scheme through the exercise of reasonable discretion by the County Clerk.

Hon. H. D. Allison

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August 17, 1937.

This department is of the opinion that the phrase "registration number" as used in the Act should be construed to mean "voter's number" and may be printed "voter's number", by the County Clerk when printing the forms to be used as registration sheets.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

WOS:H

ASSESSORS: Assessments in a county or city of the third class must conform in value.

May 12, 1937.

5-13



Mr. E. S. Anderson
Assessor of Boone County
Columbia, Missouri

Dear Sir:

We acknowledge your request for an opinion dated May 10, 1937, which reads as follows:

"I would like very much to have an opinion on 6779 in regard to city assessors for cities of the third class and county assessors' books, and if they have to agree as to value, and if any property that is omitted from the city assessor's books has to be omitted from the county assessor's books."

Section 6779 R. S. Mo. 1929, provides:

"In assessing property, both real and personal, in cities of the third class, the city assessor shall, jointly with the county assessor, assess all property in such city, and such assessment, as made by the city assessor and county assessor jointly, and after the same has been passed upon by the board of equalization, as hereinafter provided for, shall be taken as the basis from which the city council shall make the levy for city purposes; and for the purpose of giving cities of the third class representation on the county board of equalization, when said board is sitting for the purpose of equalizing the assessment on such city property, the mayor and city assessor shall

sit with the county board of equalization when the said board is passing upon the assessment of such city property, and shall each have a vote in said board, and they shall be paid for such service the same amount per day and out of the same fund as other members of such board of equalization. The assessment of city property as made by the city and county assessor shall conform to each other, and after such board of equalization has passed upon such assessment and equalized the same, the city assessor's book shall be corrected in red ink in accordance with the changes made by the board of equalization, and so certified by said board, and then returned to the city council."

In the case of *Bank of Carthage v. Thomas* 48 S. W. (2d) 930, 1. c. 934, 330 Mo. 19, the Supreme Court said:

"The law contemplates that, in accordance with section 9792, Rev. St. 1929, the assessor did 'value and assess' the personal property of each of the plaintiff banks at what he judged, considered, or deemed to be its true value in money. But such valuation is not final and conclusive determination of the true value of the property, for the statute, section 9812 and 9813, Rev. St. 1929, provides that the county board of equalization in equalizing 'the valuation and assessments' upon all property within the county 'shall raise the valuation' of any property 'such as in their opinion' has been returned below its 'real value' and 'reduce the valuation' of any property 'which, in their opinion, has been returned above its true value as compared with the average valuation' of property within the county."

CONCLUSION.

This department is of the opinion that the city and county assessors' books must be made to conform with each other, and, in the end, be identical as to the value of assessed property. To this end Section 6779, supra, provides that the city assessors act jointly with the county assessors, and finally provided, "that the assessment of the property as made by the city and county assessors shall conform to each other."

Where there is a difference of opinion as to the estimated value of property between the city and the county assessors, then the Legislature intended that the question of said disputed valuation be fixed by the County Board of Equalization, to the end that the city assessment books be corrected in red ink to conform to the county assessment, as fixed by the County Board of Equalization.

The fact that a city assessor arbitrarily omits assessable property on his books does not authorize the county assessor to make the same omission. The county assessor's duty is to assess all personal and real property in the county as provided by Section 9756 R. S. Mo. 1929, and to make up his assessment books as provided by Section 9778 R. S. Mo. 1929, and to value the property according to its true value in money, as provided by Section 9792 R. S. Mo. 1929. Where the assessor's estimated value is wrong, the Legislature has provided the County Board of Equalization to raise or lower the estimated value of the county assessor's books, and thereby right the wrong, if there be a wrong.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

MOTOR VEHICLES: Reciprocity or comity between states is recognized by Section 7768, R. S. Mo. 1929, as it relates to licenses of motor vehicles.

February 25, 1937



Mr. Richard C. Ashby
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Mr. Ashby:

This department is in receipt of your letter of February 16th relating to the following question:

"The Highway Patrol has asked me to obtain an opinion on this proposition. Kansas and Iowa licenses expire December 1 of each year, and they are allowed a period of grace until February 1. From February 1, they can use their old licenses, but they must pay a penalty of fifty cents per month after that date. The question now arises to the officers whether a car from one of those states operating upon last year's license and past the period of grace, which is February 1, allowed by those states and by this state, may operate in this state on last year's license past the period of grace so allowed by those states and this state even though they may operate upon payment of a penalty. That is to say, may a car using an outstate license of last year operate past February 1 even though there is a provision in their state for the operation of the car upon payment of

the penalty."

The Secretary of State of Missouri, who also has under his jurisdiction and control the registration of motor vehicles, we are informed, has certain reciprocity agreements with the other states respecting licenses for motor vehicles.

We are informed that such an agreement exists from year to year with the states of Kansas and Iowa. The agreement is made by Section 7768, R. S. Mo., as amended, 1929, which is as follows:

"A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

We are, therefore, of the opinion that if reciprocity, or comity, exists between the State of Missouri, and any other state, as contained in section 7768, quoted supra, that it is not a violation for a non-resident operator to operate a motor vehicle in the State of Missouri. It would

appear from the facts as contained in your letter the states of Kansas and Iowa place a penalty on an operator of a motor vehicle after December 1st of each year by operating the same after the expiration of the year for which the license was issued. But we call your attention to the fact that the reciprocity agreements mentioned herein in Section 7768 must be based on the "current year" as used in the section.

17 Corpus Juris, page 411, defines the "current year" as follows:

"The year running, passing, current, on its progress, ordinarily the calendar year, although the context may show an intention to refer to a year other than the calendar year."

You state in your letter that "from February 1, they can use their old licenses, but they must pay a penalty of fifty cents per month after that date."

"Comity" is defined in 11 Corpus Juris, page 1235 as follows:

"Generally, complaisance, concession; courtesy between equals; friendly civility; respect, reciprocity; a disposition to accommodate; good will; the granting of a privilege, not of right but of good will; a willingness to grant a privilege, not as a matter of right, but out of deference and good will."

In the decision of State v. Nichols 99 Pac. 876, the court, in speaking of comity between states, said:

"Comity depends not alone upon a disposition to favor the citizen of another state or country, but rests upon well settled principles of practice, expediency, and convenience. It is a rule recognized

Mr. Richard C. Ashby

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February 25, 1937

by courts and applied within bounds of discretion. It is based upon the statute law or decisions of courts of general jurisdiction of other states or countries, rather than upon our own. These will be recognized and given force if it be found that they do not conflict with the local law, inflict an injustice on our own citizens, or violate the public policy of the state."

In Missouri, what is commonly termed the "deadline" for obtaining licenses was February 15. To permit citizens of another state to operate motor vehicles in our state, after the above date, especially when the laws of the foreign state recognize its own "deadline" February 1, the licensee being permitted to operate the motor vehicle by paying a penalty each month would be, as said in the Nichols decision, to inflict an injustice on our own citizens or violate the public policy of the state in conflict with our laws.

We are, therefore, of the opinion that citizens of Iowa and Kansas cannot operate motor vehicles in this state on licenses issued by such states for the year 1936, by reason of reciprocity with this state, after February 15, 1937.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

OFFICERS: SHERIFFS: EXECUTIONS: Incoming sheriff may complete sale of property under execution where outgoing sheriff has levied but not completed sale.

March 12, 1937



Hon. Richard C. Ashby,
Prosecuting Attorney,
Livingston County,
Chillicothe, Missouri.

Dear Sir:

This department acknowledges receipt of your inquiry of February 27th, which is as follows:

"Bill Uhrmacher, Sheriff, has asked me to obtain a written opinion from the Attorney-General's office on a question involving an execution and transfer of title under the following circumstances. Roy, while he was Sheriff, received an execution on some land levied upon the land, and after the sale of the land to be held in the January term of Court, but after his term expired. Now, on the day Roy advertised the sale to be held, instead of Roy selling the land Bill went ahead and sold the land and issued a title to the purchaser of the land under that sale. On January 1, when Bill assumed the office, Roy turned over to him the written returns and assigned them over to Bill, stating what he had done and assigning all his claims to the fees in all those cases.

"Bill is very interested in obtaining the opinion from you that he can use for authority as there have been

a number of sales under the Drainage District which were made in this fashion, and the question has arisen up here on this. Bill asked me to write you about it.

"We would appreciate your opinion on this matter at your earliest convenience as Bill is in something of a quandary about it and would like to know what to do about it."

We understand your question to be the following: Mr. Uhrmacher is the present sheriff of your county and was inducted into such office the first of the year 1937, and at the time he qualified and became the sheriff, acting as such, there were turned over to him by the outgoing sheriff certain official actions and matters which had been started by the outgoing sheriff and were not completed until the first of the year when the new sheriff took office, among them being that an execution was issued and levied upon land by the old sheriff, and the land was advertised for sale by the old sheriff, but the date fixed in the notice for the sale was in January and after the old sheriff's term of office had expired. Is the present sheriff, who took office the first of the year 1937, the proper person to hold the sale and sell said land under said execution and execute a deed therefor to the purchaser?

Section 1215, R. S. Mo. 1929, provides as follows:

"Whenever the term of office for which any sheriff shall have been elected has expired, * * * it shall be his duty to deliver over all writs of execution not executed to such person as may have been elected or appointed and qualified to discharge the duties of sheriff; and such new sheriff shall receive

all such writs, and proceed to execute the same, in the same manner as if such writs had been originally directed to him; * * "

In the case of *Porter v. Mariner*, 50 Mo. 364, Burrus, who was the sheriff when the first executions were issued, made the levy and returned the executions without any sale of the property levied on, and then he died. The new executions were issued to Hayden, the then sheriff, but his term of office expired before he made the deed, and it was contended that no sheriff except the one who made the levy could make a deed after the expiration of his term of office. The statute at that time was very similar to the statute at present the law in this state and which is quoted above. The court there says, l. c. 367:

"If the deceased officer, in case he had lived, could have made a deed after his term had expired, so can the officer who makes the sale of the property levied on. And in fact he is the only party to make the deed, and can do so without any order of the court."

In the case of *Ozark Land and Lumber Co. v. Franks*, 156 Mo. 673, it is held that it is proper for a sheriff whose term of office has expired to make a deed to correct a mistake in a deed made by him as such officer while in office, the mistake being that the deed was signed by the circuit clerk, but acknowledged in open court by the sheriff, and also in a recital that the judgment for taxes was against M. Morby whereas the judgment itself recited that it was against M. Marley. At page 689 the following is stated:

" 'It is a well settled rule of law, however--and a rule of the common law, recognized and confirmed by statute-- that when an executive officer has begun the

service, or commenced the performance of a duty, and thereby incurred a responsibility, he has the authority, and indeed is bound to go on and complete it, although his general authority as such officer is superseded by his removal, or by the expiration of his term of office.'

* * *

"In *Porter v. Mariner*, 50 Mo. 364, it was held that a sheriff may after the expiration of his term of office, and without an order of court make a deed to land levied on by his predecessor."

In the case of *Merchant's Bank of St. Louis v. Harrison*, 39 Mo. 434, 1. c. 443, the court says:

"It is insisted by the defendants that the sheriff, having made his endorsement of a levy before his resignation, had power and authority under the statute to go on and complete the levy, by an advertisement and sale, after his resignation, and notwithstanding that he had turned over the writ unexecuted to the coroner, his successor in office for the time being. The statute provides that it shall be the duty of a sheriff who has resigned 'to deliver over all writs of execution not executed to such person as may have been elected or appointed and qualified to discharge the duties of sheriff, and such new sheriff shall receive all such writs, and proceed to execute the same in the same manner as if such writ had been originally addressed to him;' * * * In *Duncan v. Matney*, 29 Mo. 368, where the former sheriff had not only endorsed a levy, but advertised the property, before turning over the writ to his successor, it was held that the

successor was bound to adopt the acts of his predecessor, without incurring the expense of a new levy and advertisement, unless satisfied that they were illegal and irregular. And in the case of Carr v. Youse, ante p. 346, where a new sheriff had been appointed, it was held to be entirely proper for the coroner to deliver over his unexecuted process to the new sheriff and that it was legal and proper for the sheriff to complete the execution of it. * * * But without determining the question, whether a valid levy had been made here, it is sufficient, we think, that the execution had been actually handed over to his successor, whereby his power over the execution and his whole function as sheriff had ceased and come to an end; he no longer had any authority to act in the matter."

These three cases are referred to just as throwing some light on the construction of statutes similar to the section here under consideration. However, we do not understand the inquiry in your instance to have reference to whether the former sheriff may proceed, and therefore do not express ourselves on that question.

In the case of Kane v. McCown, (1874), 55 Mo. 181, the court discussed a similar question to the one here presented, and said, l. c. 197:

"But upon the whole we think the intention of the law was to require executions not completely executed to be handed over to and completed by the sheriff in office at the time of the sales. The 59th section does not prohibit this in the case of levies by a previous sheriff, although the 60th section

undoubtedly authorizes the sheriff, who levies the writ, to go on and complete the various acts required under the original process. He is not required to do so, and the practice has been otherwise. This section is merely designed to give validity to, or rather to recognize the validity of, a title acquired in this way. The power of the officer, who makes the levy, to proceed with the advertisement, sale and deed is recognized. But the 59th section does not say that, if the original officer, who levies the writ, hands it over to his successor, who proceeds to make advertisement and sale, and deed, such sale and deed are void.

"Admitting that this section does not require the sheriff who makes the levy to hand over the writ to his successor, simply because his term of office has expired, and that the words 'not executed' have no application to a case where there has been a levy, still it does not prohibit the officer from so handing over to his successor writs which have been only partially executed; and in either event the sale is valid and the deed valid. The successor may adopt the levy of his predecessor and proceed with the advertisement, sale and deed; and so if the original sheriff who makes the levy, instead of handing over to his successor the writ, chooses to proceed under the 62nd section and make advertisement, sale and execute a deed, it is also valid. "

In the Kane case the judgments were rendered in April, 1864, and the executions on them were return-

able to the October Term, 1864. No October term was held. The executions were levied and as no sales could have been made in October, 1864, new executions were issued in February, 1865, returnable to the April Term, 1865, or the writs were handed over to the sheriff elected and acting in 1865, to be completed after levy.

By the provisions of Section 1215, supra, it is the duty of the former sheriff to deliver over "all writs of execution not executed" to his successor. It would seem that the fair meaning of the words "not executed" is that the writs have not completely run their course as contemplated in the law. The statute does not say all writs on which levy has not been made or has been made, and by the use of the term "not executed" it would seem that it is the duty of the retiring sheriff to turn over to the incoming sheriff all writs, speaking of them with reference to the sale of land under execution, where the land has not been actually sold under the advertisement had pursuant to the execution issued.

CONCLUSION

It is our opinion that the incoming sheriff was authorized under the statute to receive from the outgoing sheriff all writs of execution not executed at the time of the expiration of the term of office of the outgoing sheriff, and to proceed with such writs and the execution thereof in the same manner that the retiring sheriff should have proceeded if he had continued in office, and that a writ of execution is not executed and therefore is within the provisions of Section 1215, when it has been delivered by the clerk to the former sheriff during his term of office, and was by him levied and by him advertised for sale, but the sale had not yet occurred at the time his term of office expired, and the sale date as fixed by said notice of sale under execution was at a date after the incoming sheriff had been inducted into office and qualified

Hon. Richard C. Ashby

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March 12, 1937

and was acting, and that it is the duty of such incoming sheriff to complete said sale and hold said sale and execute the deed therefor.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

DW:HR

CONSOLIDATED SCHOOL DISTRICTS:

Back taxes collected after disorganization of consolidated school district should go to the original districts or to the districts formed in proportion to the area, assessment and the amount paid in by each district, or same may be settled by an interplea by each district for the amount contended for.

June 8, 1937

Honorable Richard C. Ashby
Prosecuting Attorney
Chillicothe, Missouri



Dear Sir:

This Department is in receipt of your letter of May 26, wherein you request an opinion on the following situation relative to a consolidated school district which has now been dissolved or disorganized. You set forth the facts as follows:

"The County Treasurer of Livingston County has asked that I obtain a written opinion from you upon a question involving back taxes, which came into his office, subsequent to the dissolution of the consolidated school district.

"The facts are these: Several school districts in Sampsel Township had consolidated into a consolidated school district, located at Sampsel, Missouri. Thereafter I believe the date was in 1933, or the early part of 1934 the consolidated school district was dissolved. From the date of dissolution to the present date, there has accumulated in the office of the County Treasurer, the sum of one thousand, three hundred and eighty nine dollars (\$1,389) in back taxes of this consolidated school district, which was dissolved in 1933.

"The question involved is this - in what manner shall the County Treasurer disburse this money?

"I would appreciate your opinion on how the back taxes of this consolidated district should be disbursed according to law. Also, whether in your opinion it would not be wise for the County Treasurer to pay the money into the County Court and interplead the several school districts. I would appreciate your prompt attention, as the residents of these school districts are demanding some action. "

We have searched the statutes carefully and diligently in an effort to determine the manner of disposition of the money derived from back taxes. We are unable to determine any guide in the statutes. School districts and their officers are creatures of the statutes and their powers and duties are derived solely from the statutes.

In the absence of statutory authority, we must attempt to arrive at a practical and logical conclusion as to the disposition of the sum of \$1,389.00 in back taxes now on hand from the former consolidated school district.

Section 9345, Revised Statutes Missouri 1929, relates to the formation of consolidated school districts and requires three or more common school districts, or a village district having less than 200 children of school age by the last enumeration, together with two or more adjoining districts, before complete consolidation can be consummated. Other statutes refer to the procedure. Section 9356 refers to the property of the various districts which have become consolidated. The last sentence of said section being as follows:

"The division of property and money on hand in case school districts are divided by the formation of any consolidated district shall be governed by sections 9278 and 9279."

Sections 9278 and 9279 refer, respectively, to the division of property when a new district is created and the valuation of the property and how it is to be divided.

In the decision of *Rice v. McClelland*, 58 Mo. 116, it was held that:

"When a tax is levied it must be collected and paid into the treasury to the credit of the particular district for which it was levied, and any claim for such taxes by a district thereafter organized must be settled under the provisions of Section 7279."

In the decision of *State v. Scott*, 307 Mo. 250, it was held that all the provisions relating to changes of boundary lines and division of property of common school districts shall apply to towns, cities and consolidated districts.

Section 9331, amended in 1931, Laws of Missouri 1931, page 350, deals with the disorganization and dissolution of a consolidated school district. The last portion of said section is as follows:

"* * if two-thirds of the resident voters and taxpayers of such school district present and voting, shall vote to dissolve such town, city or consolidated school district, then from and after that date the said town, city or consolidated school district shall be dissolved, and the same territory included in said school district may be organized into a common school district under article 3 of this chapter."

Section 9332 refers to the manner of discharging liabilities of a consolidated school district after

the district has been dissolved or disorganized. We herewith quote the section in full, for the reasons which will hereinafter be mentioned:

"Whenever any town, city, or consolidated school district heretofore or hereafter organized under the laws of the state of Missouri, shall have been or may hereafter be disorganized or abolished, and such district shall, at the time of disorganization or dissolution, have any bonds or other obligations outstanding and unpaid, it shall be the duty of the county superintendent of public schools of the county, or in case such district embraced territory in two or more counties, then of the superintendent of public schools of the county theretofore having the largest number of acres of land in the district, on or before the first day of May of each year, to ascertain and certify to the county court, or courts, as the case may be, the rate of taxation necessary to be levied upon the taxable property within the former corporate limits or boundary line of such district, sufficient to pay the interest on and the principal of bonds falling due during the succeeding year. It shall be the duty of the county court of such county or counties, upon receipt of such certificate and at the time it is required by law to determine and levy the rate of taxation for county, school, road and other taxes, to make an order levying the rate of taxation so certified by the county superintendent of public schools upon the taxable property within the former corporate limits or

boundary lines of the district, and it shall be the duty of the clerk of the county court or courts at the time he makes up the county tax books to extend therein such rate of taxation against such property, and when so extended it shall be the duty of the collector of the revenue of such county or counties, at the time he demands and collects other taxes, to demand and collect the taxes herein required to be levied, and when so collected the same shall be paid to the county treasurer of the county which had the largest number of acres of land in the disorganized district, and thereupon such county treasurer shall deposit the moneys received by him in the bank, trust company, or other place where the principal and interest of the bonds of the district are payable."

Bearing in mind that your question presents the problem of assets rather than liabilities, as referred to in the above section, yet, we think that said section 9332, at least though more pertinent to your question, throws some light on the disposition that should be made of the delinquent taxes. In the first instance, a consolidated district is composed of a number of lesser districts, and when dissolved the lesser or former districts again come into existence if re-organized under Article III of Chapter 57.

In the original consolidation the assets and liabilities of the former rural districts are assumed by the consolidated district, then, by the same logic, should not the assets be returned to the district after dissolution of the consolidated district.

The question next arises in what manner should the distribution be made.

June 8, 1937

Under Section 9332 the manner of assuming liabilities after disorganization is set forth and we think that the same should be followed in distributing the money now on hand derived from back taxes. It would appear that the districts involved should be able to determine or settle the amount of percentage each district should receive, based on area, the amount of taxes paid in, enumeration, etc. Failing in this method, we agree with your suggestions that a practical way to settle the dispute would be for each district to interplea for the fund or to contend for its rightful percentage. It would appear that the Legislature has been remiss in its duty to pass statutes covering the situation which you present.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

COUNTY COURT:) Does not have to assign its reasons in the
DEPUTY COUNTY CLERK:) record for its refusal to approve the County
Clerk's appointment of a deputy county clerk.

December 14, 1937.

Honorable Richard C. Ashby
Prosecuting Attorney
Chillicothe, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of November 27th, in which you request the opinion of this Department on the following question:

Under Section 11680, Revised Statutes of Missouri, 1929, an appointment of a deputy clerk made by the county clerk should be approved by the judge or judges, or a majority of them in vacation, or by the court. The question is, if the county court refuses to approve the appointment, does it have to give its reason for such refusal?

In an opinion to Honorable Randall R. Kitt, Prosecuting Attorney of Livingston County, dated March 15, 1935, this Department held that the "county court may refuse to approve the appointment of a deputy county clerk when they have reasonable ground to believe that said deputy is incapable of performing the duties of said office, for any reason, or is disqualified by virtue of the provisions of any statute or the constitution." We are enclosing copy of the above mentioned opinion.

Section 11680, supra, does not state that the county court is required to set forth its reasons for disapproval of a deputy clerk appointed by the county clerk.

Attached to your letter of request is a certified copy of the order of the county court of Livingston County made at the November Term, 1935, in which two members of the court refused to approve the appointment of a deputy county clerk, in which the court does not state the reasons for its disapproval. We have been unable to find any case in Missouri

or elsewhere where a confirming body, such as the county court in this instance, is required to state its reasons why it does not desire to approve or confirm an appointment made by a person who has the authority to make such appointment.

In 46 Corpus Juris, page 953, Section 68, it is aid:

"Where the appointment is made as a result of a nomination by one authority and confirmation by another, the appointment is not complete until the action of all parties concerned has been had."

And this statement of law is approved in Schulte v. City of Jefferson, (Mo. Ap.) 273 S. W. 170, in which the Kansas City Court of Appeals said (l. c. 172):

"It is well settled--

"Where the appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not complete, until the action of all bodies concerned has been had, and the body which has been intrusted with the power of confirming appointments may reconsider its action before any action based upon its first decision has been taken." 13 Cyc. p. 1372; Meachem's Public Office and Officers, Sections 114, 124; 22 R. C. L. p. 433, Section 84.

"Plaintiff was not a de jure officer until at least confirmed by the council. If anything at all, he was a de facto officer, and such officer is not entitled to the emoluments of the office. 29 Cyc. 1393; Sheridan v. City of St. Louis, 183 Mo. 25, 39, 40, 81 S. W. 1082, 2 Ann. Cas. 480; Luth v. Kansas City, 203 Mo. App. 110, 113, 218 S. W. 901; Throop on Public Officers, Section 517."

In Troop on "Public Officers," page 491, Section 517, which might be applicable to the question you have in mind, it is stated:

"Although, under the rule laid down by the courts in New York, a voluntary payment by the municipality of the salary of one who is merely an officer *de facto*, protects the municipality, yet if it refuses to pay the salary, he cannot recover it by action. As was said, in one of the cases, establishing the former rule, 'the right to the salary and emoluments of a public office attaches to the true, and not to the mere colorable title; and, in an action brought by a person claiming to be a public officer, for the fees and compensation given by law, his title to the office is in issue, and if that is defective, and another has the real right, although not in possession, the plaintiff cannot recover. Actual incumbency, merely, gives no right to the salary or compensation.' So, where a person claiming to be rightfully entitled to a municipal office, on the ground that he held over upon the failure of the appointing power to appoint his successor, applied for a mandamus, to compel the mayor to countersign a warrant of the city comptroller for his salary; and it appeared that the applicant's right to hold over was questionable; the court denied the application, saying: 'The salary and fees are incident to the title, and not to the usurpation and colorable possession of an office It does not follow' (because the acts of an officer *de facto* are valid) 'that a right can be asserted and enforced, on behalf of one who acts merely under color of office, as if he were an officer *de jure*. When an individual claims by

action an office, or the incidents to the office, he can only recover upon proof of title. Possession under color of right may well serve as a shield for defence; but cannot, as against the public, be converted into a weapon of attack, to secure the fruits of the usurpation and the incidents of the office.'

It must be kept in mind and it needs no citation of authority that there is a presumption of right action by an official and if the county court did not approve the appointment it was not essential that it make a record of its reasons for the rejection.

As a practical proposition a great many bodies have the power and authority to approve an appointment made by an executive officer and we do not find that that body is required to state its reasons why it does not approve a certain individual appointed. The Senate in Missouri has the authority to confirm certain appointments made by the Executive, but each individual Senator nor the body itself is not required to state its reasons in the record for not confirming a certain appointment. In certain municipalities the mayor or other executive officer is authorized to make certain appointments and the council or the body of aldermen must approve same.

In the absence of a statute which requires the county court to state its reasons for the disapproval of an appointment under Section 11680, R. S. Mo. 1929, we conclude that it is not necessary for the "judge or judges, or a majority of them in vacation, or by the court" to set forth the reasons for said disapproval.

It is, therefore, our opinion that the county court by its action taken, as set forth in the appended order, is sufficient and that the court was not required

Hon. Richard C. Ashby

-5-

Dec. 14, 1937

to set forth its reasons in its order of non-approval
of the appointment of the deputy county clerk.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

CIRCUIT CLERKS: Circuit clerks are entitled to fees earned although not collected during the year for which they are earned, but collected in subsequent years, for one year's service.

March 2, 1937

36



Mr. C. W. Baker
Circuit Clerk
Audrain County
Mexico, Missouri

Dear Mr. Baker:

This will acknowledge receipt of your letter, which reads as follows:

"Will you please advise me if a Circuit Clerk resigns on January 1st, 1937, leaving two years of unexpired term, is he entitled to earned fees for the year 1936 to be paid him if he has not collected the full amount of fees due him, according to law, in the preceding year?"

We direct your attention to Section 11786, Laws of Missouri, 1933, page 369, relating to the aggregate amount of fees a circuit clerk may retain for one year's service. It reads in part as follows:

"The aggregate amount of fees that any clerk of the Circuit Court under Articles 2 and 3 of this Chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. * * * * * provided, that in any county wherein the clerk of the Circuit Court is ex-officio recorder of deeds, said offices shall be consider-

March 2, 1937

ed as one for the purpose of this section; provided, further, that clerks of the Circuit Court shall be allowed to retain, in addition to the fees allowed under this section, all fees earned by them in cases of change of venue from other counties; provided, further, that, until the expiration of their present terms of office, the persons holding the offices of Circuit Clerks shall be paid in the same manner and to the same extent as now provided by law."

Section 11814, Laws of Missouri 1933, page 372, makes it the duty of the circuit clerk to charge and collect in all cases every fee accruing to their offices, and that at the end of each quarter to file with the county clerk a report of all such fees paid and accrued to the office of the circuit clerk. Quarterly, every circuit clerk shall pay into the county treasury the amount of any fees collected in excess of the sums permitted to be retained for his services and pay of deputies and assistants.

Casual reading of the above cited statutes indicates that the Legislature intended that the circuit clerks were to be paid on a fee basis and that the amount of fees due the circuit clerk could not exceed the maximum amounts enumerated in Section 11788, supra, for any one year's service.

We approach your precise question. Did the Legislature contemplate that the fees earned in any one year must be collected during that year in order to be retained by the circuit clerk? Or, may they be earned in one year and collected in another and be retained by the circuit clerk, provided the fees collected do not exceed the amount permitted to be retained by law?

In the case of Allen vs. Cowan, 96 Mo. 193, the Supreme Court had before it for consideration this proposition, "Can the fees earned by a circuit clerk each year he was in office, though not collected in the year in which they were earned, be

applied when collected to the payment of his salary? In passing upon the question heretofore stated, the court, at page 195-196 said:

"In 1883 (Acts 1883, p. 93) the act of 1874 was amended, increasing the amounts authorized to be retained by clerks for deputy-hire. The obvious intent of the constitutional and statutory provisions above referred to was to fix the annual compensation which a clerk of a court of record might receive out of the fees and emoluments of the office, and the amount of such fees which he might appropriate to the payment of deputies and assistants. If the fees of the office of clerk annually earned by him amounted to a sum sufficient to pay his salary, and the compensation allowed to be paid deputies and assistants, he would have the undoubted right so to apply the same when collected. In Thornton v. Thomas, 65 Mo. 272, it was held that the fees of the office constituted a trust fund to be applied in the payment of deputies and assistants and the salary of the clerk fixed by law, and the surplus, if any after such payments, to be paid into the treasury of the county.

The question as to whether one of these trusts would be to supply any deficiency in the receipts of a former year to cover expenses and salaries was neither before the court nor decided in that case. If the annual fees earned by a clerk, as is held in the case above cited, are chargeable with a trust in favor of such clerk to the extent of his salary and the compensation allowed his deputies, it logically follows that whenever collected they should be applied to the discharge

March 2, 1937

of that trust. This deduction is consonant not only with reason but the justice of the case. Under any other ruling a clerk might in a given year earn in fees a sufficient amount to pay his salary, and be deprived of a large part of it if he failed to collect the whole of the fees so earned either because earned in suits which were not determined during the year or from any other cause.

The views above expressed return an affirmative answer to the proposition stated, and result in an affirmance of the judgment, and it is hereby affirmed."

In the case of Harrington vs. the City of St. Louis, 107 Mo. 327, the court had before it for consideration the statute relating to the compensation of the sheriff of the City of St. Louis which statute, in effect and substance, provided that the sheriff may, for each year of his term, receive and retain fees that do not exceed the sum of ten thousand dollars (\$10,000) and that all fees, compensation and emoluments collected by him as sheriff in excess of the sum permitted to be retained by him should be paid to the treasurer of the City of St. Louis. The proposition as here confronted the court is analagous in the present instance.

In passing upon the constitutional provision relating to when the fees of any executive officer, of any city or municipality shall not exceed the sum of ten thousand dollars (\$10,000) and the provision when fees are earned and not collected in the year in which they are earned, the court said, at page 330:

"The section of the constitution before quoted declares in plain terms that the fees of no such officer, exclusive of salaries actually paid to his deputies, shall exceed the sum of

\$10,000, for any one year. This does not mean that the fees, over and above deputy hire, shall not exceed \$20,000 for two years. The law itself divides the official term into years for all the purposes of applying the limitation as to the amount of fees which the sheriff may retain. Each year of the official term stands by itself. It follows that the sheriff must render a separate account of receipts and expenses for each year. When the fees for the particular year reach the amount of \$10,000, with expenses added, the balance must be paid over to the city. The excess of one year can not be carried into another year for the purpose of bringing the fees of that year up to \$10,000, with deputy hire added. It is not the object of this law to make the clear compensation of the sheriff \$10,000, per annum. His compensation for each year must come from the fees and emoluments of the office for that year, but when they reach the clear sum of \$10,000, the balance must be paid over to the city.

With this result it is proper to be more explicit as to what fees must be brought into each year's account. For illustration we will take the first year of the first term in this case. The receipts for that year will be composed of the fees and emoluments earned and collected during that year, and, also, of the fees and emoluments earned during the year, but collected during a subsequent year. In other words, the fees of a particular year are those earned during that year, no matter when collected. It often occurs that fees and commissions are earned in one year and collected in a succeeding year. All such fees and commissions must be

carried into the account of the year in which they were earned."

In the case of Corbin vs. Adair County, 171 Mo. 385, the Supreme Court had before it for consideration, fees earned by a circuit clerk and collected by the successor to the circuit clerk. And, in passing upon the right of the former circuit clerk to recover the uncollected fees from his predecessor, at page 389, said:

"The testimony of plaintiff further discloses that a large amount of fees are due him as circuit clerk, of which at least \$1,200 are collectible and when collected by the sheriff or his successor they will belong to him until he has received the amount of the salary earned by him for the year 1898, not to exceed \$1,600. (Allen v. Cowan, 96 Mo. 193.) So that it is apparent that the plaintiff is not remediless. To the amount of the difference between the fees collected by him which he had earned in 1898 and retained, and the amount earned and not collected for that year, not exceeding \$1,600, he can demand and recover the uncollected fees from his successor, and his own evidence shows they will be more than sufficient. But these considerations are really outside of the case before us. This bill is predicated upon mistake of fact and fraud, and there is no foundation for either charge in the record, and the judgment of the circuit court dismissing his bill was right and is affirmed."

From the above cases, it will be noticed that fees earned by a circuit clerk during any particular year are entitled to be received by a circuit clerk, even though

March 2, 1937

collected in another year and that such fees, when collected, would be chargeable to that particular year's account. It will also be noticed that a person may recover from the successor to the office of the circuit clerk, fees collected by the successor, when they were earned in another year by one who was at that time the circuit clerk.

CONCLUSION

It is the opinion of this department that the circuit clerk in 1936, who resigned January 1, 1937, is entitled to all the fees earned by him in 1936, regardless of when collected, not to exceed the maximum amount he is allowed to retain under the provisions of Section 11786, Laws of Missouri, 1933, page 369.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS:RT

DOG RACES:) American Animal Auction--Violation of Section 4286.
POOL MAKING:)

June 14, 1937

6-14



Mr. Joseph E. Babka
Assistant Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Sir:

We have your letter of June 10, 1937, requesting an opinion as to our construction of the "American Animal Auction" for the racing of horses and dogs.

The law deals only with realities and not appearances. The mere use of the terms "sale, mortgage, bill of sale, board of appraisers, options, liens, etc.", does not in any way add to the respectability of a scheme. The outward form and terms used will be disregarded and we shall look beyond the phraseology. We analyze "American Animal Auction", briefly as follows:

(1) The owner of a dog authorizes the racetrack operators to sell it at a price fixed by the owner. This price may be any arbitrary sum, and undoubtedly will be high enough to prevent an honest sale of the animal.

(2) The dog entered in the race is to be sold not more than thirty minutes, and not less than five minutes prior to the race. At first the whole dog is offered for sale; and if there are no buyers then the half dog; and if there are no buyers for the half dog then the quarter dog; and if there are no buyers for the quarter dog then smaller portions.

(3) Within one hour after the auction the owner of any portion of the dog may sell his interest back to

the racetrack operators at the appraised value of the dog which is its value immediately after the race.

(4) Charges are made by the racetrack operators against the owner's interest for furnishing housing facilities.

Stripped of the above phraseology and peering behind the curtain we find in substance that the operation of this plan would be about as follows:

(1) The owner fixes a price for his dog at One thousand dollars, which may be far in excess of his value and so exorbitant that no one would buy the whole dog.

(2) The sale of a fractional interest in the dog from five minutes to thirty minutes prior to the race means that a purchaser may purchase a ticket representing a small interest, say a one five-hundredth interest in a Thousand dollar dog for Two Dollars.

(3) It takes only a few minutes to run a dog race and giving the holders of these tickets one hour in which to resell his interest back to the operators merely affords between thirty and fifty-five minutes in which to run the race and pay off the winners.

(4) The charge made by the racetrack operators is merely "the take".

Suppose five dogs entered a race--each valued at One thousand dollars, and five hundred tickets on each dog were sold at Two dollars each, making a total of Five thousand dollars bet on the race. Suppose the winning dog received a prize of Three thousand dollars, the dog finishing second received One thousand dollars and the dog finishing third received a Five hundred dollar prize.

Therefore, the five hundred ticket holders who theoretically owned one hundred per cent of the winning dog which they purchased for the collective sum of One thousand dollars, would within less than one hour after the purchase of this dog find that his value had gone to Three thousand dollars, making the tickets held on the dog worth

June 14, 1937

Six thousand dollars. Reduced to ordinary racetrack language a Two dollar ticket representing a one five-hundreth interest in the dog before the race, becomes worth Six dollars after the race; the holders of a similar interest in the second place dog get their money back; the owners of the third place dog get half their money back and the theoretical owners of the other two dogs get nothing.

Similar subterfuges have heretofore been presented to the Missouri Courts and held to be in violation of Section 4286 R. S. Missouri 1929, which in part provides:

"* * *selling any pools upon the result of any trial or contest of skill, speed or power of endurance of man or beast,* * *"

The above statute applies to dog races. State ex inf. Gentry, Attorney General, vs. Ramona Kennel Club Inc., (1928) 8 S. W. (2) 1.

"Pool Selling", as pertaining to dog racing, is a scheme of facilitating betting on races; the event of a race determining the winner. The term "bet" within the gambling statute, means the risking of a certain thing or sum against another specified thing or sum on an uncertain event. The term "wager" in the gambling statute means a contract by which two or more agree that money or a thing shall be paid or delivered to one on the happening or not happening of a certain event. Wellston Kennel Club vs. Castlen (1932) 55 S.W. (2) 288.

It is therefore the opinion of this office that the plan "American Animal Auction" is a violation of Section 4286, supra, as construed in the Wellston Kennel Club opinion.

Respectfully submitted,

APPROVED:

FRANKLIN E. REAGAN,
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

FER:MM

COUNTY BUDGET LAW: Surplus revenue of a subsequent year may be applied to a deficit of a prior year, but surplus revenue of a prior year may not be applied to a subsequent year's obligations while obligations of a year prior to the year for which there is a surplus are outstanding.

July 2, 1937.

7-16



Honorable Sam A. Baker
Ex Officio Treasurer
Bollinger County
Marble Hill, Missouri

Dear Sir:

This department is in receipt of your letter of June 8, 1937, in which you request an opinion as follows:

"In this county there are a lot of county warrants issued in the year 1931-32 and 1933, which have never been paid and which are outstanding. There is revenue coming in on the 1934-1935 back taxes on real estate, and there are no outstanding warrants or bills for these years. Has the county court the right to use this revenue incoming on the 1934-1935 delinquent taxes to pay off the old county warrants in order of their Registry?"

Enclosed is a copy of an opinion heretofore written by this department on January 29, 1935, to the Honorable Forrest Smith, State Auditor, in which it is concluded that:

"It is the opinion of this department that revenue of 1934 cannot be used to pay interest on warrants issued prior thereto, but if any surplus remains after all obligations have been taken care of, or if revenue is derived from delinquent taxes, the same may be applied on the interest of the protested warrants in question."

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1
In the case of Kansas City, Fort Scott & Memphis Railroad Company v. Thornton, 152 Mo. 570, which is referred to in the opinion hereto attached, the court said, l. c. 575:

"Under * * * provisions of the Constitution warrants may be issued to the extent of the revenue provided for the year in which such warrants were issued and the warrants so issued each year must be paid out of the revenue provided and collected for that year. If the revenue collected for any year for any reason does not equal the revenue provided for that year and hence is not sufficient to meet the warrants issued for that year, the deficit thus caused can not be made good out of the revenue provided and collected for any other year until all the warrants drawn and debts contracted for such other year have been paid, or in other words only the surplus revenue collected for any one year can be applied to the deficit of any other year. Thus each year's revenue is made applicable, first, to the payment of the debts of that year, and secondly, if there is a surplus any year it may be applied on the debts of a previous year."

With reference to a part of your question as to whether the delinquent revenue of the years 1934 and 1935 may be applied to the payment of obligations incurred in 1936 and 1937, we direct your attention to that part of the preceding quotation which we have underlined. In State ex rel. Clark County v. Hackmann, 280 Mo. l. c. 697, the court, in speaking of how a

July 2, 1937

warrant was to be paid for which no funds were available from the revenue of the year in which it was issued, said:

"On the contrary, this court has often said in no uncertain terms that it (the warrant) was valid and payable out of any surplus revenue in the hands of the county treasurer that might arise in subsequent years."

This means, as we understand it, that each year's obligations must be paid from that year's revenue, but, if there is a deficit in that year, the surplus revenue of a subsequent year may be applied to the payment of the deficit.

In State ex rel National Bank of Rolla v. Johnson, 162 Missouri 621, the court had before it three questions. The first of which does not concern us here since we have heretofore concluded that the surplus revenue of a subsequent year may be applied to the payment of a deficit of a prior year.

The second question before the court at l.c. 628, was as follows:

" * * * What is the lawful method of applying such payment? Must warrants be paid in the order of their presentation and registration, or are they payable pro rata to all the outstanding indebtedness."

The court in answer to this question said at l.c. 631:

"We conclude that this surplus, after the current expenses for the years * * * had all been paid,

at once became subject to this general statute, Section 3166 Revised Statutes 1889, (now Section 12139 Revised Statutes 1929), which provides a just and equitable rule for the payment of the debts of the counties. The preferred right of payment according to registration is not taken away further than the changed condition wrought by the constitution requires, and when the constitution is read into and with this section, it merely changes the order of payment so that the funds provided for each year's expenses, is primarily the fund out of which warrants drawn for those expenses are to be paid according to their presentation and registration in that year, and when they are all paid and a surplus, as in this case, remains, then it is applicable to unpaid warrants of former years and Section 6771 Revised Statutes 1899, (now Section 12139 Revised Statutes 1929), provides the rule of priority just as it did before its modification by the constitution of 1875, and the surplus is not to be distributed pro rata."

The third question before the court was, as follows:

"If such surplus is so applicable and if payable in the order of their registration, is it the duty of the treasurer to so pay them, or must the county court first distribute the fund for the payment of such warrants before the treasurer can pay any of such warrants for past years' indebtedness?"

July 2, 1937

The court in answer to this question said at l.c. 633:

"It was not at all necessary for the county court to make any further appropriation of the fund before the treasurer could pay re-lator's warrant out of this surplus. The court is required to distribute the current tax into the different funds each year, and may, in proper cases, transfer moneys from one fund, when not needed, to another that is insufficient, but after all the warrants for any year have been paid there is no provision of law for distributing this surplus into different funds, but it is in the hands of the treasurer, as an executive officer, charged by the statute with the duty of disbursing the funds on warrants drawn by the county court; and as the warrants have been drawn, all he has to do is to pay them in the order of their registration whenever he had money enough to take up a warrant,"

CONCLUSION

Therefore, it is the opinion of this Department that the surplus revenue received from the delinquent taxes for the years 1934 and 1935 may be applied to the payment of obligations incurred in previous years that are still outstanding. That said surplus revenue from the years 1934 and 1935 can not be applied to the payment of obligations for years 1936 and 1937, while obligations for years prior to the years 1934 and 1935 are outstanding. That no order of the county court distributing said surplus fund pro rata to the various funds for the payment of said warrants is necessary, but that the county treasurer may pay the warrants in the order of their presentation and registry, whenever he has sufficient funds to do so.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR (Acting)
Attorney General

LLB MR

- COUNTY BUDGET ACT:
1. Any surplus remaining at close of fiscal year, may be used to pay outstanding valid county warrants for previous years.
 2. Warrants should be paid according to registration.
 3. Section 14 of County Budget Act applies to counties of more than 50,000 population.

March 1, 1937

3-9



Mr. Lee Barham
Circuit Clerk
Stoddard County
Bloomfield, Missouri

Dear Sir:

This Department is in receipt of your letter of February 17, wherein you propound certain questions relating to the County Budget Act for an opinion. Your questions are somewhat similar in nature. However, to make distinctions and to clarify the same we shall attempt to answer each question separately.

I.

Your first question is as follows:

"Any surpluses existing in any year since the effective date of the present Budget Law, can or cannot be applied or distributed to and on any outstanding warrants or obligations for any years previous to the enactment and effectiveness of the present Budget Law."

Assuming that you desire your questions answered solely for the purpose of the budget in your own county, we call your attention to the fact that the Budget Act presents two systems of procedure, the first eight sections governing counties of less than 50,000, the next twelve sections relate to counties over 50,000. Knowing your county to be less than 50,000 it is necessary that we confine our conclusions

to the first eight sections, pages 340 to 346, inclusive. It was the purpose of the county budget act to promote economy and efficiency in county government. By Section 22, page 351, Sections 9874, 9985 and 9986 were especially repealed, and all other sections, insofar as they might conflict, were repealed. In our interpretation of the budget act we have not treated it as abrogating and nullifying all of the sections of the Revised Statutes of 1929 pertaining to the financial structure of the county, but when said sections conflict with the budget act naturally the provisions of the budget act must take precedence and repeal any part of a section which is in conflict therewith.

By the terms of the County Budget Act, page 341 the expenditures of a county for the current year are placed in six different classes. The sixth class is as follows:

"After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose. Provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six. Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

By the provisions of Class Six, as herein quoted, it is evident that the Legislature took

into consideration the fact that many counties, at the time the budget act became effective, would have outstanding warrants. The budget for any year is based on ninety per cent of the anticipated current revenue.

It was held in the case of State v. Johnson 162 Mo. 621, as follows:

"A county warrant valid when issued is not rendered invalid because the revenue provided to pay it is not collected during the year in which it was issued, or is misappropriated by the officers of the county for whose act the holder of the warrant is not responsible. On the contrary, the surplus county revenue remaining after the payment of all current expenses of every kind for the year for which such revenue was levied and collected, may be used in the payment of outstanding valid unpaid county warrants for previous years."

We are, therefore, of the opinion that any surplus existing in any year under the Budget Act can be applied to outstanding warrants for previous years.

II.

Your second question is:

Is it true in accordance with the Law that any surpluses emerged or carried forward from year to year preceding and including the year prior to the effective date of the

present Budget Law, be used and distributed, as the County Court may see fit, to the payment of outstanding warrants and obligations unpaid, in any of the years preceding and including the year prior to the effective date of the present Budget Law and that any surpluses in any year following and including the year succeeding the enactment and effective date of the present Budget Law be applied and used in the payment of outstanding warrants and unpaid obligations in the year in which said outstanding warrant or unpaid obligation accrued, or emerged and carried forward and distributed in the payment of outstanding warrants and unpaid obligations for any of the years, as the County Court may see fit, following and including the year succeeding the effective date of the present Budget Law of Missouri?"

Having come to the conclusion in the first question that any existing surplus at the close of the fiscal year under the budget act can be used for discharging obligations or outstanding warrants from the previous year, your second question would therefore relate to the power of the county court to discharge the obligations in any manner they see fit. The decision quoted supra, *State ex rel. v. Johnson*, is followed in the case of *Holloway v. Howell County* 240 Mo. 1. c. 612, as follows.

"The bill alleges that the share of the district is still in the county treasury, but the proof shows nothing of the sort. Whatever mere theory be indulged by way of inference, one way or the other, the actual

fact is, as shown by the proof, the money levied for county purposes was used for county purposes, presumably for paupers, insane persons, the salaries of officials, the expenses of running the courts, jury fees, expenses of elections, criminal costs and roads and bridges elsewhere. (Vide, R.S. 1909, sec. 11423.) It is not clear there was any 'county revenue' left at the end of any year after paying the indebtedness and obligations of the county for the current year. But if there was, then under certain statutory conditions, the county court had the right to transfer it to other proper funds and use it for county purposes for ensuing years or existing deficits, if any, after all contracts entered into with reference to the current year creating present indebtedness had been complied with and all outstanding current county obligations had been satisfied. "

The duties of the treasurer with respect to entering warrants is set forth in Section 12139, as follows:

"He shall procure and keep a well-bound book, in which he shall make an entry of all warrants presented to him for payment, which shall have been legally drawn for money by the county court of the county of which he is the treasurer stating correctly the date, amount, number, in whose favor drawn, by whom presented, and the date the same was presented;

and all warrants so presented shall be paid out of the funds mentioned in such warrants, and in the order in which they shall be presented for payment:"

Section 12140 contains the provisions for the county treasurer paying the warrant. The pertinent part is as follows:

"No county treasurer shall refuse the payment of any warrant legally drawn upon him and presented for payment, for the reason that warrants of prior presentation have not been paid, when there shall be money in the treasury belonging to the fund drawn upon, sufficient to pay such prior warrants and any such warrant so presented; but such treasurer shall, as he shall receive money into the treasury belonging to the fund so drawn upon, set the same apart for the payment of warrants previously presented for the ordinary current expenses of the county as mentioned in the preceding section, and in the order presented, so that no such warrant of subsequent presentation shall remain unpaid by reason of the holder of such warrants of prior presentation failing to present the same for payment after funds shall have accrued in the treasury for their payment: "

The Johnson decision also holds that delinquent taxes, when collected, must be applied to outstanding

warrants issued in the year in which the taxes were levied. Since the enactment of the budget act we think that the Johnson decision is also decisive of what shall be done with any surplus remaining in any year. After referring to the sections hereinabove quoted the court says, l. c. 631:

"This section then had been the law of this State for twenty years before the adoption of the Constitution of 1875. Prior to that, it was not necessary that a county warrant should be drawn upon a special fund or that it should come to the holder during the year in which the indebtedness was created. What, then, was the effect of the Constitution upon this section? As was ruled in *Andrew County v. Schell*, 135 Mo. 31, and *State ex rel. v. Payne*, 151 Mo. 670, that section was modified by the Constitution to the extent that thereafter the warrants drawn by the county court in any year to meet all the necessary and current expenses for that year must first be paid in full in the order of their registration, and if a surplus was left, then the section operated on all other warrants just as it had previous to the adoption of the Constitution of 1875. In a word, that section, in so far only as it conflicted with the provisions of section 12 of article 10 of the Constitution, became inoperative by force of the Constitution as soon as it

went into effect, because inconsistent therewith. But with this exception there is no such repugnancy as requires us to hold it was absolutely repealed, the rule of construction being that before it shall be construed as repealed by implication only, the two must be so repugnant that both can not stand, and, we think, with the modification we have mentioned, both can stand. Such has been the opinion of the Legislature, we think, from the fact that this section has been preserved through three revisions since the adoption of the Constitution. We conclude that this surplus, after the current expenses for the years 1895 and 1896 had all been paid, at once became subject to this general statute, section 3166, Revised Statutes 1889, which provides a just and equitable rule for the payment of the debts of the counties. The preferred right of payment according to registration is not taken away further than the changed condition wrought by the Constitution requires, and when the Constitution is read into and with this section, it merely changes the order of payment so that the funds provided for each year's expenses is primarily the fund out of which warrants drawn for those expenses are to be paid according to their presentation and registration in that year, and

when they are all paid and a surplus, as in this case, remains, then it is applicable to unpaid warrants of former years and section 6771, Revised Statutes 1899, provides the rule of priority just as it did before its modification by the Constitution of 1875, and the surplus is not to be distributed pro rata."

We are, therefore, of the opinion that the unpaid obligations should be discharged out of any surplus remaining and should be paid according to the registration of the warrants.

III.

Your third question is:

"As to Sec. 14, pages 348 & 349, Missouri Laws, 1933, can any surpluses in each of several years following and including the year succeeding the effective date of the present Budget Law of Missouri, be used to pay any outstanding warrants or unpaid obligations in any of the years preceding and including the year prior to the effective date of the present Budget Law of Missouri?"

Evidently you refer to the first paragraph on page 349, which is as follows:

"Any cash surplus at the end of any fiscal year shall be carried forward and merged with the revenues of the succeeding year. Payment of any legal unpaid obligations of any prior year,

March 1, 1937

however, shall be a first charge in the budget against the revenues of the budget year; provided that any deficit existing at the end of the year preceding that in which this act takes effect may be paid over a term of years, or in such other manner as the county court may determine."

As stated in the beginning of this opinion, your county is not affected by this portion of Section 14; sections 9 to 20, inclusive, being applicable to counties of more than 50,000 population; the first eight sections, applicable to your county, do not give the county court any such power. We think the logic and authorities heretofore quoted in your first two questions are applicable and, as stated in the last paragraph of your letter, that each year following and including the effective date of the budget law must carry itself financially, and that all obligations of any year were to be paid from the assessed revenue in that particular year. If any surplus remains after all obligations are paid said surplus may be used in paying past obligations.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

OWN:LC

COUNTY BUDGET ACT: Warrants in Class 6 may be used
for taking care of a deficit in
Class 4.

3-29

March 25, 1937



Mr. Lee Barham
Circuit Clerk
Stoddard County
Bloomfield, Missouri

Dear Sir:

Replying to your letter of March 11 relative to
the County Budget Act, we shall again attempt to answer
the question which you propound, which is as follows:

"In case the Budget for the year
1935, for Stoddard County, did not
set up in class 4, a high enough
estimate to pay the whole year's
salary of the Deputy Circuit Clerk,
which was \$100.00 per month, the
Circuit Clerk estimated Budget
being exhausted at the end of
October of that year, leaving no
allowance therein to pay the
last two months' salary of the
Deputy Clerk, and therefore
the Court and the Clerk of the
County Court could not order
issued and issue warrants for
these two months' salary, could
class 6 warrants be issued for
these two months' salary, provided
of course, that there was no sur-
plus estimates in any other classes
that could be transferred to class
4?"

The point really involves two questions. The
first one being can an officer exceed the amount of his

estimate or the amount accepted by the County Budget for him for the year. You state that the budget of the Circuit Clerk is exhausted, that is, all of the estimate as originally made has been paid. You do not explain as to why the deputy circuit clerk did not receive in the estimate the total amount of his salary for the year.

Section 3, page 342, of the County Budget Act, Laws of Missouri 1933, contains the duties of the various officers who shall claim compensation out of Class 4:

"It is hereby made the express duty of every officer claiming any payment for salary or supplies to furnish to the clerk of the county court, on or before the fifteenth day of January of each year an itemized statement of the estimated amount required for the payment of all salaries or any other expense for personal service of whatever kind during the current year and the section or sections of law under which he claims his office is entitled to the amount requested, also he shall submit an itemized statement of the supplies he will require for his office, separating those which are payable under class 4 and class 6. Officers who are paid in whole or in part other than out of the ordinary revenue, whether paid by fees or otherwise, shall submit an estimate for supplies in the same manner as officers who are paid a salary out of ordinary revenue. No officer shall receive any salary or allowance for supplies until all the information required by this section shall have been furnished. The clerk of the county court shall prepare and file an estimate for his office; also for the expense of the judges of the county court.

If for any year there should not be sufficient funds for the county court to pay all the approved estimates under class 4, after having provided for the prior classes, the county court shall apportion and appropriate to each office the available funds on hand and anticipated, in the proportion that the approved estimate of each office bears to the total approved estimate for class 4."

It would appear by the last sentence that if there are not sufficient funds in Class 4 to pay the approved estimates the county court shall apportion and appropriate to each office the available funds on hand and anticipated, in the proportion that the approved estimate of each office bears to the total estimate approved in Class 4. In Section 4 it is provided, in enumerating the duties of the county clerk,

"Less all known lawful obligations against the county December 31, last, and for which warrants were not drawn at that date,"

"Total unpaid obligations of the county on January 1st of the current year. (This shall include unpaid warrants and outstanding bills for which warrants may issue.)."

In the case of a deputy circuit clerk under the present statutes it is the duty of the county court to fix his salary, and we think that if the county court fixes the salary the deputy circuit clerk is entitled to the same, the same as any other officer whose salary or compensation is fixed by statute. If the deficit as to the deputy circuit clerk's salary is due to a mistake

March 25, 1937

in computation we think such a mistake could be rectified in the budget on file and that a copy of the correction could be mailed to the State Auditor. If the budget estimate is not elastic enough to permit the deputy circuit clerk to receive his salary, then he must lose the last two months' compensation as mentioned in your letter. As stated before, we think he is entitled to the same and that by the provisions of Section 4 it is contemplated that obligations from the previous year are carried over to the ensuing year.

The other question arises as to how he is to receive the compensation for the last two months. You suggest Class 6 provided that there is no surplus estimates in any other classes that could be transferred to Class 4.

Class 6, under Section 2, page 342, is as follows:

"After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose. Provided however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six. Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

Under Section 5, which is an explanatory section relating to the classes as enumerated in Section 2, the provisions of Class 6 are further explained, as follows:

"Amount available for all other expenses after all prior classes have been provided for. No expense may be incurred in this class until all the prior classes

have been provided for. No warrant may be issued for any expense in class 6 unless there is an actual cash balance in the county treasury to pay all prior classes for the entire current year and also any warrant issued on class six. No expense shall be allowed under class six if any warrant drawn will go to protest. Provided, however, if necessary to pay claims arising in prior classes warrants may be drawn on anticipated funds in class six and such warrants to pay prior class claims shall be treated as part of any such prior funds. Nor may any warrant be drawn or any obligation be incurred in class six until all outstanding lawful warrants for prior years shall have been paid. The court shall show on the budget estimate the purpose for which any funds anticipated as available in this class shall be used."

By the terms of the above proviso:

"Provided, however, if necessary to pay claims arising in prior classes warrants may be drawn on anticipated funds in class six and such warrants to pay prior class claims shall be treated as part of such prior funds."

It would appear that the Legislature contemplated that warrants can be drawn from class 6 in the event of a situation such as you present.

We are, therefore, of the opinion that funds from class 6 may be used to take care of the deficit in any

Mr. Lee Barham

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March 25, 1937

prior classes, which, in the instant case, is class
4.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

COUNTY BUDGET ACT -- The juvenile clerk can receive compensation during 1937 only from surplus funds from the other classes; the circuit clerk cannot withhold fees to compensate him as juvenile clerk.

November 2, 1937



Honorable Lee Barham
Clerk of Circuit Court
Stoddard County
Bloomfield, Missouri

Dear Sir:

This department is in receipt of your letter of October 18, 1937, wherein you make the following inquiry:

"Would appreciate very much, having your opinion on the following, at your earliest convenience:

"Under Section 11814a, pages 447 and 448, Laws of Missouri, 1937, the Circuit Clerk is to receive a salary for his services as Clerk of the Juvenile Court, in addition to statutory compensation as Circuit Clerk, and in my county, it is a salary of \$500.00 per year, payable in monthly installments, and also, further in accordance with your opinion on this section heretofore made, the compensation for said services of Clerk of the Juvenile Court is and was to begin on September 6th, 1937.

"Now, how is one going to receive this monthly compensation for said services as Juvenile Clerk, if there is insufficient funds within the Budget to pay same? Due to the 1937 Budget having been made without any consideration or expectation of a salary for the Juvenile ex-officio Clerk, additional.

"Would it not be possible and legal to withhold the amount due and payable the Circuit Clerk as Juvenile Clerk, each month, out of the collections made and payable to the County? Until the end of this year, as there is nothing or insufficient funds in the Budget for this year to pay this monthly salary as Juvenile Clerk."

We are enclosing copy of an opinion rendered to Honorable G. Derk Green, Prosecuting Attorney of Linn county, which discusses the question that you present with reference to paying additional salary to the circuit clerk as clerk of the juvenile court, as it may be affected by the county budget act.

The only additional manner which we may suggest at this time is the fact that the Legislature liberalized the budget act by amending Class 5, Section 2, page 340, Laws Mo. 1933, so that it now reads as follows, Laws Mo. 1937, page 423:

"Class 5. The county court shall next set aside a fund for the contingent and emergency expense of the county, the county court may transfer any surplus funds from classes 1, 2, 3, 4 to class 5 to be used as contingent and emergency expenses. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

Therefore, in addition to what is contained in the opinion to Mr. Cain, if there is any surplus in Classes 1, 2, 3 and 4, the same may be transferred for contingent and emergency expenses. Whether or not this suggestion is of any value to you depends upon the financial condition of your county at this time.

With reference to the question as to whether or not you, as circuit clerk, could withhold from the fees derived from your office sufficient amount to compensate you as juvenile clerk, you are referred to Section 11814, Laws Mo. 1937, page 447:

" *** And monthly, such Clerks shall pay into the county treasury the amount of all fees collected by virtue of his office and every Clerk shall be liable on his official bond for all fees collected and not accounted for by him as provided by law. It shall be the duty

Honorable Lee Barham

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November 2, 1937

of the County Court to examine such monthly reports and to require of the Prosecuting Attorney to enforce payment of all fees therein shown to be unpaid in any manner now or hereafter provided by law, etc. *** "

Section 11814a contains the statement that the compensation of the circuit clerk as juvenile clerk shall be "payable out of the county treasury at the end of each month in equal monthly installments in the same manner as salaries of such Circuit Clerks as provided under this Act."

In view of the above statutes, we are of the opinion that you could not legally withhold fees to compensate you as juvenile clerk, for the reason that it would be a violation of Section 11814, which makes the clerk liable on his official bond for all fees collected and not accounted for by him as provided by law. A similar situation was discussed, and holds to the same effect in the decision of State vs. Thatcher, 92 S. W. (2d) 641.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:FE
Enc.

TAXATION Investigations and hearings by Auditor compelling production of books and papers. State Auditor in holding
SALES TAX: investigations and hearings may summon witnesses and require production of any books, papers or records of anyone having evidence needed in such hearing.

November 16, 1937



Mr. G. H. Bates, Supervisor
Sales Tax Department
State Auditor's Office
Jefferson City, Missouri

Dear Sir:

This office acknowledges your request dated November 9th for an official opinion from this department as to your authority in investigating and examining retailers for the purpose of ascertaining the amount of sales tax of such retailers, to examine books, papers, records, and persons, officers or agents of corporations, who are engaged in retail sales of personal property and/or services subject to the two per cent sales tax act, or of examining the records, books, files and papers of the party or corporation from whom such retailer obtains the articles of personal property which he sells.

Your inquiry involves the question of the construction of Sections 15, 16, 17 and 18 of the Sales Tax Act of Missouri, located at page 552, Session Acts of Missouri 1937, by which sections the Legislature has set up the procedure for the Auditor to follow in the assessing and collecting of this tax. Your inquiry goes to the question of whether or not the Auditor, or his agents, may require any person other than the person under investigation to furnish evidence pertaining to the business of such person under investigation.

Section 15 of the Act reads as follows:

"Every person engaged in the businesses herein described in this State shall keep records and books of his gross daily sales, together with invoices,

bills of lading, sales records, copies of bills of sale and other pertinent papers and documents. Such books and records and other papers and documents shall, at all times during business hours of the day, be subject to inspection by the Auditor or his duly authorized agents and employees. Such books and records shall be preserved for a period of at least two years, unless the Auditor, in writing, authorized their destruction or disposal at any earlier date."

This section requires every person engaged in the retail sale business described in the Act to keep records and books on his gross daily sales, together with invoices, bills of lading, sales records and other papers or documents, which shall be subject to inspection of the Auditor, or his agents, at all times during business hours. Such retail merchant, by entering into the businesses described in the Act, is bound to submit and furnish his records to the Auditor, or his agents, for their inspection, and by engaging in business under the Act, he surrenders his constitutional rights of search and seizure as to the information contained in such records. State vs. Bennett, 288 S. W. 50, 1.c. 53.

Section 16 of the Act, which is as follows:

"For the purpose of ascertaining the correctness of any return, or for the purpose of determining the amount of tax due from any person, the Auditor or any employee of the Auditor designated in writing by the Auditor may hold investigations and hearings concerning any matters covered by this Act, and may examine any books, papers, records or memoranda bearing upon such sales by any such person and may require within the county where the person resides or does business the attendance of such person or any officer or employee of such person, or of any person having knowledge of such sales, and may take testimony

and require proof for his information. In the conduct of any investigation or hearing, neither the Auditor nor any employee thereof shall be bound by the technical rules of evidence and no informality in any proceeding, or in the manner of taking testimony, shall invalidate any order, decision, rule or regulation made or approved or confirmed by the Auditor. The Auditor or any employee thereof holding such investigation shall have power to administer oaths to such persons or witnesses."

provides that the Auditor may hold hearings and investigations for the purpose of determining the amount due from any person or the correctness of his return. In such investigations or hearings, the Auditor may examine any books, papers, records or memoranda bearing upon such sales by such person then being investigated and may require within the county where the person resides, or does business, the attendance of such persons or any officer or employee of such person, or of any person having knowledge of such sales and may take testimony and require proof of such information.

Section 17 of the Act, which is as follows:

"If any person summoned as a witness by the Auditor or such employee of the Auditor shall fail to obey such summons or shall refuse to testify or answer any material question or shall refuse to produce any book, record, paper or other data when required so to do, he shall be deemed guilty of a misdemeanor and punished as provided by law."

provides for the punishment of those who fail to obey the summons and to testify or to produce the books or papers which the Auditor, or his agents, is authorized by said Section 16 to examine.

The Legislature, by Section 16 aforesaid, in authorizing the Auditor and his agents to make investigations and hold hearings, has given more authority to them than is given by the general statutes authorizing taking of depositions, in that they may examine books, papers, records or memoranda bearing upon the sales of the party being investigated or examined, and may require within the county where the person resides, who is being examined or investigated, the attendance of such person or any officer or employee of such person, or of any person having knowledge of such sales which are being investigated and may take the testimony necessary for the proofs in such examination or hearing.

In order to compel the attendance of such witnesses and the production of the books, papers or records, the Legislature has by implication authorized the Auditor, or his agents, to issue the necessary process for obtaining such evidence for by Section 17 it has provided for a punishment for those who fail to obey the summons or to testify or to answer any material questions, or to refuse to produce any books, records, papers or other data when required to do.

As Sections 15 and 16 of said Act encroach upon the constitutional rights of search and seizure of the citizen, they should be strictly construed, but such construction should not be so strict as to destroy the intent of the Legislature. In support of this contention, we quote from 64 A.L.R. Colcord v. Granzow, 699, l.c. 706 as follows:

"The rule of strict construction, as applied to statutes, does not mean that words shall be so restricted as not to have their full meaning, but merely means that everything shall be excluded from the operation of the statutes so construed which does not clearly come within the meaning of the language used. 25 R.C.L. at page 1076, says: 'The rule of strict construction comes into play only when the language, after analysis and subjection to the ordinary rules of interpretation, presents ambiguity.'"

To construe Section 16 of the Act to hold that the Auditor

November 16, 1937

or his agents, does not have authority to summons witnesses and require the production of books, papers and records of any person who had such information, would be such a construction upon this section as to prevent the very object of the Legislature in enacting the section. This would be contrary to the rule of statutory construction. Missouri Granitoid Company vs. George, 150 Mo. App. 650, l.c. 657 reads:

"Statutes are not to be construed so as to pervert the very object aimed at."

CONCLUSION

This office is, therefore, of the opinion that the Auditor, or his agents, in holding investigations of sales concerning any matters covered by the two per cent Sales Tax Act, and pertaining to the retail sales, may at all times during business hours of the day, require the production of records, papers and documents in the possession of such retail merchant; and in such hearings, they may issue subpoenas compelling the attendance of any person having knowledge of the matters being inquired into; or the production of any books, papers, records or memoranda which are relevant to the issues involved in the investigation or hearing; and may punish any person who fails to obey such process.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General
TWE:RT

LIQUOR: When and where anyone may sell intoxicating liquor in original package not to be consumed on premises.

December 17, 1937.

Hon. William Barton,
Representative, Montgomery County,
Jonesburg, Missouri.



Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

"May a Village with population of less than 500 prevent any person meeting the qualifications necessary to sell liquor in the original package from obtaining a state license to sell liquor in the original package in such village? Under Section 27 (Laws of Missouri, 1937) and Section 25 (Laws of Missouri 1935, p. 276) it seems that all a Village might do is to set a fee $1\frac{1}{2}$ times the state fee of \$50.00. Is this view correct?"

The Liquor Control Act specifically provides that local option provisions do not apply to the sale of intoxicating liquor in original packages not to be consumed on the premises. Section 44-a-7 provides:

"The provisions made by this act for local option shall be held to be applicable only to sales for consumption on the premises where sold, and shall not be construed to prevent the sale of intoxicating liquor in the original package and not to be opened or consumed on the premises where sold, nor to prevent the sale, at retail by the drink for consumption on the premises where sold, of malt liquor

containing not to exceed five (5%) per cent of alcohol by weight, under license issued in accordance with the provisions of this act."

Under the Liquor Control Act, a person may sell intoxicating liquor in the original package not to be consumed on the premises when so licensed by the Supervisor of Liquor Control.

Section 22 of the Liquor Control Act, in part, provides:

"Intoxicating liquor shall be sold at retail in the original package upon a license granted by the Supervisor of Liquor Control, and said intoxicating liquor so sold shall not be consumed upon the premises where sold, nor the original package opened on said premises of the vendor, except as otherwise provided in this act. For every license issued hereunder, for sale at retail in the original package, there shall be paid by the licensee to the Supervisor of Liquor Control, the sum of fifty (\$50.00) dollars per year; * * * *"

Section 25 of the Liquor Control Act, however, provides that said licensee shall pay into the county treasury wherein the premises are located a fee not to exceed a certain amount, and also that said licensee shall pay into the municipal treasury a license fee to be determined by the law-making body of said municipality, not to exceed one and one-half times that charged by the State for such license; also that such municipality may make and enforce ordinances for regulation and control, and provide penalties for violation of said ordinances, where same are not inconsistent with the provisions of the Liquor Control Act.

In view of the above provisions of the Liquor Control Act, it is the opinion of this department that a municipality cannot enact ordinances inconsistent with the statutory provisions

Hon. William Barton

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of the Act. They may, as above stated, enact ordinances not inconsistent with the provisions of the Act.

Therefore, since local option does not apply to sales of intoxicating liquor in the original package, and the Liquor Control Act specifically reads that they may sell intoxicating liquor in the original package when licensed by the Supervisor of Liquor Control, it is the opinion of this department that the municipal authorities may collect a license fee from a person for the sale of intoxicating liquor in the original package not to be consumed on the premises, but cannot prohibit a person qualified and licensed by the Supervisor of Liquor Control from selling intoxicating liquor in the original package not to be consumed on the premises.

Yours very truly,

AUBREY R. HAMMETT, Jr.,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

ARH:HR

INDICTMENT & INFORMATION--Counts for felony and misdemeanor
may not be joined.

January 6, 1937

1-11



Honorable G. C. Beckham
Prosecuting Attorney
Crawford County
Steelville, Missouri

Dear Sir:

We have your request for an opinion of this office
reading as follows:

"I very often have complaints against
persons for operating a motor vehicle
while in an intoxicated condition, in
violation of Section 7783 of the Revised
Statutes of Missouri, 1929.

In these cases it is often difficult to
prove beyond a reasonable doubt that the
defendant is intoxicated. Would it be
possible to include a second count in
such an information charging careless
driving, which, of course, is a plain
misdemeanor? If this could be done it
would greatly expedite matters as the
evidence in such cases will almost always
show careless driving, even if it does
fail to prove beyond a reasonable doubt
that the defendant was intoxicated."

The right to charge a defendant with several crimes
in one information has been looked upon with disfavor in this
state save and except certain specific instances wherein some
specific rule of law makes a provision therefor. This is
particularly true in the case of burglary and larceny wherein
the same is specifically provided for by statute. In State
vs. Kurtz (1927) 295 S. W. 747, 1. c. 749, the Supreme Court
said:

January 6, 1937

"Under our practice it is error to join counts in the same indictment or information charging a felony and misdemeanor. Storrs vs. State, 3 Mo. 9; Hilderbrand vs. State, 5 Mo. 548. It may be taken advantage of either by demurrer or motion in arrest, and, as defendant complains of the joinder in his motion for a new trial which has been substituted for the motion in arrest (Laws 1925, Sec. 4080, p. 198), the question is preserved. The joinder constituted error."

The Kurtz case supra was expressly approved and followed in State vs. England (1928), 11 S. W. (2d) 1024.

It is apparent from a careful examination of Article I, Chapter 41 relating to motor vehicles, R.S. Missouri 1929, that it was the clear intent of the law makers to make the violation of the many regulations contained therein a criminal offense. Section 7770 relates to number plates. A violation thereof may be a misdemeanor. State vs. Hass, 82 S. W. (2d) 621. Section 7777 relates to the rules on the road and traffic regulations. A person may be prosecuted for a violation thereof (Section (k)), State vs. Nece, 255 S.W. 1075. Sections 7782(a) and 7786(c) makes it a felony to tamper with a motor vehicle, or to drive the same without the owners permission, State vs. Wahlers, 56 S. W. (2) 26. Section 7788 prescribes the regulations as to weight of trucks or motor vehicles upon the highways. The violation of this section is a misdemeanor. State vs. Schwartzman Service, 40 S. W. (2) 479. Sections 7783 (f) and 7786 (c) make it a felony to leave the scene of an accident without stopping and giving your name and certain other information. State vs. Hudson, 285 S.W. 733. These sections are all a part of Article I, Chapter 41, R.S. Missouri 1929. Section 7786(d) makes it a misdemeanor to violate any of the provisions of this Article (except those specifically designated therein) and it would appear that driving a car in violation of the rules of the road as laid down in Section 7775 R. S. Missouri 1929, and being a part of Article I, Chapter 41, is included therein.

The cases heretofore cited conclusively show that the violation of various sections of Article I is a criminal offense.

January 6, 1937

Careless driving is therefore a misdemeanor, 7775, 7786(d), R.S. Missouri 1929, while driving a car intoxicated is declared to be a felony, 7786(c), 7783(g). The evidence of either offense is not necessarily germane to the other, and for that reason neither offense is essentially a part of the other, but are totally independent of each other. A person does not have to be intoxicated to drive a car in a careless and reckless manner; neither does a person charged with driving an automobile while intoxicated have to drive the same in a careless and reckless manner. A careless driver may or may not be intoxicated; a drunken driver may or may not drive the car in a careless and reckless manner. An acquittal of one would not necessarily be a bar to a prosecution for the other. Concentrated offenses may be joined only when they arise out of the same transaction, and are so cognate that an acquittal or conviction for one would be a bar to a trial for the other. This is the test laid down in State vs. Christian, 253 Mo. 382, State vs. Young, 266 Mo. 723, and State vs. Kurtz, supra.

Under the circumstances outlined in your letter, we would recommend that in cases where the defendant is acquitted of driving a car intoxicated, that you also file a charge of careless driving against the defendant and try him on that charge. As a matter of practice it may expedite matters to file both charges separately in the beginning.

It is therefore the opinion of this office that counts for careless driving and driving a car while intoxicated may not be joined in the same information.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General

FER:MM

POISON-PROSECUTING ATTORNEYS: Prosecuting Attorneys are authorized to inspect poison register books.

June 28, 1937.

6-30

Honorable G. C. Beckham
Prosecuting Attorney
Crawford County
Steelville, Missouri



Dear Sir:

We acknowledge your request for an opinion dated May 26, which reads as follows:

"I would like to have your opinion as to the construction of a certain part of Section 13152 of the Revised Statutes of 1929. In this section in referring to the record which shall be kept by druggist of poisons which he has sold at retail, the following language is used.

'Nor shall it be lawful for any registered pharmacists to sell any poisons included in Schedule "A" without, before delivering the same to the purchaser, causing an entry to be made in a book kept for that purpose, stating the date of sale, name and address of purchaser, the name of poison sold, the purpose for which it was represented by the purchaser to be required and the name of the dispenser--such book to be always open for inspection by the proper authorities, and to be preserved for at least five years.'

"The question in my mind here is who would be considered proper authorities. I, as Prosecuting Attorney of Crawford County, have requested a certain drug-

gist of this County to permit me to inspect his poison register, and he has refused to allow me to do this. Do you think I would be considered a proper authority in this case?"

You have quoted in your request portions of the law from Section 13152, R. S. Mo. 1929, which we do not requote.

Section 13156 R. S. Mo. 1929, provides in part:

"* * * *Whoever shall violate any of the provisions of section 13152 of this chapter shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than twenty-five dollars nor more than one hundred dollars. * * * *."

Section 11316 R. S. Mo. 1929, provides in part:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, * * * *."

CONCLUSION.

The duty of the Prosecuting Attorney is to commence and prosecute criminal actions, and he must exercise reasonable diligence in the prosecution of criminal offenses. He must inquire into the facts. His duty to commence prosecution embraces what is reasonably necessary to bring a criminal to trial.

The failure of a registered pharmacist in Missouri to keep books, in a specified manner on the sale of named poisons, is a crime, and unless the proper authorities be able to inspect said books from time to time, then there can be no proof of the crime. The Legislature defined

Hon. G. C. Beckham

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June 28, 1937.

the duty in order to reasonably control the sale of poisons and put on record any registered pharmacist who would sell poisons. The law was intended to especially deter those registered pharmacists who would otherwise promiscuously sell poisons. The Legislature also intended to put on record those who purchased poisons, and keep the books open to "proper authorities." This is an exceedingly wholesome police regulation and needs no argument to support its sense.

This department is of the opinion that the Prosecuting Attorney, pursuant to his duty to commence criminal actions, is a proper authority to inspect the poison register book required by law to be kept by registered pharmacists, in Missouri.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

WOS:H

BOARD OF ELECTION COMMISSIONERS:
Committee Substitute for
House Bill No. 450.

Present board of election commissioners has no authority to carry out provisions of House Bill No. 450, prior to effective date.

July 23, 1937

7/24



Honorable Fred Bellemere
Chairman, Board of Election Commissioners
Kansas City, Missouri

Dear Sir:

This will acknowledge receipt of your communication requesting an opinion from this office, which reads as follows:

"An opinion is desired as soon as convenient as to whether or not the Board of Election Commissioners of Kansas City shall proceed to set up the necessary blanks filing system etc., to put into operation September sixth the Permanent Registration Law passed by the last Legislature. We were of the opinion that it was our duty to have all preliminaries completed by September sixth in order that the public could enjoy the provisions of the act beginning with that date. However there has been some objection raised to our proceeding in the matter and as we desire to comply with the law we have ceased all action pending your opinion."

The last General Assembly passed Senate Committee Substitute for House Committee Substitute for House Bill No. 450, which act provides a complete scheme for the registration of voters and the conduct of all elections, including primary elections, in all cities which now or hereafter

have a population of more than 300,000 and less than 700,000 inhabitants. Said act was duly approved and signed by the Governor and under the provisions of Section 36 of Article IV of the Constitution, becomes effective ninety days after the adjournment of the Sessions at which it was enacted. Said effective date is September 6, 1937.

Section 3 of said act creates a board of election commissioners, composed of four members whose duty it is to administer the provisions of the act. The members are to be appointed by the Governor within sixty days after the effective date of the act with the advice and consent of the Senate. Since the appointments are to be made at a time when the General Assembly is not in session, those appointed by the Governor will serve, pending the action of the Senate at the next session of the Legislature. State ex Inf. v. Williams, 222, 268.

Section 3, supra, however, provides in part:

"With the appointing and qualifying of the new election commissioners, as herein provided, the respective terms of office of any election commissioners appointed under any previous act applying to such city shall terminate."

In view of the above, it was undoubtedly the intention of the Legislature that the members of the present election commission would serve under the provisions of the Committee Substitute for House Bill No. 450 after its effective date until the appointment and qualifying of new election commissioners under the provisions of the new act.

Section 6 of said act reads:

"Ballot boxes, poll books, etc., to be provided by board.-Such board shall provide all necessary ballot boxes, and all registry records, poll books, tally sheets, ballots, blanks and stationery of every description, with printed headings and certificates, and other equipment necessary and proper for the registry of voters and the conduct of such elections, and for every inci-

dental purpose connected therewith."

Such board as referred to in the above section, whose duty it is to provide all necessary equipment for the registration of voters and the conduct of elections, could only refer to the board appointed by the Governor, or to the present board if it holds over under the provisions of Section 3, supra.

You state, in substance, that since the effective date of the new act providing for permanent registration is effective September 6, 1937, it was the opinion of the present board that it was their duty to have all preliminaries taken care of so the public could immediately enjoy the provisions of the act upon its becoming effective. Perhaps it would be to the best interest of the general public of Kansas City if the machinery was set up in advance so the public could enjoy the benefits of the act at the earliest possible time. However, as no elections are to be held in the near future, the element of time is not so important as it might otherwise have been. Be that as it may, it is not the function of this Department to pass on the advisability of the contemplated actions of the present election commission. We can only pass as we have been called upon to do upon the legality of the action of the present board of election commissioners in purchasing the necessary equipment and setting up a system for the carrying out of the provisions of said act before its effective date, which is as stated above September 6, 1937.

There is a great abundance of authority in this and other states, that a law prior to its effective date, has no force for any purpose, and any act done under its provisions before the arrival of its effective date, is void.

The general rule of law in this regard is stated in 59 C.J. Section 673, pages 1137-1138, as follows:

"The general rule is that a statute speaks from the time it goes into effect and not otherwise, whether that time be the day of its enactment or some future day to which the power enacting the statute has postponed the time of its taking effect. The fixing of a date either by the statute itself or by consti-

tutional provision; when a statute shall be effective, is equivalent to a legislative declaration that the statute shall have no effect until the date designated; and since a statute not yet in effect cannot be considered by the court, the period of time intervening between its passage and its taking effect is not to be counted; but such a statute must be construed as if passed on the day when it took effect. While a statute may have a potential existence, although it will not go into operation until a future time, until the time arrives when it is to take effect and be in force, a statute which has been passed by both houses of the legislature and approved by the executive has no force whatever for any purpose. Before that time no rights may be acquired under it and no one is bound to regulate his conduct according to its terms, and all acts purporting to have been done under it prior to that time are void."

In *Keane V. Cushing*, 15 Mo. App. 96, the court at l.c. 99, said:

"It is a general rule that, where a constitutional provision prescribes the date at which an act of the legislature shall take effect, until the arrival of that date, it has no force or validity for any purpose whatever; not even for the purpose of imparting notice of its existence. It is said by an authoritative writer on statutory construction: 'A statute which is to become a law at a future date, is a nullity in the meantime. It does not even operate as notice to persons to be affected by it; nor does a repealing clause in it put an end to the law to be repealed.'"

July 23, 1937

In the case of State v. Bockelman, 240 S. W. 209; the Supreme Court speaking through Judge Graves at l.c. 212, said:

"The real issue in this case is to determine from what exact date such a statute speaks. In our judgment it speaks as of the date it becomes effective and not otherwise. * * * Even notice cannot and will not be taken of such statutes until by their terms they become effective. Price v. Hopkin, supra; Sammis v. Bennett; 32 Fla. loc. cit. 460, 14 South. 90, 22 L.R.A. 48."

The facts in the Kentucky case of State Board of Commissioners v. Coleman, 29 S.W. (2d) 619, are strikingly similar to the facts that herein confront us. The facts were that the General Assembly of Kentucky enacted Senate Bill No. 414 which pertains to the holding and conducting of both primary and general elections in the commonwealth of Kentucky. The act under the provisions of their constitution did not take effect until ninety days after the adjournment of the General Assembly which was March 20, 1930, and the effective date of the act was June 18, 1930. Said act made it the duty of the state election commission to adopt uniform metal ballot boxes to be used in all the election precincts of the commonwealth and to contract for the manufacture and construction of said boxes. The state board before the effective date of the new act entered into a contract for the manufacture of such ballot boxes. The Court of Appeals in Kentucky in passing upon the legality of this contract at l.c. 622, 623, said:

"It will therefore be perceived that the state election commissioners, in entering into that contract before the new act became law, i.e., before June 18, 1930, did so with no authority therefor at the time other than a mere potential one, although the contract created a binding obligation to take and pay for the required number of ballot boxes for each county

July 23, 1937

by the fiscal court of the county whose county court clerk ordered them. In so entering into the contract, the state board of election commissioners discharged and performed their entire duties under that section of the new act and carried them into complete execution.

It would seem that it would require the citation of no adjudged cases to demonstrate that it would be incompetent for public officers to perform completed duties under a law that had no existence than prospective or potential. Until the time arrives for it to take effect as a controlling mandate of governmental policy, it necessarily could have no more force than if it had never been enacted. In other words, it requires no argument to show that a statute is not a governing law until it does take effect and necessarily nothing provided for in it may legally be done until it does so. Hence we read from the text in 36 Cyc. 1192, subd. C: 'Until the time arrives when it is to take effect and be in force, a statute which has been passed by both houses of the legislature and approved by the executive officer has no force whatever for any purpose, and all acts purporting to have been done under it prior to that time are void.' (Cases cited)

Almost numberless cases could be cited, many of which were decided by this court, to the effect that an act passed by the Legislature is of no force until it takes effect according to the provisions of the prevailing Constitution, or, as in some jurisdictions, is allowed according to its terms if the time is fixed therein."

CONCLUSION

In view of all of the above, it is the opinion of this Department that the present board of election commissioners of Kansas City does not have the authority to pur-

Honorable Fred Bellemere

-7-

July 23, 1937

chase any equipment or to set up any system for the carrying out of the provisions of Senate Committee Substitute for House Committee Substitute for House Bill No. 450, which act provides for permanent registration of voters and the conduct of all elections in Kansas City after it becomes effective September 6, 1937.

It is our further opinion that any contract or act made or done by the present board of election commissioners to carry out the provisions of the new act, prior to its effective date September 6, 1937, would be null and void.

Respectfully submitted,

JET MR

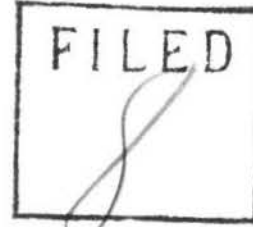
J. E. TAYLOR (Acting)
Attorney General

SHERIFF - CONSTABLE:

Power to execute state warrants.

4-7

March 16, 1937



Honorable Ernest Binnicker
Assistant Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

We acknowledge your request for an opinion dated
March 8, 1937:

"I wonder if your office would be so kind as to furnish an opinion to me on the following matter:

"1. Does a Constable of a township have the right to go out of his own county and arrest a man on a felony or misdemeanor warrant, or is he confined to his own county, or

"2. Does he have the right to go out of his county to return a prisoner where the prisoner had been arrested by the Sheriff or another officer in a foreign county on a felony or misdemeanor warrant.

"3. Does the same ruling apply in the case of a Sheriff.

"Thanking you for your attention in this matter, I am."

Black's Law Dictionary, citing Blackstone's commentations, defines the term "constable" at English Common Law thus:

March 16, 1937

"A public civil officer, whose proper and general duty is to keep the peace within his district, though he is frequently charged with additional duties."

In the case of State ex rel. v. Finn, 4 Mo. App. 347, l. c. 352, the office of sheriff in Missouri is defined thus:

"The office of sheriff is one of the oldest known to the common law. It is inseparably associated with the county. The name itself signifies the keeper of the shire or county. * * * * The sheriff was the immediate officer of the king within the shire; received his commission from the king, and directly represented the sovereign power of the State. He was the conservator of the peace within the county; had the safe-keeping of the county jail, and commanded the posse comitatus, or powers of the county. He served the process of the State, and enforced its execution, which, says Coke, is 'the life and fruit of the law.' In this country, allowing for the difference of our system, his function has been similar, and his relation to the sovereign power the same. He is the chief executive officer of the State in his county."

We must now look to the Statutes regulating territorial power of a sheriff and of a constable before we can answer your query on the right of a constable or a sheriff to arrest on a state warrant within and beyond

county boundaries.

Section 11756, R.S. Mo. 1929, provides:

"Constables may serve warrants, writs or attachments, subpoenas and all other process, both civil and criminal, and exercise all other authority conferred upon them by law throughout their respective counties."

Section 3566, R.S. Mo. 1929, provides for the issuance of capias warrants as follows:

"A warrant or other process for the arrest of the defendant indicted may be issued by the court in which such indictment shall have been found or may be pending, or by the judge or clerk thereof, or by any judge of the supreme court, and by no other officers, and may be directed to and executed in any county in this state."

Section 3568, R.S. Mo. provides for the issuance of state warrants pursuant to Grand Jury indictments as follows:

"The warrant shall issue to the sheriff of the county where the indictment or information is filed, unless the prosecuting attorney directs it to be issued to some other county; warrants may be issued to different counties at the same time. The sheriff must execute the warrant and subpoenas immediately after receiving them."

Section 3418, R.S. Mo. 1929, provides for the issuance of state warrants in Justice of the Peace

Courts on misdemeanor complaints,, as follows:

" * * * * * it shall be the duty of the justice to forthwith issue a warrant for the arrest of the defendant, directed to the sheriff of the county or constable of the township, or, if no such officer is at hand, then to some competent person who shall be specially deputed by the justice to execute the same, by written indorsement to that effect on such warrant."

Section 3467, R. S. Mo. 1929, provides for the issuance of state warrants in justice of peace courts on felony complaints, as follows:

"Whenever complaint shall be made, in writing and upon oath, to any magistrate hereinbefore mentioned, setting forth that a felony has been committed, and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant reciting the accusation, and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such magistrate, to be dealt with according to law."

Section 3469, R. S. Mo. 1929, provides:

"Warrants issued by any judge of the supreme or circuit or criminal court of any county may be executed in any part of this state; and warrants issued by any other magistrate may be executed in any part of the county within which he is such officer, and not elsewhere,

unless indorsed in the manner
directed in the next section."

Section 3479, R.S. Mo. 1929, provides:

"If the person against whom any warrant granted by a judge of the county court, justice of the peace, mayor or chief officer of a city or town shall be issued, escape or be in any other county, it shall be the duty of any magistrate authorized to issue a warrant in the county in which such offender may be or is suspected to be, on proof of the handwriting of the magistrate issuing the warrant to indorse his name thereon, and thereupon the offender may be arrested in such county by the officer bringing such warrant, or any officer within the county within which the warrant is so indorsed; and any such warrant may be executed in any county within this state by the officer to whom it is directed, if the clerk of the county court of the county in which the warrant was issued shall indorse upon or annex to the warrant his certificate, with the seal of said court affixed thereto, that the officer who issued such warrant was at the time an acting officer fully authorized to issue the same, and that his signature thereto is genuine."

Section 3492, R.S. Mo. 1929, provides:

"Whenever any felony shall be committed, and the offender attempt to escape, public notice thereof shall be immediately

given, at all places near where the same was committed, and pursuit shall be forthwith made after the offender by sheriffs, coroners and constables, and all others who shall be thereto required by any such officer; and the offender may be arrested by any such officer or his assistants without warrant."

Section 3494, R. S. Mo. 1929, provides:

"Every sheriff, marshal, coroner, constable or police officer who shall fail or refuse to pursue and arrest any offender, as required by the preceding provisions, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding one year, or by both such fine and imprisonment."

In the leading case of State v. Dooley, 121 Mo. 591, 1. c. 603, 26 S.W. 558, the Supreme Court said:

"The warrant was not in evidence, but it would seem plain that neither Bennett nor Evans, although officers of Lafayette County, had any right to serve a warrant in Saline county, unless it was indorsed by a magistrate of Saline county or by the county clerk of Lafayette county, as provided by section 4024, Revised Statutes, 1889,
* * * "

CONCLUSION

From the foregoing we see that in Missouri the township constable and the county sheriff are both bound to make an arrest on a state warrant, properly in their possession, any place in their county, and in some instances any place in the state.

Where an indictment in a court of record is returned in open court, we find no provision for a state warrant to issue to any constable in the county where the indictment is found, but in such cases the state warrant is only to issue to the sheriff of the county where the indictment is filed, unless the prosecuting attorney directs it to issue to some other county, (See section 3568, supra.).

Where the state warrant is issued on a misdemeanor or a felony complaint, before the justice of the peace, it may be directed to either the county sheriff or the township constable, in which case the state warrant is properly in the hands of either for arrest and return to the venue of the crime. (See Sections 3418 and 3467, supra.). Either have equal power to execute said justice of the peace's state warrants within the county, and either may execute the same in any other county after same is indorsed by a magistrate of that county who has power to issue state warrants, and the same is true if the sheriff or constable get the clerk of the county court of the county issuing the warrant, to certify, sign and seal either upon or annex to the state warrant the fact that the officer who issued the state warrant was authorized to issue same. (See section 3470, supra.).

Where the state warrants are properly issued to any constable or sheriff by a judge of the Supreme Court, Circuit Court or Criminal Court of any county, then either the constable or the sheriff must make an arrest in any part of the state and return the prisoner to the venue of the crime. (See sections 3566 and 3469, supra.).

With, or without, a state warrant, any peace

Honorable Ernest Binnicker

-8- March 16, 1937

officer, including a sheriff and constable, must pursue an escaped prisoner and arrest him without consideration of township or county boundaries. (See sections 3492 and 3494, supra).

If we have not answered your questions you will please communicate with us further.

Respectfully submitted,

Wm. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WOS:H

DEPOSITORIES:) Personal depository bond may be cancelled,
COUNTY DEPOSITORIES:) by compliance with depository pledging
BANKS & BANKING:) assets in conformity with Laws of Mo. 1937.

October 26, 1937.

10-28



Mr. E. H. Biehle
Secretary
Home Trust Company
Perryville, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of October 21st, relative to the depository situation in Perry County, in which you request the opinion of this Department on the matters therein contained. Your letter is as follows:

"In the past it has been customary for the banks of Perry County to secure all county funds by a personal bond. We understand that the new law requires depositories of county funds to post bonds of the government or municipal bonds in escrow to be held by a third party to secure such funds.

"Inasmuch as the county holds our personal bonds, will the provisions of the new law, with which we are complying, allow the county court to release the personal bond which they now hold, same having been accepted in May of this year for a period of 2 years? If they are not authorized to return this bond, it simply means that we are giving an excess bond for the privilege of being a county depository."

We take it from your letter that your banking institution has complied with the depository law as enacted by the 59th General Assembly, found at pages 502, et seq., Laws of Missouri, 1937, which provides in part as follows:

"Notwithstanding any provisions of law of this state or of any political sub-division thereof, the public funds of every county * * * * * which shall now or hereafter be deposited in any banking institution acting as a legal depository of such funds under the provisions of the Statutes of Missouri requiring the letting and deposit of same and the furnishing of security therefor, shall be secured by the said legal depository making deposit, as hereinafter provided, of securities of the same character as are required by Section 11469 and all amendments thereto for the security of funds deposited by the State Treasurer under the provisions of Article 1 and 2 of Chapter 72 of the Revised Statutes 1929, and all amendments thereto. * * * * *" (Underscoring ours.)

And has also complied with the provisions of Section 11469, enacted at the same session of the General Assembly and found at pages 521 et seq., Laws of Missouri, 1937, which provides the character of the securities which may be given by banking institutions to secure public funds deposited with said bank. The securities which meet the requirements of the statute are set forth therein, and are as follows:

"* * * (1) bonds or other obligations of the United States, or (2) bonds or other obligations of the State of Missouri, or (3) bonds of any city in this state having a population of not less than two thousand, or (4) the bonds of any county in this state, or (5) the approved registered bonds of any school district situated in any city, town or village in this state, or (6) the approved registered bonds of any special road district in this state, or (7) the state bonds of any state, or (8) the bonds of any Federal Land Bank, or (9) the bonds of any Federal Intermediate Credit Bank, or

Oct. 26, 1937.

(10) the bonds of the Federal Farm Mortgage Corporations, or (11) the bonds of the Home Owners Loan Corporation, or (12) the bonds or other obligations of the Reconstruction Finance Corporation, or (13) the bonds of the Federal Home Loan Banks, or (14) securities issued under the provisions of the Tennessee Valley Authority Act and guaranteed by the government of the United States, or (15) securities issued under the provisions of the Federal Housing Act and guaranteed by the government of the United States, or (16) any bonds or other obligations guaranteed as to payment of principal and interest by the government of the United States to an amount at least equal in value to one hundred per centum of the amount of the deposits with said banks or banking institutions, less \$5000.00 where the depository is insured by the Federal Deposit Insurance Corporation; * * * * *

From your letter we take it that the Laws of 1937, supra, relative to the selection of the depositories and the pledging of the requisite securities to secure same have been fully complied with in every respect. It is, therefore, our opinion, in that event, that the personal depository bond or bonds, given to secure the county deposit by the banking institution, may be cancelled by the court, and the signers thereof relieved of responsibility thereafter. However, for any breach of the depository bond or bonds or violation of the terms of same, which occurred or took place prior to the cancellation of same, the principal and securities would be liable therefor.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

(Acting) J. E. TAYLOR
Attorney-General

STATE PURCHASING AGENT: Has jurisdiction over purchases of raw material for the Department of Industries of the State Prison.

August 5, 1937.

Mr. Geo. Blowers,
State Purchasing Agent,
Jefferson City, Missouri.



Dear Mr. Blowers:

We wish to acknowledge your request for an opinion wherein you state as follows:

"Will you please give us an opinion as to whether or not this department has jurisdiction over the purchases of raw material for the Department of Industries at the State Prison?

"They claim this department has no jurisdiction over the purchases due to the fact that the raw materials go into the manufacture of goods and commodities for resale."

In an opinion rendered by this department to your predecessor in office under date of December 6, 1933, a copy of which we assume is on file in your office, we held that the Department of Penal Institutions came within the State Purchasing Agent Act.

We had occasion to examine the scheme of operations of the Prison Industries in an opinion rendered to Mr. Stephen B. Hunter, Chairman of the Department of Penal Institutions, under date of June 3, 1937, a copy of which is enclosed, and it is to be noted that the operation and control of the Prison Industries is vested in the State Prison Board, which includes and refers to the Department of Penal Institutions (Section 8320, R. S. Mo. 1929).

August 5, 1937.

The State Prison Board is authorized and directed "to purchase such raw material as may be required for the manufacture of any article in any industry now or hereafter carried on by said board in the penitentiary." (Sec. 8452, R.S. 1929).

Sections 11 and 14 of the State Purchasing Agent Act, Laws of Missouri, 1933, page 414, provide as follows:

"Sec. 11. The term 'supplies' used in this Act shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things, except as in this Act otherwise provided. Contractual services shall include all telephone, telegraph, postal, electric light and power service, and water, towel and soap service. The term 'department' as used in this Act shall be deemed to mean department, office, board, commission, bureau, institution, or any other agency of the State."

"Sec. 14. All acts or parts of acts inconsistent or in conflict with this Act are hereby repealed to the extent of such inconsistency or conflict."

Webster's New International Dictionary (2nd Ed.) defines the word "material" thus:

"The substance or substances, or the parts, goods, stock, or the like, of which anything is composed or may be made; as, raw material."

The word "materials" as used in Section 11, supra, would clearly include raw materials, and there is nothing in the statutes which would indicate a legislative intent to make any distinction as to raw materials which go into the manufacture of goods and commodities for resale.

Mr. Geo. Blowers

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August 5, 1937.

From the foregoing, we are of the opinion that the State Purchasing Agent has jurisdiction over the purchases of raw material for the Department of Industries at the State Prison.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

STATE PURCHASING AGENT: Purchases of the University Co-operative Store of Columbia, Missouri, not within jurisdiction of State Purchasing Act of 1933.

August 12, 1937.



Mr. Geo. Blowers,
State Purchasing Agent,
Jefferson City, Missouri.

Dear Mr. Blowers:

We wish to acknowledge your request for an opinion wherein you state as follows:

"Will you please give me an opinion as to the purchases of the University Co-operative Store, University of Missouri, Columbia, Mo?

"I would like very much to know if the stock in this store comes under the jurisdiction of the State Purchasing Agent's Act of 1933, or is the University at liberty to buy independent from this office.

"Inasmuch, as I am going to meet with the Curators in St. Louis, Missouri, Saturday, August 14th at 11:00 A.M. to arrange a system whereby we will take over the purchases as per your opinion of July 30, 1937, this phase of the purchases, no doubt, will be discussed and I would like to have your opinion so as to know what to do."

You are evidently under the impression that the University Co-operative Store of Columbia, Missouri, is operated under the direction and control of the University of Missouri, and therefore subject to the State Purchasing Act.

August 12, 1937.

This is a mistaken impression, for the records of the Corporation Department disclose that the University Co-operative Store was organized as a private corporation in 1902 under the provisions of Chapter 12, Article 9, of the Revised Statutes of Missouri, 1899, relating to manufacturing and business companies, and is still operating as a private corporation.

The State Purchasing Act, as the term implies, relates to purchases made by the State, and therefore we are of the opinion that the purchases of the University Co-operative Store of Columbia, Missouri, do not come within the jurisdiction of the State Purchasing Act of 1933.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

PURCHASED AGENT ACT: Construction of Section 48-A, House Bill 509.
APPROPRIATION ACT: Cannot include general legislation.

October 5, 1937

10-15
FILED
9

Hon. George Blowers
Purchasing Agent
Jefferson City, Missouri

Dear Sir:

We have your request of October 5, 1937, for an opinion of this Department reading as follows:

"Will you please advise if we must buy materials from Missouri firms when the out-state firms bid low on the same material.

This opinion is wanted for Section 48a of Appropriation Bill No. 509."

The Section you refer to, 48-A, is a part of an appropriation Act, H.B. 509, passed by the 1937 Legislature, and found on page 116, Laws of Missouri 1937, reading as follows:

"All materials contracted for by the State Purchasing Department wherever and whenever possible, shall be purchased from Missouri merchants, wholesalers and retailers, manufacturers, jobbers or producers."

Turning to the State Purchasing Agent Act, Laws of Missouri 1933, page 410, we find that Section 3 of that Act provides that all purchases shall be based on competitive bids; that the contract shall be let to the lowest and best bidder.

October 5, 1937

Section 12 of the Act provides that the Purchasing Agent shall give preference to Missouri firms when quality and price are approximately the same.

If Section 48-A, supra, is to be construed as a modification or limitation upon any section of the State Purchasing Agent Act then it would be unconstitutional and in violation of Article IV, Section 28 of the Constitution of this State which provides that bills passed by the Legislature shall not contain more than one subject, which shall be clearly expressed in its title. The purpose of an appropriation bill is to set aside moneys for a specific purpose and not to change the statutory law of this state. This interpretation of the constitutional provision, supra, is supported by the following authorities:

State ex rel. vs. Thompson, 289 S.W.
338, 1. c. 340.

State ex rel. Davis vs. Smith, 75
S.W. (2)828.

In the last named case the Supreme Court said, 1. c.
830:

"Besides, legislation of a general character cannot be included in an appropriation bill. If this appropriation had attempted to amend Section 13525, it would have been void in that it would have violated Section 28 of Article IV of the Constitution which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no doubt but what the amendment of a general statute such as Section 13525, and the mere appropriation of money, are two entirely different and separate subjects."

To construe Section 48-A of the Appropriation Act as legislative in character so as to require the Purchasing Agent to buy materials from Missouri firms, when those firms are not the lowest bidder, would in effect be giving it the force and

October 5, 1937

effect of a statute or general law which the Legislature could pass as an amendment of the State Purchasing Agent Act. To so construe Section 48-A, as a general law, would make it unconstitutional.

However, it is apparent that the true meaning of Section 48-A is that the State Purchasing Agent Act shall give preference to Missouri firms "whenever and wherever possible", which means when he can legally do so. In order for the State Purchasing Agent to legally give preference to such Missouri firms they must be either the lowest and best bidder, or must have submitted a bid equal to the bid of out-of-state firms, taking into consideration the same quality and character of the material to be purchased.

It is therefore the opinion of this office that the State Purchasing Agent must buy from the lowest and best bidder as is required of him under Section 3 of the Purchasing Agent Act, and that in the event of tie bids preference should be given to the Missouri firms under Section 12 of the Purchasing Agent Act and Section 48-A of the above appropriation act.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JET:MM

COUNTY CLERKS: Deputy Clerks' pay in Nodaway County.

October 6, 1937. 10/9

Honorable Edison Blagg
County Clerk
Nodaway County
Maryville, Missouri



Dear Sir:

We acknowledge your request for an opinion dated September 9, 1937, which reads as follows:

"I would greatly appreciate an opinion from you in regard to a part of Section 11811, Laws of Missouri 1933, pages 370-371. Starting at line 20 on page 371 the part in question reads as follows: (Provided, that the county court in all counties in this state having a population of 15,000 and less than 40,000 persons may allow the county clerks to retain, in addition to the amounts herein specified, for deputies' or assistants' hire a further sum not to exceed \$500 per annum to be determined by the County Court of such county: Provided, that the County Court shall determine that the work required to be done by such clerk or clerks demand or require such extra remuneration and that the fees collected and taken in by such clerks is sufficient to pay the same but in no event shall any such allowance be made by the county court where the fees collected by such clerk is not absolutely sufficient to meet such demand,). The question that I would like to have answered is: Is there anything embodied in this part of Section 11811 that would prohibit the payment of the additional \$500.00 to a County Clerk's regular deputies provided, of course, that the County

Court saw fit to make such allowance by court order and that the fees taken in were sufficient to cover the same?

"Further I would like an opinion in regard to the same part of Sec. 11811, Laws of Missouri, 1937.

"I am hoping that you can find time to write an opinion on the above matter yourself. I have referred this question to three different attorneys here and they all feel that there is nothing to prohibit the payment of this \$500.00 to my regular deputies. However, I shall feel very much more secure if I can be guided by an opinion from your department."

Laws of Missouri 1933, p. 370, Section 11811, provide in part:

"The aggregate amount of fees that any clerk of the County Court under Article 2 and 3 of this chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. * * * ; in counties having a population of 25,000 and less than 30,000 persons, the clerks shall be allowed to retain \$2300.00 for themselves, and shall be allowed to pay for deputies and assistants \$3000.00; in counties having a population of 30,000 and less than 70,000 persons, the clerks shall be allowed to retain \$2500.00 for themselves, and shall be allowed to pay for deputies and assistants \$3500.00; in counties having a population of 70,000 and less than 200,000 persons, the clerks shall be allowed to retain \$3000.00 for themselves, and

shall be allowed to pay for deputies and assistants \$5000.00; in counties having a population of 200,000 and less than 300,000 persons, the clerks shall be allowed to retain \$3000.00 for themselves, and shall be allowed to pay for deputies and assistants not exceeding \$16,000.00 in such of said counties where Court is held at more than one place, and in all other such counties they shall be allowed to pay for deputies and assistants not exceeding \$5000.00. Provided, that the county court in all counties in this state having a population of 15,000 and less than 40,000 persons may allow the county clerks to retain, in addition to the amounts herein specified, for deputies' or assistants' hire a further sum not to exceed \$500 per annum to be determined by the County Court of such county.* * *

By the last decennial census Nodaway County has a population of 26,371 inhabitants.

Statutory authority for appointing deputy county clerks for any county is found in Section 11680 R. S. Mo. 1929, which provides:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

October 6, 1937.

Your question is determinable by statutory construction of the two statutes above set out, and as a guide for statutory construction we find that Section 655 R. S. Mo. 1929 provides in part:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import;* * * *."

CONCLUSION.

The words and phrases used in Section 11811, and Section 11680, supra, should be given their ordinary and usual meaning.

In Section 11811, supra, the Legislature in providing compensation for deputy county clerks, speak of the "aggregate amount of fees that any clerk* * * shall be allowed to retain for any one year's service."

The only plausible construction of such language is, that out of fees collected by the county clerk in his official capacity, he shall retain or withhold in his custody such sums within the limitation set out in the section, to be used for services rendered.

The word "retain" as used in Section 11811, supra, eliminates the county as a possible debtor for deputy county clerk hire, and precludes any right of any deputy to receive or enforce compensation for services from the revenues of the county, binding all deputies to look only to the retainer in the hands of the county clerk for their pay. County warrants are not to be used to pay for the services of any deputy county clerks, prior to September 6, 1937.

October 6, 1937.

Section 11680, supra, provides that the County clerk appoint deputy county clerks, as a part of their prerogative, same to be approved by the County Court.

Section 11811, supra, provides for a retainer of \$3000.00 for deputy hire in counties the size of Nodaway County, and in the same section provides for an additional sum for deputy hire "not to exceed \$500.00", which additional sum is left up to the sound discretion and record order of the County Court, the Legislature not intending that the county clerk be handicapped for lack of help.

Construing Section 11811, supra, we are of the opinion that where the County Court, in its sound discretion, has ordered the county clerk of Nodaway County to retain from his collected fees an additional sum of \$500.00 for necessary deputy clerk hire, then in that case the county clerk was entitled to \$3500.00 as a total retainer to be expended for clerk hire. Without such an order of the County Court, the county clerk was entitled to only \$3000.00 as a total retainer to be expended for clerk hire.

On September 6, 1937, a new law went into effect whereby compensation of the county clerk and his deputies, for services rendered, became from that date on a charge against the county and not a charge against the retainer in the hands of the county clerk, and the new law provides further that compensation for services are payable in monthly installments by monthly warrants drawn on the county. (See Laws of 1937, p. 440, Section 11811.) Outside of this charge we interpret the Laws of 1937 with the same interpretation as we have given herein to Section 11811 in the Laws of 1933.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

WOS:H

STATE PURCHASING AGENT:
CONSERVATION COMMISSION:

The State Purchasing Agent should purchase the supplies for the State Conservation Commission, except he has no authority to lease or purchase land for it.

October 18, 1937. ¹⁰⁻²⁵



Honorable George Blowers,
State Purchasing Agent,
Jefferson City, Missouri.

Dear Sir:

This acknowledges your inquiry which is as follows:

"Will you please give this office an opinion as to whether or not the Conservation Commission comes under the State Purchasing Act of 1933."

Replying thereto, Constitutional Amendment No. 4 was adopted, effective July 1, 1937 (Laws of Missouri, 1937, page 614), the last provision of which is that the amendment shall be self-enforcing. The Act provides:

"The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wild life resources of the State, including hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of the same, and the administration of the laws now or hereafter pertaining thereto, shall be vested in" the Conservation Commission.

Powers conferred are the following:

"Said Commission shall have the power to acquire by purchase, gift, eminent domain, or otherwise, all property necessary, useful or convenient for the use of the Commission,"

including the right of condemnation, with the specification that the latter shall be exercised in the same manner as this power is exercised by the State Highway Commission.

With reference to the moneys arising on account of the amendment is this provision:

"The fees, monies, or funds arising from the operation and transactions of said Commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wild life resources of the State and from the sale of property used for said purposes, shall be expended and used by said Commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wild life resources of the State, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto and for no other purpose."

It further states:

"The general assembly may enact any laws in aid of but not inconsistent with the provisions of this amendment,"

and in terms repeals all inconsistent laws.

It would seem that the line of demarcation is to determine what laws would be inconsistent with the provisions of the constitutional amendment as written.

It is a well recognized rule of statutory construction that repeals by implication are not favored, but operate only where there is an irreconcilable inconsistency, and that effect shall be given to all laws or constitutional provisions where it is possible to do so.

Section 43 of Article IV of the Missouri Constitution provides, among other things, the following:

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the general assembly shall have no power to divert the same or to permit money to be drawn from the treasury except in pursuance of regular appropriations by law."

Under the provisions of the latter section of the Constitution, if the money arising by reason of the provisions of the Conservation Commission Act belong to the State, then it must be paid into the state treasury. No provision of the amendment creating the Conservation Commission is to the contrary. Effect can be given to both provisions. So doing, it would appear that the reasonable construction to be given the Conservation Commission Act is that the control, management, etc., of the wild life resources of the State as set forth therein is vested in said Commission, and the Legislature cannot divest the Conservation Commission of the same, but the Legislature may enact any and all laws as its wisdom dictates, except such as would by fair construction be inconsistent with a specific provision of the Act creating said Commission, and except that the administration of the laws regulating the wild life resources shall not be taken away from said Commission. The Act seems to contemplate this by providing that "the administration of the laws now or hereafter pertaining thereto" shall be vested in the Commission. Likewise, as to the powers conferred on the Commission by the second paragraph of the amendment that it "shall have the power to acquire * * * all property necessary, useful or convenient for the use of the Commission." This does not discard all other law with reference thereto, whether it be by legislative act or giving meaning to other provisions of the Constitution. In fact, this same section by providing that in eminent domain proceedings the Commission shall be governed by the laws "as now or hereafter provided for the exercise of eminent domain by the State Highway Commission," plainly indicates that the Legislature shall function in the field of prescribing the course to be pursued by said Commission, but is prohibited from taking away from the Commission the right of eminent domain as that right exists with respect to the Highway Commission.

The further provision in the third paragraph on page 615, Laws of Missouri, 1937, respecting the money arising "from the application and the administration of the laws and regulations pertaining to * * * wild life resources" of the "State

shall be expended and used" by the Commission for the "control, management, restoration, conservation and regulation" of the wild life resources of the State, is consistent with the view that while the Legislature is not authorized to take away, by enacting a statute, the administration of the laws as passed or that may be passed by the Legislature, yet the field is open to the Legislature to pass laws regulating in the hands of the Commission the expenditure of the said money, having always in mind that the money shall actually be expended by the Conservation Commission, but that it shall be expended only after it has been collected, placed in the state treasury as provided by Section 43 of Article IV, supra, and appropriated by the Legislature, the important safeguard being guaranteed to the Commission that the Legislature is prohibited from diverting these funds to some other purpose or field than that of the wild life resources of the State.

In this way there is the check and balance placed on the one department by the other. It would appear that the application of this rule of not turning over to any one department "body, boots and breeches" is not only sound policy, but is further emphasized and clearly shown by the Act creating the Commission where it is therein expressly stated that the General Assembly "may enact any laws in aid of but not inconsistent with the provisions of this amendment."

To hold otherwise would mean that the Conservation Commission should be a law unto itself, under no check, answerable to no other department of government, and would have all power, and, like the King, could do no wrong, so whatever they did or might do would be right because they did it, and would cast into the discard Section 43 of Article IV of the Constitution, and would violate the rule of statutory construction that said Section 43, supra, should not be repealed by implication, and would violate sound public policy.

The fair meaning to be placed on said amendment is that it guarantees that the administration of the wild life resources of the State shall not by legislative act be taken away from said Conservation Commission, but that the Legislature may enact laws regulating the manner in which the Commission may acquire property, and may by legislative act determine the amount of license that may be required by the Conservation Commission or may be collected by them, and that the moneys so collected by said Conservation Commission belong to the State, the Conservation Commission merely being a State agency, and

that said money so collected should be paid into the state treasury as provided by Section 43, supra, of the State Constitution.

By the constitutional amendment creating the Conservation Commission the Legislature is divested of any power to determine the number of conservation commissioners, to determine what their political faith shall be, to fill vacancies in a different way than as provided by said amendment, or to determine the salary or tenure of office of the commissioners. Likewise, the Legislature shall have no power to take away from the Conservation Commission the appointment of a Director of Conservation, nor the right to determine the number of assistants or other employees of the Commission, nor shall the Legislature have power to determine the qualifications of the Director or his assistants or employees, nor fix their individual salaries.

By the State Purchasing Agent Act, Laws of Missouri, 1933, Section 2, page 411, the Legislature prescribes the following:

"The purchasing agent shall purchase all supplies except printing, binding and paper, as provided for in Chap. 115, R. S. 1929, for all departments of the State, except as in this Act otherwise provided. He shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the State."

It would seem that the Act creating the Purchasing Agent has not authorized him to negotiate leases or purchase real estate for a department that derives its power to acquire lands from the Constitution of the State. If Amendment No. 4, supra, creating the Conservation Commission, authorizes the Conservation Commission to purchase real estate, which it probably does do, then insofar as the activities of the Conservation Commission apply to leasing and purchasing real estate, the State Purchasing Agent would have no authority.

The Conservation Commission Act not having definitely prescribed an exclusive method of purchasing to be followed by the Conservation Commission, the Legislature has the authority to pass laws prescribing the method by which purchases may be

10/18/37

made by the Conservation Commission, and the Legislature having prescribed that method by the above Section 2 of the State Purchasing Agent Act, the same should be followed.

CONCLUSION

It is our opinion that the State Conservation Commission comes under the provisions of the State Purchasing Agent Act of 1933, except as to the transactions of the Conservation Commission having to do or dealing with leasing or purchasing real estate.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

DW:HR

STATE CONSERVATION COMMISSION: The printing on behalf of the
PRINTING: State Conservation Commission
should be procured through the
State Printing Commission.

December 20, 1937.

Honorable George Blowers,
State Purchasing Agent,
Jefferson City, Missouri.



Dear Sir:

This acknowledges your inquiry which is as follows:

"Will you please confirm our conversation of even date, stating that it was your opinion that the printing for the Conservation Commission comes under the State Printing Contract."

Replying thereto, Constitutional Amendment No. 4 was adopted, effective July 1, 1937 (Laws of Missouri, 1937, page 614), the last provision of which is that the amendment shall be self-enforcing. The Act provides:

"The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wild life resources of the State, including hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of the same, and the administration of the laws now or hereafter pertaining thereto, shall be vested in" the Conservation Commission.

Powers conferred are the following:

"Said Commission shall have the power to acquire by purchase, gift, eminent

domain, or otherwise, all property necessary, useful or convenient for the use of the Commission,"

including the right of condemnation, with the specification that the latter shall be exercised in the same manner as this power is exercised by the State Highway Commission.

With reference to the moneys arising on account of the amendment is this provision:

"The fees, monies, or funds arising from the operation and transactions of said Commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wild life resources of the State and from the sale of property used for said purposes, shall be expended and used by said Commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wild life resources of the State, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto and for no other purpose."

It further states:

"The general assembly may enact any laws in aid of but not inconsistent with the provisions of this amendment,"

and in terms repeals all inconsistent laws.

It would seem that the line of demarcation is to determine what laws would be inconsistent with the provisions of the constitutional amendment as written.

It is a well recognized rule of statutory construction that repeals by implication are not favored, but operate only where there is an irreconcilable inconsistency, and that effect shall be given to all laws or constitutional provisions where it is possible to do so.

Section 43 of Article IV of the Missouri Constitution provides, among other things, the following:

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the general assembly shall have no power to divert the same or to permit money to be drawn from the treasury except in pursuance of regular appropriations by law."

Under the provisions of the latter section of the Constitution, if the money arising by reason of the provisions of the Conservation Commission Act belong to the State, then it must be paid into the state treasury. No provision of the amendment creating the Conservation Commission is to the contrary. Effect can be given to both provisions. So doing, it would appear that the reasonable construction to be given the Conservation Commission Act is that the control, management, etc., of the wild life resources of the State as set forth therein is vested in said Commission, and the Legislature cannot divest the Conservation Commission of the same, but the Legislature may enact any and all laws as its wisdom dictates, except such as would by fair construction be inconsistent with a specific provision of the Act creating said Commission, and except that the administration of the laws regulating the wild life resources shall not be taken away from said Commission. The Act seems to contemplate this by providing that "the administration of the laws now or hereafter pertaining thereto" shall be vested in the Commission. Likewise, as to the powers conferred on the Commission by the second paragraph of the amendment that it "shall have the power to acquire * * * all property necessary, useful or convenient for the use of the Commission." This does not discard all other law with reference thereto, whether it be by legislative act or giving meaning to other provisions of the Constitution. In fact, this same section by providing that in eminent domain proceedings the Commission shall be governed by the laws "as now or hereafter provided for the exercise of eminent domain by the State Highway Commission," plainly indicates that the Legislature shall function in the field of prescribing the course to be pursued by said Commission, but is prohibited from taking away from the Commission the right of eminent domain as that right exists with respect to the Highway Commission.

The further provision in the third paragraph on page 615, Laws of Missouri, 1937, respecting the money arising "from

the application and the administration of the laws and regulations pertaining to * * * wild life resources" of the "State shall be expended and used" by the Commission for the "control, management, restoration, conservation and regulation" of the wild life resources of the State, is consistent with the view that while the Legislature is not authorized to take away, by enacting a statute, the administration of the laws as passed or that may be passed by the Legislature, yet the field is open to the Legislature to pass laws regulating in the hands of the Commission the expenditure of the said money, having always in mind that the money shall actually be expended by the Conservation Commission, but that it shall be expended only after it has been collected, placed in the state treasury as provided by Section 43 of Article IV, supra, and appropriated by the Legislature, the important safeguard being guaranteed to the Commission that the Legislature is prohibited from diverting these funds to some other purpose or field than that of the wild life resources of the State.

In this way there is the check and balance placed on the one department by the other. It would appear that the application of this rule of not turning over to any one department "body, boots and breeches" is not only sound policy, but is further emphasized and clearly shown by the Act creating the Commission where it is therein expressly stated that the General Assembly "may enact any laws in aid of but not inconsistent with the provisions of this amendment."

To hold otherwise would mean that the Conservation Commission should be a law unto itself, under no check, answerable to no other department of government, and would have all power, and, like the King, could do no wrong, so whatever they did or might do would be right because they did it, and would cast into the discard Section 43 of Article IV of the Constitution, and would violate the rule of statutory construction that said Section 43, supra, should not be repealed by implication, and would violate sound public policy.

The fair meaning to be placed on said amendment is that it guarantees that the administration of the wild life resources of the State shall not by legislative act be taken away from said Conservation Commission, but that the Legislature may enact laws regulating the manner in which the Commission may acquire property, and may by legislative act determine the amount of license that may be required by the Conservation Commission or may be collected by them, and that the moneys so

collected by said Conservation Commission belong to the State, the Conservation Commission merely being a State agency, and that said money so collected should be paid into the state treasury as provided by Section 43, supra, of the State Constitution.

By the constitutional amendment creating the Conservation Commission the Legislature is divested of any power to determine the number of conservation commissioners, to determine what their political faith shall be, to fill vacancies in a different way than as provided by said amendment, or to determine the salary or tenure of office of the commissioners. Likewise, the Legislature shall have no power to take away from the Conservation Commission the appointment of a Director of Conservation, nor the right to determine the number of assistants or other employees of the Commission, nor shall the Legislature have power to determine the qualifications of the Director or his assistants or employees, nor fix their individual salaries.

In the case of State ex rel. Publishing Co. vs. Hackmann, 314 Mo. 33, (1926), the Supreme Court had before it a mandamus proceeding to require the payment to a publishing company of a printing bill for the State Highway Commission. The publishing company, relator, did not have a contract with the State Printing Commission, but contended that it was entitled to the bill being paid because it was for a printing bill on behalf of the State Highway Department, and that the State Highway Department moneys stood appropriated therefor without legislative appropriation by virtue of the constitutional provision in Section 44a of Article IV of the Constitution. The Supreme Court ruled against this contention, and holds (page 43) that the Highway Commission is

"a subordinate branch of the Executive Department. As such it is required, under the mandatory provisions of Chapter 89, to secure the payment of its accounts for printing and the purchase of stationery in the manner prescribed in that chapter.

"There is nothing in the act creating the Highway Commission which militates against the correctness of this conclusion. We are authorized to presume that the Legislature in framing the act was familiar with the constitutional and statutory restrictions

regulating the payment of money out of the State Treasury for any purpose. In framing Section 12 of the act, therefore, providing that the supplies therein specified should be furnished to the commission (which was a proper provision, and not an unusual one in the creation of any department), it is prescribed that such supplies shall be paid for as 'other expenses authorized by this act.' In this specification no mention is made of printing. The reason therefor is evident. Cognizant of the fact that the Highway Commission was a branch of the Executive Department and that its printing must be paid for in the manner prescribed in Chapter 89, regulating public printing, it was omitted and properly so."

It would certainly not be proper to classify the Conservation Commission as a legislative or judicial body, and if not, then it must be, like the Highway Commission, "a subordinate branch of the executive department." Just as there is no provision in the act creating the Highway Commission which militates against the correctness of this conclusion, so there is nothing in the amendment creating the Conservation Commission which militates against the correctness of the same conclusion as to it.

By the same line of reasoning pursued by the court in the above case with reference to the State Highway Commission and the authority of that body to contract for its printing and purchase of supplies, the same result should be reached with reference to the State Conservation Commission.

By the express terms of Section 2, page 411, Laws of Missouri, 1933, the Purchasing Agent's power to function for the "printing, binding and paper as provided for in Chapter 115, R. S. Mo. 1929, for all departments of the State" is excepted from the field of activity of the State Purchasing Agent.

The Conservation Commission Act not having definitely prescribed an exclusive method of procuring "printing, binding and paper" for the Conservation Commission, the Legislature has the authority to pass laws prescribing the method by which purchases may be made on behalf of the Conservation Commission

12/20/37

with respect to printing, binding and paper, and as the law creating the State Purchasing Agent exempts from his control the purchasing of the state printing, and the law further prescribes a definite course to be followed as defined in Chapter 115, Article 1, R. S. Mo. 1929, and by the latter provision creates the Secretary of State, State Auditor and State Treasurer ex-officio commissioners of the public printing, and definitely prescribes their duties and authority, it follows that:

CONCLUSION

The printing that is required or is reasonably necessary in the proper conduct of the State Conservation Commission is required to be procured through the State Printing Commission.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

DW:HR

INTOXICATING LIQUOR: No provision licensing persons for sale of intoxicating liquor and beer on boats or vessels.

March 10, 1937.

Mr. Wallace I. Bowers,
Chief Clerk,
Department of Liquor Control,
Jefferson City, Missouri.



Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of March 2, 1937, which reads in part as follows:

"May this department issue 5% and 3.2% beer permits to owners of boats, operating on navigable waters in this state? In this same instance, may this department issue by the drink permits, issued to Railroads in this state, costing \$100.00 per year as provided in Section #22 of the Liquor Control Act?"

The cardinal rule of construction of statutes is to arrive at the legislative intent. There is no provision in the Liquor Control Act specifically providing for the licensing of any person or persons to sell intoxicating liquors or beer on navigable waters within this state.

Section 20 of the Liquor Control Act provides in part:

" * * * * *

"Every license issued under the provisions of this Act shall particularly describe the premises at which intoxicating liquor may be sold thereunder, and such license shall not be deemed to authorize or permit the sale of intoxicating liquor at any place other than that described therein."

Section 5 of the same Act provides:

"No person, agent or employee of any person in any capacity shall sell intoxicating liquor in any other place than that designated in the license, or at any other time or otherwise than is authorized by this act and the regulations herein provided for."

A similar provision provides for the licensing for sale and consumption of beer on the premises.

Section 13139e, part (c) of the Liquor Control Act provides:

"For a permit authorizing the sale of non-intoxicating beer for consumption on premises where sold, Twenty-five Dollars (\$25.00)."

It is impossible to issue a liquor license to persons for the sale of intoxicating liquor and beer on boats or vessels upon navigable streams in this state for the following reasons:

1st. In view of the above provisions of the Liquor Control Act requiring that each license describe the premises at which such liquor or beer may be sold thereunder, there is no conceivable way that one could describe, with particularity, the premises in a liquor permit for the sale on boats or vessels. Premises, as construed in the majority of cases, refers to real property located on land, which may be referred to as being located at a certain street number in some town or city.

2nd. Section 25 of the Liquor Control Act provides that counties and incorporated cities may charge for a license.

Section 25 of the Act provides:

"In addition to the permit fees and license fees and inspection fees by this act required to be paid into the state treasury, every holder of a permit or license authorized

by this act shall pay into the county treasury of the county wherein the premises described and covered by such permit or license are located, or in case such premises are located in the City of St. Louis, to the collector of revenue of said city, a fee in such sum (not in excess of the amount by this act required to be paid into the state treasury for such state permit or license) as the county court, or the corresponding authority in the City of St. Louis, as the case may be, shall by order of record determine, and shall pay into the treasury of the municipal corporation, wherein said premises are located, a license fee in such sum, (not exceeding one and one-half times the amount by this act required to be paid into the state treasury for such state permit or license), as the law-making body of such municipality, including the City of St. Louis may by ordinance determine. The Board of Aldermen, City Council or other proper authorities of incorporated cities, may charge for licenses issued to manufacturers, distillers, brewers, wholesalers and retailers of all intoxicating liquor, located within their limits, fix the amount to be charged for such license, subject to the limitations of this act, and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of all intoxicating liquors within their limits, provide for penalties for the violation of such ordinances, where not inconsistent with the provisions of this act."

It is not hard to understand what difficulties would arise, in view of this provision. There is hardly a navigable stream that does not flow through several counties in this state. It would be very difficult to regulate and control such licensing, if allowed. There would be no fixed place of business other than on some designated body of water. Such a license was never contemplated by the Legislature in the enactment of the Liquor Control Act.

With regard to the latter part of your request, we assume you have reference to the licensing of persons for sale of intoxicating liquor and beer on boats and vessels under the same provision applicable to railroads, which reads as follows:

Sec. 22, in part:

"For every license issued to any railroad company, railway sleeping car company operated in this state, for sale of all kinds of intoxicating liquor, as herein defined, at retail for consumption on its dining cars, buffet cars and observation cars, the sum of one hundred (\$100.00) dollars per year, PROVIDED, that said license shall not permit sales at retail to be made while said cars are stopped at any station; and provided further, that a duplicate of such license shall be posted in every car where such beverage is sold or served, for which the licensee shall pay a fee of one (\$1.00) dollar for each duplicate license * * *."

It is impossible to construe this provision to include any business other than enumerated therein, namely, railroad company and railway sleeping car company.

It is a well known canon of statutory construction that the expression of one thing is exclusive of another.

CONCLUSION

In view of the foregoing, it is the opinion of this Department that the Legislature never contemplated the licensing of persons for the sale of intoxicating liquor or beer on boats or vessels on navigable streams in this state, and would, therefore, be a violation of the law to issue such license.

Furthermore, that provision with regard to licensing of a railroad company and railway sleeping car company is not applicable to boats or vessels.

Very truly yours,

AUBREY R. HAMMETT, Jr.
Assistant Attorney-General

ARH/LD

APPROVED:

J. R. TAYLOR (Acting) Attorney-General.

SCHOOLS: A school district situated in two or more counties or townships shall deposit bonds voted with the county or township in which schoolhouse is situated.

4-22
April 15, 1937



Honorable F. C. Bollow
Prosecuting Attorney
Shelby County
Shelbina, Missouri

Dear Sir:

This Department is in receipt of your letter of February 3, 1937, requesting an opinion on the following:

"In accordance with the provisions of Section 9198 of the Revised Statutes of 1929 a district commonly known as the Moreman School District has voted bonds to rebuild a school building destroyed by fire. This section provides, among other things, that 'said bonds shall not be negotiated by said board until said bonds have been deposited with the county or township in which said district shall be situated'. This district lies both in Shelby and Monroe Counties. The area lying in both counties is about equal, with probably the greater valuation in Shelby County. The portion lying in Shelby County has been known as District No. 64, and that in Monroe County as District No. 75. The school house was located in Shelby County and the new building is to be erected on the site of the old. I would appreciate your opinion as to which county the bond or bonds should be registered in to meet the requirements of Section 9198."

April 15, 1937

This is a question without precedent in this state or in other states which have similar statutes to ours. Therefore we must, if possible, reason this matter to a conclusion that will permit the bonds voted by the school district to be deposited either in the one or the other county, or in both, so that said bonds may be negotiated to provide the means to erect the school building. Yet we must reach a conclusion that will not be contrary to other school laws of this state, and that will conform, if possible, to Section 9198 R.S. 1929.

Assuming and considering Districts 64 and 75, known as the Moreman School District, to be one district, and further assuming that said district could legally vote a valid bond issue to erect a school building within the confines of the district. The question then arises: Where are the bonds voted to be deposited in order to comply with the provisions of Section 9198 R.S. 1929? This Section is in part as follows:

"When bonds are voted under this section for the erection of one or more school-houses, to be erected on the same or different sites in common school districts, said bonds shall not be negotiated by said board until said bonds have been deposited with the county or township in which said district should be situated, and upon the order of said board, and the payment to the county or township treasurer of the amount agreed to be received for the same by said board from the person or persons loaning said money upon said bonds. The county or township treasurer shall countersign said bonds and deliver the same to the person or persons named by said board of directors."

The Legislature when it enacted Section 9198 R.S. 1929, failed to provide, in express language, the place in which those school districts lying in two or more

Honorable F. C. Bollow

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April 15, 1937

counties should deposit bonds voted, so that the bonds could be negotiated, and the courts by interpretation have not pointed the way.

To meet the requirements of Section 9198 R.S. 1929, heretofore quoted, the bonds must be deposited in the county or township in which the district is situated until the payment, by the purchaser of the bonds, of the agreed price, is made to the county or township treasurer. It would therefore be an impossibility for the bonds to be deposited in both counties or townships since they must remain on deposit until the money borrowed is paid into the county or township treasury. Therefore the bonds must be deposited in either the one or the other of the counties or townships in which the district is situated. The contemporaneous construction that has for a long period of time been given Section 9198 R.S. 1929 is that the bonds voted by a school district situated in two or more counties or townships shall be deposited in the county or township in which the school site is to be situated.

In State ex rel Chick v. Davis, 201 S.W.529, 1.c.530, the court in construing an ambiguous statute, said:

"Though the statute be not clear, its ambiguity opens the way for the rule that the actual construction given for a long period by those charged with its administration, the supervising courts and the Legislature acquiescing therein, is regarded as strong evidence of its true meaning."

Therefore we conclude that the bonds voted by the district should be deposited in the county or township in which the schoolhouse is to be situated, in order to give force and effect to the statute and the contemporaneous construction of said statute.

Respectfully submitted,

APPROVED:

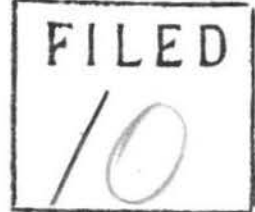
Oliver W. Hale

J. E. TAYLOR
(Acting) Attorney General

Assistant Attorney-General

SCHOOLS: Directors in consolidated School districts shall fill vacancy in accordance with Sec. 9290 R. S. Mo. 1929, when one candidate is elected and other candidates tie in votes, where two are to be elected.
April 26, 1937.

Honorable F. C. Bollow
Prosecuting Attorney
Shelby County
Shelbina, Missouri



Dear Sir:

This office is in receipt of your letter of April 8, 1937, requesting an opinion on the following question:

"In the Emden school district which is a consolidated district having six directors, at the recent election two directors were to be elected, both for the same term of years. The election resulted in one candidate receiving twenty-nine votes and the next three candidates receiving twenty-eight votes each. I am familiar with the general law that a public officer holds an office until his successor is elected and qualified, but here that law cannot cover the situation. I believe the candidate who received the twenty-nine votes is unquestionably elected but which one of the retiring directors does he succeed and which one of these retiring directors must now step out of his way and permit him to sit on the board pending the election of the second new director.

"Again I am unable to find any section of the statute authorizing the appointment of the second director in the event of a tie, such as was had here or authorizing the holding of a second election in the event of such a tie. Again if a new election is to be held, is the candidate receiving the twenty-nine votes entitled to sit on the board calling for such special election and appointing judges to act at such election?"

Section 9329 R. S. MO. 1929, provides, among other things, that said directors elected shall qualify within four days after their election. If this section is mandatory the director who received twenty-nine votes has lost his right to qualify for said office, but, in our opinion, the section is merely directory. In *Hudgins v. School District*, 278 S. W. 269, 1. c. 770, the court, in defining mandatory and directory statutes, said:

"Under a general classification, statutes are either mandatory or directory; a determination of their character in this respect is of first importance in their interpretation. If mandatory, in addition to requiring the doing of the things specified, they prescribe the result that will follow if they are not done; if directory, their terms are limited to what is required to be done."

If the Legislature had intended this provision of Section 9239 R.S. Mo. 1929, to be mandatory, they should have provided that if the elected director did not qualify within four days that his office will be deemed vacant. The rule stated in the *Hudgins* case, *supra*, when applied to this provision of this statute, clearly makes said provision directory.

Section 9328 R. S. Mo. 1929, provides that said directors elected shall hold office for three years and until their successors are duly elected and qualified. In *State v. Brown* 274 S. W. 965, 1. c. 967, the court said:

"The law is well settled that, where a public officer is elected or appointed to hold office for a definite period, and until his successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy. *State ex rel. Lusk*, 18 Mo. 333; *State ex rel. Stevenson v. Smith*, 87 Mo. 158. It follows that the incumbent properly holds until his successor is elected or appointed and qualified, and it is then only that his term expired.

Ordinarily, the rule in the Brown case, supra, is controlling, but in the instant case we think the exception to this general rule is applicable. The exception to the general rule, as stated in 74 A. L. R. 491, is as follows:

"The exceptions to the general rule, as stated above, are generally dependent on special constitutional or statutory provisions, or necessarily result from the peculiar facts of the particular case."

There are no special constitutional or statutory provisions in this state. The exception to the general rule in the instant case arises from the peculiar facts of the case.

The question is, if no vacancy is created by the failure to elect a second board member, which one of the two incumbents whose terms are expired would hold over? The candidates do not run to succeed any particular incumbent, but run for one of the offices which is to become vacant by reason of the expiration of the terms of the incumbents. Therefore, if the elected candidate was not elected to succeed any particular incumbent, how can it be said that either of the incumbents would have the right to hold over until his successor is elected and qualified. There has been no one elected to succeed the incumbent in particular, but merely a person elected to fill an office that has become vacant because the incumbent's term has expired. Since the elected candidate was not elected to succeed any particular incumbent, we think it necessarily follows that neither of the incumbents could hold over because of the failure to elect a member to fill the vacancy created by the expiration of his term. If this is true then a vacancy exists in the board of directors of the school district which must be filled as provided by Section 9327, R. S. 1929. This section provides that vacancies in consolidated school district boards shall be filled in the same manner as vacancies in boards of other school districts. Section 9290, R. S. 1929, of the laws applicable to common schools supplies the procedure to be followed in filling such vacancies, and is as follows:

"If a vacancy occur in the office of director, by death, resignation, refusal to serve, repeated neglect of duty or removal from the district, the remaining directors shall, before transacting any official business, appoint

some suitable person to fill such vacancy; but should they be unable to agree, or should there be more than one vacancy at any one time, the county superintendent of public schools shall, upon notice of such vacancy or vacancies being filed with him in writing, immediately fill the same by appointment, and notify said person or persons in writing of such appointment; and the person or persons appointed under the provisions of this section shall comply with the requirements of section 9288, and shall serve until the next annual school meeting."

The case of State v. Larsen, 144 N.E. 264, we think, is authority for our ruling. This is not a parallel case, but is applicable to the instant case through the process of analogous reasoning. In that case the court said:

"At the general election, November 1921, William Hutchinson was duly elected a councilman for the village of Rocky River, Ohio, for the term of two years, beginning January 1, 1922. He duly qualified and entered upon his duties, and at the general election, November, 1923, he was re-elected to said office, but died on November 28, 1923. At the first regular meeting of the council following Hutchinson's death, the relator, Christensen, was duly elected by the council to fill his unexpired term. He duly qualified and entered upon the duties and exercised the functions thereof until the council of the village, on January 2, 1924, declared the office vacant and appointed the defendant Larsen to fill the vacancy, who thereupon qualified and entered upon the exercise of the duties of the office.

"Christensen brings this action in quo warranto, seeking the ouster of Larsen from office, and prays

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that he may be adjudged entitled thereto.

"The writ must be denied for two reasons:

"1. It is disclosed that the council of the village of Rocky River consisted of six members elected at large. At the election of the new council in November, 1923, there were thirteen candidates for the six places on the council, some of whom were candidates for re-election. None of those elected could be designated as the successor of a particular former member, consequently had Hutchinson lived he could not have been regarded as his own successor in the new term, and, therefore, Christensen, by reason of his selection for the unexpired term of Hutchinson, could not hold over and become Hutchinson's successor in the new term. Under such circumstances the new term was not an appendage of the unexpired term, and the case of State ex rel. Hoyt v. Metcalfe, 80 Ohio St. 244, 88 N. E. 738, has no application."

The ruling in the Larsen case, supra, as we understand it, is that the council members are elected at large and that none of those elected could be designated as the successor of a particular former member. Consequently, had the deceased member lived and been re-elected he could not have been regarded as his own successor in the new term, and a person appointed to fill his unexpired term could not hold over as successor of the deceased member upon the new term, because the deceased member had no particular successor.

In the instant case, the two expiring terms were to be filled by board members elected at large. The successful candidate was elected at large and not to succeed any particular incumbent. That had one of the incumbents been a candidate and elected he would not be successor to himself, because he would have been elected at large to fill a vacancy created by the expiration of a term of office. The incumbents in this case, under these peculiar facts, could have no successors and cannot hold over until such a successor is elected

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and qualified because this would never happen.

Therefore, from the foregoing, it is our opinion that, due to the peculiar circumstances in this case, the general rule of incumbents holding over until successors are elected and qualified does not apply. Under the exception to the general rule the offices of the incumbents expire at the end of their term, and said incumbents do not hold over. The candidate receiving twenty-nine votes should qualify and take his place as a member of the board of directors, thus filling one of the offices. The remaining members of the board whose terms have not yet expired should, together with the newly elected and qualified member of the board, select and appoint a qualified person to fill the other vacant directorship. The vacancy to be filled as provided by Section 9290 R. S. 1929.

Respectfully submitted,

James L. HornBostel
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB:LC

CITIES OF THE FOURTH CLASS: Board of Aldermen may pass motions or resolutions when a majority of the quorum of the Board concur.

May 24, 1937.

Mr. Marvin E. Boisseau,
City Attorney,
University City, Missouri.



10

Dear Mr. Boisseau:

We wish to acknowledge your request for an opinion wherein you state as follows:

"A question has arisen with reference to a situation in University City, concerning which I would like to have your opinion.

"University City is a City of the Fourth Class and is divided into three Wards. The Board of Aldermen consists of two members from each Ward, or a total of six members.

"At the recent City election, one member of the Board of Aldermen, who had been elected Alderman for a term which does not expire until April 1938, was elected as Mayor. He has been sworn into office, thus leaving five members of the Board and necessitating a special election to fill out his unexpired term as Alderman.

"Under the Statutes relating to Cities of the Fourth Class, the affirmative vote of a majority of the entire Board is necessary for the passage of an ordinance, and it is my understanding that this Statute requires the votes of four members in order to make an ordinance valid, notwithstanding the fact that there are now only five members of the Board.

"The question concerning which I would like to have your opinion is this: Is it necessary to have the affirmative votes of four members of the Board to pass an ordinary motion or resolution, such, for instance, as a resolution calling a special election and designating the polling places and the judges and clerks therefor, or a resolution requiring the City Hall to be closed on the day of the special election and not requiring the City employees to perform their regular duties on such day?

"I may add that the Board has no rule of procedure stating what shall constitute a quorum or what vote shall be necessary for the passage of motions or resolutions, or bearing in any other manner upon the questions above presented."

19 R. C. L., Sec. 194, p. 895, distinguishes between an ordinance and a motion or resolution, as follows:

"A municipal ordinance or by-law is a regulation of a general, permanent nature enacted by the governing council of a municipal corporation. There are certain formalities usually required in the case of an ordinance or by-law to guard against too hasty and ill considered action, such as a number of successive readings on different days; if there are two chambers, submission to them on different days; and, in any event, the approval of the mayor. A resolution, or order as it is sometimes called, is an informal enactment of a temporary nature, providing for the disposition of a particular piece of the administrative business of a municipal corporation. It is not a law and there is in substance no difference between a resolution and a motion. A motion, resolution, or order may be enacted in both chambers in a few minutes and usually does not require the approval of the mayor."

The distinguishing characteristic is that an ordinance is of a permanent nature, while a resolution or motion is of a temporary nature.

Section 7016, R. S. Mo. 1929, provides the manner in which an ordinance is to be passed, in part, as follows:

"No ordinance shall be passed except by bill, and no bill shall become an ordinance unless on its final passage a majority of the members elected to the board of aldermen shall vote for it * * *."

With reference to the manner in which a resolution or motion may be passed, the statutes are silent, and we must therefore look to the common law rules as to quorums and majorities.

In Dillon on Municipal Corporations, (5th Ed.) Vol. 2, Sec. 521, p 845, we find the following statement:

"The common law rules as to quorums and majorities, established with reference to corporate bodies consisting of a definite number of corporators, have also, in general, been applied to the common council, or select governing body of our municipal corporations, where the matter is not specially regulated by the charter or statute. The quorum of a body has been defined to be that number of the body which, when assembled in their proper place, will enable them to transact their proper business, or in other words that number that makes the lawful body, and gives them the power to pass a law or ordinance. If there be no statutory restriction, a majority of a municipal council or board is a quorum, and a majority of a quorum may act. Thus, to use Mr. Dane's illustration, if the body consists of twelve common councilmen, seven is the least number that can constitute a valid meeting, though four of the seven (the seven being duly assembled and present) may act."

May 24, 1937.

And Section 524, page 850, illustrates as follows:

"So, if a board of village trustees consists of five members, and all, or four, are present, two can do no valid act, even though the others are disqualified by interest from voting, and therefore omit or decline to vote; their assenting to the measure voted for by the two will not make it valid. If three only were present, they would constitute a quorum; then the votes of two, being a majority of the quorum, would be valid; certainly so where the three are all competent to act."

In the case of City of Batesville v. Ball, 100 Ark. 296, 140 S. W. 712, citing Dillon on Municipal Corporations, we find this statement:

"In this case the form in which the council expressed its decision was called an ordinance, but it was in fact only a resolution, in the passage of which it was required only that a majority of the quorum of the council should concur. 1 Dillon on Municipal Corporations, Secs. 282-283."

From the foregoing, we are of the opinion that, there being no statute governing same, in order to pass a motion or resolution it is only necessary that a majority of the quorum present should concur. The Board of Aldermen consisting of six members, five being present, three members would constitute a majority of the quorum.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

COUNTY BUDGET ACT:
ROADS AND BRIDGES:

1. County Court cannot use funds of the county to build bridges in special road districts.
 2. No funds budgeted under class 3 can be used for the repair, upkeep or building of bridges in special road districts.
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June 28, 1937

Honorable Chas. D. Brandom
Prosecuting Attorney
Daviness County
Gallatin, Missouri



Dear Sir:

This Department is in receipt of your letter of some time ago relative to the repair and upkeep of bridges. Your letter is as follows:

"The County Court of this County has directed me to write you for an opinion on the following questions:

"1. What, if any, bridges within a special road district are supposed to be constructed or maintained by the County Court?

"2. Under the Budget Law (see Section 2, Class 3, laws 1933 page 341) can the County Court include in its budget funds for the upkeep, repairs or replacements of bridges of any kind, character or value within a special road district?

"In this connection I call your attention to the fact that this County is a county under Township organization and has several special road districts within the County. It has been generally understood that the special road districts are required to maintain and replace all bridges and culverts within the district except such bridges as are commonly called County Bridges, such as bridges

across a river etc. These so-called bridges have been maintained and repaired by the County Court out of the general revenue funds.

"Section 7898 R. S. 1929, provides that no -road district shall be compelled to build a bridge which costs \$50.00 or more; also providing that the County Court shall determine what bridges - shall be built and maintained by the County and what by Road districts. From this section it would appear that the county might be required to build and maintain any bridge costing \$50.00 or more (although I understand they all cost more than that), even culverts, although the special road district laws would seem to require the districts to build the bridges within ~~the~~ boundaries.

"The said Budget law on its face apparently prohibits the County from setting aside anything for the upkeep, repair or replacement of bridges in any special road district, regardless of the cost thereof. It would seem to me that this clause in the Budget law would probably be construed to prohibit the County Court from setting aside money for bridges which it is the duty of the special road district to repair or replace and not intended to prohibit the County from setting aside funds to repair or build so-called County bridges. But again arises the question as to just what bridges the special road district is required to maintain or replace and what bridges come under the County Court's jurisdiction.

"With the County bridges being paid out of the general County revenue

the special road districts (residents thereof) pay their proportionate part of the general fund and it would seem that the district is entitled to have County money expended on bridges within their district the same as any other portion of the County.

"Your usual prompt opinion in this matter will be greatly appreciated."

I

"What, if any, bridges within a special road district are supposed to be constructed or maintained by the County Court?"

You stated in your letter that Daviess County is organized under township organization, hence it will be necessary to treat your question purely from that standpoint. The sections relating to road districts in township organizations are 8176 to 8199, inclusive. The confusing section relating to your section is, as mentioned in your letter, 7898, and we might add the additional section of 7900, said sections being, respectively, as follows:

"Each county court shall determine what bridges shall be built and maintained at the expense of the county and what by the road districts: Provided, that no road district shall be compelled to build a bridge which costs fifty dollars or more."

"The county court may order any bridge built by the county to be

June 28, 1937

attached to a road district, for the purpose of being kept in repair by such road district; but when the repairs necessary at one time shall exceed in value fifty dollars, the same shall not be required to be done by such road district."

In your letter you refer to Section 7898, the section referring to bridges which shall be built and maintained at the expense of the county; closely related to the same subject matter is Section 7900, relating to attaching bridges to districts. The sections are under Article IV, Chapter 42, relating to Bridges. From a complete consideration of the statutes, beginning with 7898 to 7914, inclusive, it would appear that the bridges mentioned in Article IV refer only to common road districts. There is apparently no provision which in anywise would be referable to bridges in special road districts. Therefore, in considering your question, we are of the opinion that these sections have no bearing on the question. The statutes deal with special road districts in counties of less than 50,000 inhabitants under Article IX, and special road district-benefit assessment in counties under township organization in Article X, of Chapter 42. Article XVI of Chapter 42 refers to special road district-benefit assessment in counties under township organization, which applies to your county. In an effort to arrive at an ultimate conclusion to your specific question, we shall review, briefly, the sections in the three articles herein mentioned, dealing with bridges. Articles IX and X being reviewed merely for the purpose of differentiating and fortifying the conclusion,

Under Section 8039, Revised Statutes Missouri 1929, relating to special road districts in certain counties not under township organization, the county court is given the right to build bridges and assist in building bridges in its discretion.

Under Section 8066 the building of bridges is done by authority of the commissioners. This section

is under Article X, relating to special road districts and benefit assessments in townships not under township organization. Also, Section 8065 contains the following sentence:

"Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts within the district, to construct, improve and repair such highways, bridges and culverts * * * * *."

Referring to Article XVI, relating to special road districts under township organization, the only pertinent section we can discover relating to bridges is Section 8180. The pertinent part being as follows:

"Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts, within the district to construct, improve and repair such highways, bridges and culverts, and shall have all the power, rights and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purposes may employ hands and teams at such compensation as they shall agree upon; rent, lease or buy teams, implements, tools and machinery; all kinds of motor power, and all things needed to carry on such work; Provided, that said commissioners may have such road work, or bridge or culvert work, or any part thereof, done by contract,

under such regulations as said commissioners may prescribe."

CONCLUSION

In view of the fact that the statutes contemplate repairing and constructing bridges shall be done by the special road district and that by the terms of Section 8182 the Board of Commissioners is empowered to levy taxes on property in the district for maintenance of bridges and culverts, and the said Board is further empowered under Section 8183 to issue bonds under certain circumstances for the purpose of constructing, repairing, and maintaining bridges and culverts within the district, we are of the opinion that the County Court is not empowered to construct or maintain any bridges in special road districts under township organization.

By the terms of the sections herein mentioned, and by complete consideration of all the statutes governing special road districts in township organization, under Article XVI it would appear that the district itself has complete control over the repairing, constructing and maintaining of bridges within its district.

II

"Under the Budget Law (see Section 2, Class 3, Laws 1933 page 341) can the County Court include in its budget funds for the upkeep, repairs or replacement of bridges of any kind, character or value within a special road district?"

Honorable Chas. D. Brandom

-7-

June 28, 1937

Due to the conclusion reached under your first question, it would naturally follow that the County Court could not include in its budget any funds for the repair, upkeep, maintenance or replacement of bridges in a special road district. In fact, irrespective of our holding on your first question, the budget act contains a positive prohibition, same being under Section 2, Class 3, page 341, Laws of 1933.

"The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county."

We interpret the portion quoted above in parenthesis, "and not in any special road district" to refer to any or all bridges in a special road district,

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN/LC

TOWNSHIP ORGANIZATION: }

TOWNSHIP TRUSTEE:
Fee & Compensation. }

Township Trustee entitled to 2% on first one thousand dollars and 1% on remainder.

August 10, 1937

FILED 11

Honorable Charles D. Brandom
Prosecuting Attorney
Daviness County
Gallatin, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of August 9th, in which you request the opinion of this Department on the question therein submitted. Your letter is as follows:

"With reference to Section 12,310 as amended by the laws of 1931, page 377, this provides that the township trustee as ex-officio treasurer shall receive a compensation of 2% for receiving and disbursing all money coming into his hands as such up to \$1000.00 and 1% of all sums over \$1000.00. The question is, does this 2% on the first \$1000.00 mean with reference to each fund held by him or on all funds regardless of the source? In other words, as trustee he has in his hands school money belonging to several districts within the township, also township money and road and bridge money. Does the 2% commission apply on the first \$1000.00 in each fund of each school district or only upon the aggregate? I thought it possible that your office had passed on this question, and if so I would appreciate a copy of your opinion. It seems that almost every township trustee in the county is inquiring, so I will appreciate hearing from you."

The duties of the township trustee and ex-officio treasurer of townships in counties under township organization are set forth in Section 12290, R.S.Mo. 1929, Article 7, Chapter 86, Revised Statutes of Missouri, and is as follows:

"He shall keep a correct account of all moneys coming into his hands by virtue of his office, from what source received, and what amount, of the amount paid out, to whom paid, and on what account, in a book to be kept by him and provided for the purpose by the township; said book to be kept in such a manner as to show the amount of money in his hands belonging to each school district or fractional part in the township and the amount of road money belonging to the township. He shall make settlement annually between the twentieth day of March and the fifteenth day of April with the county clerk of all moneys received by him on account of schools, showing how the same have been disbursed, and he shall settle with the county treasurer within twenty days after the apportionment of the school funds to the school district, and receive all money in the hands of the county treasurer belonging to his township, and receipt for the same, and shall pay all warrants drawn on him by the board of school directors in his township out of the funds belonging to the district making the order, and he shall not pay any money out belonging to any other fund than that mentioned in the warrants, and he shall file with the township clerk on or before the day of the regular meeting of the township board in April a detailed statement of all money by him received and paid out, to whom and out of what fund, and the amount of hand, and at the expiration of his term of office he shall turn

over to his successor all moneys, books and papers belonging to the office, and take duplicate receipts for the same, one to be filed with the township clerk, the other to be retained by himself."

The compensation received by the township trustee as ex-officio treasurer is set forth in the last proviso of Section 12310, R.S.Mo. 1929, as amended by Laws of 1931 at page 377, and is as follows:

"* * * And provided further, that the township trustee as ex officio treasurer shall receive a compensation of two per cent. for receiving and disbursing all moneys coming into his hands as such treasurer when the same shall not exceed the sum of one thousand dollars and one per cent. of all sums over said amount."

It will be noted that the township trustee as ex-officio treasurer has the responsibility and care of township funds and Section 12310, supra, provides that he "shall receive a compensation of two per cent. for receiving and disbursing all moneys coming into his hands as such treasurer when the same shall not exceed the sum of one thousand dollars and one per cent. of all sums over said amount." We take it that this section means that he shall receive as his compensation for receiving and disbursing all moneys, two per cent. on the first one thousand dollars and one per cent. on all sums over said one thousand dollars. The trustee, being custodian of all of the township funds, his compensation received for receiving and disbursing should be based and figured on the aggregate amount of moneys so handled by him and it cannot be broken up into separate funds, such as school funds, township funds, and any other funds which may come into his hands, for the purpose of figuring the amount of compensation he should receive for handling same.

It is, therefore, our opinion that the two per cent. commission which he shall receive is based on the first one

Hon. Charles D. Brandom

-4-

Aug. 10, 1937

thousand dollars received and disbursed by him and the one per cent. on the remaining portion received and disbursed, and that the whole of the funds in his hands, made up of the various apportionments, is to be considered as one sum for the purpose of figuring the township trustee's compensation.

We are enclosing a copy of an opinion rendered by this Department January 5, 1934, which might be of interest to you in connection with the same question.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

Enc.

CONTAGIOUS : Liability of City of the Fourth Class.
DISEASES : Section 9025, 1933 Session Acts, does
not shift such liability to the county
in which such city may be located.

September 15, 1937.

10-4



Mr. Charles D. Brandon,
Prosecuting Attorney
Daviness County,
Gallatin, Missouri.

Dear Mr. Brandon:

We acknowledge receipt of your letter of
June 14, 1937, wherein you request an opinion of this
office, which is as follows:

"Have you in your office an Opinion as
to the liability of the County or City
for the expenses in connection with con-
tagious diseases, that is for quarantin-
ing and fumigating. Is this an obliga-
tion of the County or of the City?

"In this particular case our City is a
City of the 4th class which would have
the right under Section 7023 R. S. Mo.
1929, to pass Ordinances regulating the
handling of contagious diseases, quaran-
tine laws, etc. The City had an old
Ordinance in 1900 creating a Board of
Health, but for many years has not operat-
ed under the ordinance and has not appoint-
ed a Board of Health. The City has merely
appointed a Physician to look after the City
Employees or prisoners in case of accident
or sickness.

"Under the circumstances here, would the
County be liable for expenses in connec-
tion with cases of Smallpox or other con-
tagious diseases within the City limits?

Yours truly,
CHAS. D. BRANDON.

P.S. Section 9025 as amended by the Laws
of 1933, page 271, would seem to throw
the costs on the County. But this might
not apply within the City limits."

As we understand your inquiry, you desire to know whether or not Section 9025, 1929 Statutes as amended by Section 9025, 1933 Session Acts, would make the county liable for the expenses in connection with contagious diseases in a city of the fourth class.

There is but one difference in Section 9025, 1929 Statutes and 9025, Session Acts of 1933 at page 271, relating to the appointment of Deputy State Health Commissioners and that is, that under the 1929 Statutes their appointment was, by the county courts, compulsory, whereas, under the 1933 Act, such appointments by the court were made optional. Said statute is as follows:

"At the first regular February term of the county court in each county of the State after this article becomes effective and at the regular February term of said county court every year thereafter, said court may appoint a reputable physician, as a Deputy State Commissioner of Health for a term of one year. In case of a vacancy in the office of the Deputy State Commissioner of Health of the county, the county court may at its next regular term of court appoint a reputable physician for the unexpired term. But the power of deciding whether or not such a deputy state health commissioner will be appointed shall be vested in the county court. If a county court of any county decides to appoint a deputy health commissioner, as empowered in this act, it shall agree with said commissioner as to the compensation and expenses to be paid for such services which amount shall be paid out of the county treasury of the county."

The only question involved in the above statute is the optional right of the county courts to appoint Deputy State Commissioners of Health for the different counties.

The rights of Boards of Alderman to make regulations and pass ordinances for the prevention of the introduction of contagious diseases in a city of the fourth class and for the abatement of the same in said city is determined by Section 7023, 1929 Statutes which is, in part, as follows:

"The Board of Aldermen may make regulations and pass ordinances for the prevention of the introduction of contagious diseases in city, and for the abatement of the same, and may make quarantine laws and enforce the same within five miles of the city."

In the case of Barton v. City of Odessa, 109 Mo. App. 1. c. 83, the court recognized the power and liability of a city of the fourth class under Section 5961, 1889 Statutes which is similar to said Section 7023, 1929 Statutes.

Chapter 52, 1929 Statutes, relating to public health and the powers and duties of the State Board of Health to safe guard the health of the people in the States, Counties, Cities, Villiages and Towns provides that the means to carry out such provisions may be appropriated in the manner set out in Section 9038 of said Chapter 52, which is as follows:

"The county court or city council in any such city shall have power to appropriate money out of the current revenues of the county or city, as the case may be, for the purpose of carrying out the provisions of this article."

CONCLUSION.

It is, therefore, the opinion of this department that a city of the fourth class would be liable for the expenses in connection with contagious diseases within the city, and that Section 9025, 1933 Session Acts, does not shift such liability from such city to the county in which it is located.

Yours very truly,

S. V. MEDLING
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

SVM:LB

ASSESSORS: Compensation for taking list and entering in assessment book of stock in banks

Oct 6, 1937

Oct 6, 1937
10/9



Hon. Charles D. Brandon
Prosecuting Attorney, Daviess County
Gallatin, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date in which you request an opinion as follows:

"A controversy has arisen in this county with reference to the charges which an assessor is entitled to make in connection with the assessment on parties holding bank stock. The statute seems to require a list of all stockholders, to be prepared by the assessor. Some of these stockholders, of course, are assessed on other property and this bank stock is included with the other property, but some of the stockholders occasionally are not assessed in this county on other property.

Is there only one charge for the whole list of stockholders - or can the assessor charge for each name on the list, except those also assessed on other property?

Will you please advise just what charges the assessors are entitled to make under the circumstances."

Section 9765, R.S. Missouri, 1929, was repealed by the legislature in 1931 and a new section enacted. The new section, Laws of 1931, page 357 is, in part, as follows:

"The property of manufacturing companies and other corporations named in Article 7, Chapter 32, insurance companies organized under the laws of this state and all other corporations, the taxation of which is not otherwise provided by law, shall be assessed and taxed as such companies or corporations in their corporate names. Persons owning shares of stock in banks, or in joint stock institutions or associations doing a banking business, shall not be required to deliver to the assessor a list thereof, but the president or other chief officer of such corporation, institution or association shall, under oath, deliver to the assessor a list of all shares of stock held therein, and the face value thereof, the value of all real estate, if any, represented by such shares of stock, * * * * * and such shares * * * so listed to the assessor shall be valued and assessed as other property at their true value in money, less the value of real estate, if any, represented by such shares of stock, * * *."

This section requires that banking corporations prepare the tax list containing the stock in said bank, and not the owners of said stock.

Section 9766, R.S. Missouri, 1929, is in part as follows:

"The taxes assessed on shares of stock embraced in such list shall be paid by the corporations, respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from the dividends accruing on such shares; * * * * *"

In *State ex rel v. People's Bank of DeSoto*, 263 S.W. 205, 206, the court said:

"The manifest purpose of Section 12775, supra, (now section 9765) is to afford the assessor authentic information as to the owners of the shares of stock in a corporation that such share may be properly assessed against them. St. Louis Bldg. & Saving Ass'n v. Lightner, 42 Mo. l.c. 426."

Thus it appears that though the banking corporation is required to make the tax list and pay the taxes, the shares of stock are assessed against the owners of said stock. State ex rel v. Gehner, 5 S.W. (2nd) 40, 319 Mo. 1048.

Section 9806, R.S. Missouri, 1929, as amended in Laws of 1931, page 359, is in part, as follows:

"The compensation of each assessor shall be thirty-five cents per list in counties having a population not exceeding forty thousand, * * * *, and shall be allowed a fee of three cents per entry for making real estate and personal assessment books, all the real estate and personal property assessed to one person to be counted as one name, * * * *."

The bank stock assessed against the owner would, of course, be personal property, and would be entered under the name of the owner in the personal assessment book.

In State v. Gomer, 101 S.W. (2nd) 57, the court had before it a question which required a comprehensive review of the law, as it concerns the compensation of assessors. In this case, the court drew nine conclusions. The seventh conclusion of the court, applicable here, is set out at l.c. 66 and is as follows:

"Seventh. That as for compensation for taking the lists required to be delivered to him by owners of personal property (in counties of not more than 40,000 population) an assessor should be paid thirty-five cents for each list taken and should also be paid a fee of three cents per entry for each entry of a property owner's name and the personal property assessed to him, in the alphabetical list in the part of his book concerning personal property."

Under the provisions of Section 9765, R.S. Missouri, 1929, in its present form, the owner of the bank stock does not prepare the tax list, but by statute the banking corporation is required to prepare this list. Nevertheless, it is a tax list taken by the assessor, and for which, in counties having a population of less than 40,000, which includes Daviess County, he is entitled to one fee of thirty-five cents.

The decision in the Gomer case, supra, and the provisions of Section 9806, R.S. Missouri, 1929, as amended, are clear, we think, in providing that for entering the personal property of each owner under his name in the personal assessment book, the assessor is entitled to a fee of three cents for each entry, all personal property and real property listed under one owner to be counted as one entry.

If the owner of said bank stock has already been entered in the personal assessment book and his personal property listed under his name the assessor is not entitled to a fee of three cents

for entering the bank stock owned by him, or any other separate item of personal property, because it is expressly provided that the three cent fee is for entering his name, in the alphabetical list of the assessor's book, and all his personal property listed thereunder.

Therefore, it is the opinion of this department that the assessor of a county having a population of less than 40,000 is entitled to one fee of thirty-five cents for taking, from the president or chief officer, the list of all stock and owners thereof in a banking corporation. That the assessor is not entitled to a fee of thirty-five cents for each name contained in said list taken from the corporation, but only the one fee for the whole list containing all the stock and the owners thereof. That for entering the name of the owner of said stock in the alphabetical list, in that part of the assessor's book covering personal property, the assessor is entitled to three cents, but that in no event is the assessor to charge and receive three cents for entering and listing each separate item of personal property under the name of its owner. The three cent charge is for entering the name of the owner and listing all his personal property thereunder, which would include any bank stock he may own.

Respectfully submitted,

APPROVED:

J.E. TAYLOR
(Acting) Attorney
General.

LLB:VAL

AWBREY R. HAMMETT, Jr.
Assistant Attorney-General

CRIMES AND PUNISHMENTS: A prosecution under Section 4143, R. S. Mo. 1929, must show a wilful and malicious intention to destroy landmarks.

February 4, 1937

2-8

Honorable Tom A. Brown
House of Representatives
Jefferson City, Missouri



Dear Sir:

This Department is in receipt of your letter of January 28, 1937, wherein you request an opinion embodied in your letter as follows:

"I have a letter from the Assistant Surveyor of Mercer county, Missouri, Mr. Joseph Stewart, who is also the general utility surveyor for all of my section of the state, in which he states that in the construction of highways throughout our section he finds a deplorable condition of the destruction of surveyor's established corners which have been destroyed by the construction of these highways. He gives many specific cases where he has found much trouble in making surveys and says surveys have been very expensive to the farmers who have employed him to run the lines. Instead of finding the corner that his notes give him for a starting point, he often has to go many miles to find such corner and re-run all the old lines over to re-establish the corner that has been destroyed in the construction of highways. I will quote some of his letter to me:

" 'Some time ago the Wynn family called upon me to set marks for them to use in dividing the Wynn farm. The Wynn farm is along, and south of Highway number 6 in Grundy county, and just east of Davies county line. Highway builders had put service material over the necessary corners and had gone outside the old right of way and took up the witness marks and left no marks so that I was up in the air. The worker had set the grader blades so as to tear out some of the corner stones, and when it was suggested to him to replace the marks he said he was making roads; not setting corner rocks. It cost fifty dollars to have the corner stone relocated.'

"He gives me numerous other instances in Mercer county, and my own county of Harrison. Mr. Stewart's object in writing me was to get me to introduce a bill to force the highway department to relocate the corners they destroy, but upon investigation of the statutes it seems to me that sections 4143 and 11605 are all the laws we need on this subject. I would like your opinion on this subject as to whether you consider them adequate so that we can fully prosecute those people who destroy these surveyors' corners. If the law is not adequate I will try to introduce the bill that will cover the subject."

You state in your letter that most of the landmarks and mileposts were destroyed by highway workers. We are unable to locate any statute compelling the

Highway Department to restore any such landmarks or posts, in the event that same are destroyed when the Department is building or repairing roads.

You refer to two sections in your letter which might cover the situation. Section 4143 is as follows:

"Every person who shall willfully or maliciously, either: First, remove any monument of stone or any other durable material, created for the purpose of designating the corner or any other point in the boundary of any lot or tract of land, or of the state, or any legal subdivision thereof; or, second, deface or alter the marks upon any tree, post or other monument, made for the purpose of designating any point in such boundary; or, third, cut down or remove any tree upon which any such marks shall be made for such purpose, with intent to destroy such marks, shall, upon conviction, be adjudged guilty of a misdemeanor."

The other section, namely, 11605, is as follows:

"It shall be the duty of every county surveyor and every deputy county surveyor to report as soon as practicable all violations of law relative to the destruction of landmarks that come under their observation, or of which they have knowledge, to the grand jury or to the prosecuting attorney of the county in which the violation occurs."

The latter section is merely a duty imposed upon the county surveyor and deputy county surveyor with respect to violations, and no prosecution could be maintained under said section, so that in reality the only section which is truly a penal section is Section 4143. Your attention is called to the first sentence of said Section which uses the words "shall willfully or maliciously." Applying the section to highway employees and officials when landmarks are destroyed, do the elements 'willfully and maliciously' accompany their acts in every case. In most instances we assume that the landmarks are destroyed accidentally, and not intentionally, on the part of the Highway Department. Ordinarily, when a statute denounces a crime as a misdemeanor a wrongful intention is not necessarily an element of proof.

The Kansas City Court of Appeals has construed "willfully and maliciously", as used in Section 4143, Revised Statutes Missouri 1929, in the case of State v. Ferguson 82 Mo. App. 1. c. 585, in the following language:

"It is quite true that in misdemeanors a wrongful intent is not necessarily essential. For instance, a sale of intoxicating liquor to a minor is an offense, regardless of the belief of the seller that he was of age. So of many cases affecting the revenue, especially that of the Federal government. The legislature, on account of the facility of evading the law, cuts off all opportunity to do so by broadly declaring the act itself to be the offense.

"But here, the offense consists not alone in moving a corner stone, but in willfully moving it. That is, in moving it knowing it was a corner stone. A

man might move a stone in the most innocent way, and under circumstances where no one would have thought of it being a corner stone, yet, if it afterwards turns out to have been, in fact, a corner stone, he surely ought not to be charged with a violation of this statute, notwithstanding he intentionally moved the stone. The act lacks the statutory element of willfulness.

"There are many cases where the supreme court of this and other states have held in grave felony cases, that, willfully merely meant, intentionally. But those are cases which involved other terms of definition to make out the offense - terms which necessarily showed wrongful motive. So while in such cases, murder for instance, willfully would mean intentionally, yet the further words defining the offense demonstrates that it must be a wrongful intention. It would not be allowable, of course, in a case of murder to instruct that willfully could mean an innocent act done intentionally.

"The statute in question by using the word willfully meant more than the mere voluntary act; it meant to imply a wrongful act. Merely doing an act intentionally, that is, not accidentally, will not fill the definition of a misdemeanor which requires that it shall be done willfully. The voluntary act should be with a bad or an unlawful purpose. State v. Preston, 34 Wis. 682;

Honorable Tom A. Brown

-6- February 4, 1937

Commonwealth v. Kneeland, 20
Pick.220; Hanson v. South
Scituate 115 Mass.336; Fuller
v. Railway, 31 Iowa, 204;
Felton v. United States 96 U.S.
699;1 Bishop's Crim. Law. sec.
428."

CONCLUSION

We are of the opinion unless it could be shown that the employees of the Highway Department willfully and maliciously destroyed the landmarks, no prosecution could be maintained under Section 4143. Therefore, the present law, in our opinion, is not adequate to protect the landmarks in every instance.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

CREDIT UNIONS - Powers of Commissioner of Securities.

May 25, 1937.

5-29



Honorable Dwight H. Brown,
Secretary of State,
Capitol Building,
Jefferson City, Missouri.

Dear Sir:

We have your request of April 14, 1937, for an opinion relative to the construction of Section 5084 Revised Statutes of Missouri, 1929, relating to Credit Unions, which request contains the following questions:

"FIRST: Can the agent of the Commissioner of Securities be an employee of the Securities Department?

"SECOND: In the event that such agent is not an employee of the Securities Department, in what way shall this agent be compensated, also in that regard how are the other general expenses of the liquidation to be paid; such as court costs in the event suit is necessary in order to collect funds due the Credit Union?

"THIRD: In the case of Credit Unions whose total assets are so small as to be entirely used up by the liquidation or are not sufficient to even cover such cost, what action can this department take other than liquidation?"

In answer to the first question, the agent of the Commissioner of Securities may or may not be an employee of the office. Section 5084 R. S. Mo. 1929, merely provides that the Commissioner shall cause one of his agents to take possession of the business. This agent may be appointed at any time, but since the statutes are silent as to the payment of this agent's compensation, the agent, if not an employee of the department, must look to other sources for his compensation.

5-25-37.

As to the second question, it would appear that in the event the Commissioner applies for receivership and the Commissioner or his agent is appointed receiver, the compensation for the receiver's services could be paid from the assets of the Credit Union. This will also take care of the question of court costs on any suits instituted by the receiver in order to collect funds due the Credit Union.

As to the third question, it is entirely a matter of discretion with the Commissioner under Section 5084 as to whether or not the Credit Union is permitted to resume business, or its affairs are finally liquidated. It would appear that small, insolvent unions would of necessity require liquidation.

It is, therefore, the opinion of this office that the Commissioner of Securities may appoint an agent, who may or may not be an employee of his office, to take charge of Credit Unions; that if necessary he may apply to the circuit court for an order appointing him or his agent receiver, and may manage the affairs of the Union under such receivership, in accordance with general receivership law.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney-General

APPROVED:

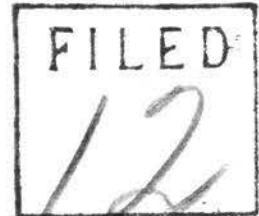
J. E. TAYLOR
(Acting) Attorney-General.

FER/LD

TRADE NAMES:

Secretary of State, Section 12449 may register brands on milk bottles or cans in the name of the assignee.

8-6
August 5, 1937.



Hon. Dwight H. Brown,
Secretary of State,
Jefferson City, Mo.

Dear Sir:

This department is in receipt of your request for an opinion which reads as follows:

"The enclosed is a copy of a letter received by this department. Not knowing just how to proceed relative to change in registration, we ask that you please let us have your opinion in this matter."

The letter which accompanies the request, reads as follows:

"I wish, on receipt of this letter, you would be kind enough to send us forms for the registration of brands for bottles, cases, milk and cream cans, which are now registered in your state under the name of The Borden Company.

We have acquired their property and wish to change the registration on these to Frank Pilley and Sons, Inc."

Section 12449 R. S. Mo. 1929 provides as follows:

"RECEPTACLES FOR MILK, CREAM, ETC.-BRANDS - CERTIFICATES.-Any person engaged in manufacturing, bottling, or selling milk, buttermilk, cream or ice cream in any kind of receptacle, having the name of such person or other mark or device printed, stamped, engraved, etched, blown, painted or otherwise permanently fixed upon the same, may file in the office of the secretary of state for record a description of the name, mark or device so used; and cause such description to be printed once each week for three successive weeks in a newspaper published in the county in which the principal place of business of such person is located, or if the principal place of business of such person is located in another state, then in the county wherein the principal office or depot of such person within the state of Missouri is located. It shall be

August 5, 1937.

the duty of the secretary of state to issue to the person so filing for record a description of such name, mark or device in his office, to duly attest a certificate of the record of the same, for which he shall receive the fee prescribed by statute for the issuance of certificates. In all prosecutions under this article such certificate shall be prima facie evidence of the adoption and ownership of such name, mark or device and the right of the person named therein to adopt and use the same. (R.S.1919, Section 12020)."

The question presented in this request is whether the Secretary of State under Section 12449, supra, may register the brands on milk bottles and cans in the name of the assignee of such brands. While Section 12449 is not included in the Chapter 136 of the Revised Statutes of Missouri 1929 which deals with trade marks, names and emblems, still the registration of such names or symbols as provided for by Section 12449, partakes of a nature of a trade name and law applicable to trade names will apply to the Statute in question.

A similar question was presented in Ex-parte General Motors Corporation 347 O.B.1047, 1926 C.D.64 from which we quote at length because the question presented there is the same as the one in this case. The Commissioner held as follows:

"it would seem clear that Congress intended in the act to provide for but a single registration and that the Patent Office has exhausted its authority under the act when it follows the procedure laid down therein. It was stated that the alleged inconveniences arising from a transferee having to establish its title in certain cases were too trivial to outweigh the inconvenience to the public of having two coexisting registrations of the same mark.
* * * * *

The statute does not prohibit the re-registration of a trade-mark by the transferee, and there are certain advantages to the transferee in having the mark registered in his own name. For example, it will be much less expensive for him to obtain registration of the mark in the foreign countries, since it will not be necessary to file copies of the papers evidencing the transfer of title with the necessary legalizations thereof, and in the event

August 5, 1937.

of a suit against a later user the certificate of registration to the transferee will be prima facie evidence of his ownership, whereas if he has to sue on the registration granted to his transferor he will have to prove his title unless the defendant in the suit will stipulate it.
* * * * *

Under this policy it is not believed that registration should be refused to the transferee of a trade-mark unless such re-registration is specifically forbidden by the statute or follows as an obviously necessary inference from the statute.

No such prohibition being found in the statute it follows that the registration here sought should be granted."

The above case was approved by the Court of Customs and Patent Appeals in *Panhard Oil Corporation vs Societe* 39, Fed. (2nd) 496.

It is therefore the opinion of this department that the assignee of a name or symbol used on milk bottles or cans may register the same with the Secretary of State by following the procedure laid down in Section 12449 R.S.Mo.1929.

Yours very truly,

APPROVED:

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

AO'K:LB

PENAL INSTITUTIONS: Hopless incorrigibles who disrupt the system and government of the State Industrial school may be returned to the sentencing court's jurisdiction for other orders.

September 1, 1937.

q-v

Honorable George D. Bryant
Chairman, Pardon and Parole Board
Jefferson City, Missouri



Dear Sir:

We have your request for an opinion, dated August 24, 1937, which reads as follows:

"Re: Annabelle Dudley - Chillicothe

"Mrs. Kitty Shepherd Griesser writes the Penal Board concerning the above named inmate of the Industrial Home for Girls as follows:

" 'I have another matter that is very discouraging. We have a girl here named Annabelle Dudley, sentenced to this home March 19th, 1934 from Livingston County, sentenced until she is 21 years of age, which will be 1940. When I came here I was informed that she was a very obstreperous girl, a bad influence for all the rest of the girls and to prepare for all sorts of trouble from her.

" 'I have been here five months and I find that this girl is most incorrigible and all that the word implies. I have tried kindness. I have placated her. On August 18th she had disrupted the whole cottage to the extent of having to put her in a straight jacket. In my opinion the only word that would describe this girl's influence is sinister. She has been a disrupting influence and caused no end of trouble in every

place we have put her. Frankly I feel that this girl is a born criminal and I believe that she is a dangerous influence for the new girls that are coming in. Is there any way that I could have her transferred to the women's prison in Jefferson City? I have reviewed her history and her record and from the advent of her coming to this Institution, she has caused not end of trouble.'

"Does the Penal Board have authority to transfer this girl from the Industrial Home for Girls to the Missouri State Penitentiary."

Section 8364 R. S. Mo. 1929, provides:

"All commitments to the industrial home for girls of girls, over the age of twelve and under the age of eighteen shall be made by the juvenile division of the circuit court. Every girl over the age of twelve years and under the age of twenty-one years, who shall be convicted of any offense not punishable with imprisonment for life, or whose associations are immoral or criminal, or bad and vicious, or who is incorrigible to such an extent that she can not be controlled by her parents or guardian in whose custody she may be, may be sentenced to said industrial home until she shall reach the age of twenty-one years, if the court or magistrate before whom such conviction shall be had deems the girl so convicted a fit subject to be committed to said home, and the age of the girl so committed to be indorsed on the commitment in case any such

child is under twelve years of age the same to be placed under the control of the state board of charities and corrections, as provided by article 1, chapter 90, R. S. 1929."

Section 8367 R. S. Mo. 1929, provides:

"No court or magistrate shall sentence any neglected or dependent girl to said institution, or any girl who is insane or idiotic, or afflicted with an incurable disease or encephalitis, or who is so incorrigible that, in the opinion of the officer sentencing her, there is not a fair possibility of her reformation."

Section 8368 R. S. Mo. 1929, provides:

"The officer in charge of the institution, by and with the written consent of the president of said board, shall be authorized and empowered to return whence she came any girl who shall be found to be incorrigible or an improper subject for admission; and thereupon the court or magistrate by whom the said girl was committed, or his successor in office, shall have power to pass such sentence as would have been legal in the first instance if said girl had not been sent to said industrial home."

CONCLUSION.

The legislative purpose of the State Industrial Home for girls is to confine, away from hardened criminals, young girls found to be incorrigible and immoral,

September 1, 1937.

at the same time found guilty of an offense not punishable with imprisonment for life, or found guilty of a misdemeanor, and to reform girls. It was not intended by the Legislature as a sanctuary for hardened criminals of the female sex.

The Legislature realized that inmates in the State Industrial Home for girls, through oversight or misinformation, or in the natural dissipating processes of nature may be discovered committed to the Industrial Home for girls and at the same time be hardened criminals with no hope of reformation.

The jurisdiction of any Circuit Court to commit any incorrigible to the State Industrial School for girls is found in Sections 8364 and 8367, supra. Your description of the girl indicates that by her conduct she was not eligible for commitment in the first place, and that the trial judge was mistaken in his original opinion that there was a fair possibility of her reformation.

Pursuant to Section 8368, supra, after first obtaining the written consent of the Board of Pardons and Paroles, you have the statutory authority and power to return the girl, as hopelessly incorrigible and an improper subject for commitment, to the custody of the sheriff of the county in which the girl was originally committed, to be dealt with according to law. We know of no way for you to transfer her to the Women's Prison in Jefferson City, as suggested in your letter.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

WOS:H

CHAUFFEURS AND REGISTERED) Section 5, p. 372 of the Motor Vehicle Law
OPERATORS LICENSES) of the Session Acts of 1937 must be followed
in lieu of Sections 7765 and 7766 of the
1929 statutes, in the issuance of licenses
to school bus and common carrier drivers.

October 6, 1937 10/9



Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Mr. Brown:

We acknowledge receipt of your letter of September 25, 1937, wherein you request an opinion as follows:

"We kindly request that you furnish this department an opinion concerning the following matter:

'Section 7765 of the Motor Vehicle Laws provides for the issuance of Chauffeur's license to persons over the age of 18 years. Section 5 of the recently passed Driver's license law provides that no person who is under the age of twenty-one (21) years shall drive any motor vehicle while in use as a school bus for the transportation of pupils to or from school, nor any motor vehicle while in use as a public or common carrier of persons or property, nor in either event until he has been licensed as a chauffeur or as a registered operator."

Which of these sections should this department follow in the issuance of Chauffeur's License? Kindly fully advise us in this connection."

Section 7765 of the 1929 statutes provides for the registration of chauffeurs, and among other provisions is the following:

"No certificate of registration as chauffeur shall be issued to any person under the age of eighteen years."

Section 7766 of the 1929 statutes provides for the registration of registered operators and among other provisions is the following:

"No certificate as a registered operator shall be issued to any person under the age of eighteen years."

Section 5 of the Motor Vehicle Laws, of the Session Acts of 1937, at page 372 relating to licensing drivers, is as follows:

"No person who is under the age of twenty-one (21) years shall drive any motor vehicle while in use as a school bus for the transportation of pupils to or from school, nor any motor vehicle while in use as a public or common carrier of persons or property, nor in either event until he has been licensed as a chauffeur or as a registered operator."

Said Section 5, supra, suspended and revoked Sections 7765 and 7766 of the 1929 statutes insofar as they affected the changing of the age of persons who shall drive any motor vehicle while in use as a school bus for the transportation of pupils to or from school, and who shall drive any motor vehicle while in use as a public or common carrier of persons or property, from the age of eighteen to twenty-one years.

The provisions of said Section 5, 1937 Session Acts, are so inconsistent with and repugnant to said Sections 7765 and 7766 of said 1929 statutes, as to the above provisions, that they cannot operate together.

October 6, 1937

In regard to the question of the conflict of a law with a former law, in the case of Asel vs. City of Jefferson, 287 Mo. 1. c. 204, the Court held:

"It follows that the two acts, providing for an entirely different method of procedure as to the paving and re-surfacing of streets respectively, are in that respect so inconsistent and repugnant that they both cannot operate together. But the Act of 1919, having been enacted subsequent to the Act of 1911, necessarily repeals the latter."

CONCLUSION

It is therefore the opinion of this Department that Section 5, page 372 of the Motor Vehicle Law, Session Acts of 1937, must be followed in lieu of Sections 7765 and 7766 of the 1929 statutes in the issuance of licenses to school bus and common carrier drivers, and that such licenses may not be issued to persons who are under the age of twenty-one years, but that said Section 5, supra, does not suspend nor revoke this right to issue licenses to chauffeurs and registered operators (under said Sections 7765 and 7766, 1929 Statutes) except as to school bus and common carrier drivers.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

SVM:MM

TAXATION:

Sales Tax-
Only State Penal
Institutions Exempt

) Only Penal Institutions supported by funds
) appropriated out of State Treasury exempt
) from provisions of the 2% Sales Tax Act.
)
)

October 12, 1937

10-13



Mr. Marcy K. Brown, Jr.
Assistant City Counselor
Kansas City, Missouri

Dear Sir:

This office acknowledges receipt of your request for an official opinion of this department as to whether or not the 2% sales tax should be collected on supplies sold to Kansas City, Missouri, for the penal institutions of said city, including the Municipal Farm and the Women's Reformatory of that city.

From your letter it appears that you are under the impression that such sales should be exempt because said institutions are classed as penal institutions and that by the provisions of Section 46 of the 2% Sales Tax Act, penal institutions are exempt from the provisions of said Act.

The word "person" is defined in Subsection (a) of Section 1 of the Act to include municipal corporations. Kansas City is a municipal corporation of the State of Missouri.

The word "purchaser" is defined in Subsection (e) of Section 1 of the Act to mean a person who purchases tangible personal property or to whom services are rendered, receipts from which are taxable under Section 2 of the Act. Section 2 of the Act provides for the collection of a tax equivalent to 2% of the purchase price paid or charged for every retail sale in this state of tangible personal property.

By virtue of the provisions of Subsection 39 of Section 1 of Article I of the charter of Kansas City, said city is permitted to acquire, provide, operate and maintain charitable, educational, comfort, recreative, curative, corrective, detentive, penal and other institutions. It is by virtue of the provisions of this section that the City of Kansas City operates

October 12, 1937

and maintains penal institutions, including its Municipal Farm and Women's Reformatory, which institutions are used for the purpose of confining persons who have violated the charter and city ordinances of said city. These institutions are penal institutions, supported by funds of Kansas City, Missouri.

The Legislature, by Section 46 of the Sales Tax Act, exempted from the provisions of the Act sales made by or to

" * * * penal institutions and industries operated by the Department of Penal Institutions, * * * "

The Department of Penal Institutions referred to in said Section 46 was created by virtue of the provisions of Section 8316, R. S. Mo. 1929 and it is provided in said Act that said department shall have and exercise control and jurisdiction over all penal institutions in this state supported in whole or in part by the direct appropriation of money out of the State Treasury, and more particularly over the Missouri Reformatory at Boonville, State Industrial Home for Girls at Chillicothe, State Industrial Home for Negro Girls at Tipton and the State Penitentiary.

In view of the fact that the Legislature by Subsection (a) of Section 1 of the Act specifically and definitely included a municipal corporation within the terms of the Act, then such municipal corporation or any of its branches or departments could not be exempted from the Act, except in clear and explicit terms.

Upon examination of Section 46, we find that the words "penal institutions" are in the same phrase as "industries operated by the Department of Penal Institutions", and the two being joined by the word "and", we construe this statute to refer to the penal institutions of the Department of Penal Institutions referred to in said Section 8316, R. S. Mo. 1929 and that it did not intend to include penal institutions which were not supported in whole or in part by the direct appropriation out of the State Treasury and which were not in the Department of Penal Institutions described in said Section 8316.

October 12, 1937

CONCLUSION

It is, therefore, the opinion of this department that sales made by or to penal institutions, which are not in the Department of Penal Institutions, as set out in Section 8316, R. S. Mo. 1929, are not exempt from the provisions of the Sales Tax Act and that the penal institutions of Kansas City, including the Municipal Farm and the Women's Reformatory are not in the exempted class of penal institutions, as set out in said Act, and are liable for the payment of the sales tax on purchases made for said institutions.

Respectfully submitted,

TYNE W. BIRTON
Assistant Attorney General

APPROVED:

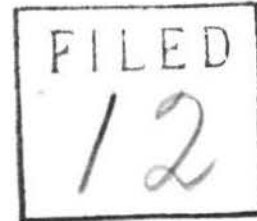
J. E. TAYLOR
(Acting) Attorney General

TWB:RT

PENAL INSTITUTIONS: Idiots and insance inmates in the State Industrial School for girls may be returned to the sentencing court's jurisdiction and delivered to the sheriff for sanity proceedings.

October 18, 1937.

10-25



Honorable George D. Bryant
Chairman, Pardon and Parole Board
Jefferson City, Missouri

Dear Sir:

We have your request for an opinion dated August 24, 1937, which reads as follows:

"Mrs. Kitty Shepherd Griesser, Superintendent of the Industrial Home for Girls Chillicothe, writes us concerning Alberta Shunk and Doris D. Shunk as follows:

'This is a matter I have tried to adjust myself but to no avail. Alberta Shunk and Doris Dean Shunk were committed to this home from Holt County. After observing Alberta for a day or so, we learned she is an idiot. We cannot let her out of her room because she gets lost in the halls. Some girl has to look after her all the time.

'I called Judge Bridegman, who sentenced her to this Institution and informed him that this girl was an idiot and did not belong here, and that I wished he would have his worker call for her and sentence her to the Institution where she belongs - in my opinion this is Marshall. He was rather noncommittal and to date has done nothing about it.'

"Now the question is, does the Penal Board have authority to transfer these girls back to the county from which they were sent, or what disposition can the Board make of these cases?"

"P. S. In regard to the cases of the above named girls, permit me to call your attention to Sections 8367 and 8368 of the Revised Statutes, 1929."

Section 8364 R. S. Mo. 1929, provides:

"All commitments to the industrial home for girls of girls, over the age of twelve and under the age of eighteen shall be made by the juvenile division of the circuit court. Every girl over the age of twelve years and under the age of twenty-one years, who shall be convicted of any offense not punishable with imprisonment for life, or whose associations are immoral or criminal, or bad and vicious, or who is incorrigible to such an extent that she can not be controlled by her parents or guardian in whose custody she may be, may be sentenced to said industrial home until she shall reach the age of twenty-one years, if the court or magistrate before whom such conviction shall be had deems the girl so convicted a fit subject to be committed to said home, and the age of the girl so committed to be indorsed on the commitment in case any such child is under twelve years of age the same to be placed under the control of the state board of charities and corrections, as provided by article 1, chapter 90, R. S. 1929."

Section 8367 R. S. Mo. 1929, provides:

"No court or magistrate shall sentence any neglected or dependent girl to said institution, or any girl who is insane or idiotic, or afflicted with an incurable disease or enceinte, or who is so incorrigible that, in the opinion of the officer sentencing her, there is not a fair possibility of her reformation."

Section 451, R. S. Mo. 1929, provides:

"Whenever any judge of the county court, justice of the peace, sheriff, coroner or constable shall discover any persons, resident of his county, to be of unsound mind, as in section 448 mentioned, it shall be his duty to make application to the probate court for the exercise of its jurisdiction; and thereupon the like proceedings shall be had as in the case of information by unofficial persons."

Section 8659 R. S. Mo. 1929, provides:

"If any person, after being convicted of any crime or misdemeanor, and before the execution, in whole or in part of the sentence of the court, become insane, it shall be the duty of the governor of the state to inquire into the facts; and he may pardon such lunatic, or commute or suspend, for the time being, the execution in such manner and for such period as he may think proper, and may, by his warrant to the sheriff of the proper county or warden of the state penitentiary, order such lunatic to be conveyed to a state hospital and there kept until restored to reason. If the sentence of such

lunatic is suspended by the governor, the sentence of the court shall be executed upon him after such period of suspension has expired, unless otherwise directed by the governor."

The above legislative acts were construed in the case of *ex parte Griggs, v. Superintendent for Feeble-Minded*, 214 Mo. Aps. 304, 1. c. 306, 348 S. W. 609, the Court said:

"It will be observed that petitioner was sentenced to the Industrial Home for Girls until she becomes twenty-one years of age, not for any crime or misdemeanor, but on the ground that she was incorrigible and immoral and, unless taken from her surroundings and associates, would become a permanently unchaste and immoral woman. Under the sentence her term in the Industrial Home will expire December 20, 1924. On the mere statement or declaration of the Physician of the Industrial Home that she is of feeble mind, she has been transferred to the Colony for the Feeble-minded and Epileptic there to be kept 'until restored to reason.' No inquiry was had or adjudication was rendered finding her to be of feeble mind. Nor was any opportunity afforded her to be represented at any hearing. The result of all which is that instead of being confined in the Industrial Home where her sentence will soon expire, she is now confined in the other institution as a person of feeble mind to remain there, not until she becomes of age, but 'until restored to reason.' We think her confinement in the institution at Marshall is without authority of law.

"Section 12302, Revised Statutes 1919, under which the Governor's warrant was issued, cannot, in our view, be made applicable to a case of this kind. It provides that: 'If any person, after being convicted of any crime or misdemeanor' shall become insane before the execution of the sentence imposed, the Governor may inquire into the facts and pardon such lunatic, or commute or suspend, for the time being, the execution of the sentence for such period as he may think proper, and may, by his warrant to the sheriff of the proper county or warden of the penitentiary, 'order such lunatic to be conveyed to a state hospital and there kept until restored to reason.' The section is in Article 7, Chapter 111, relating to State Hospitals for the insane and has no reference to the Colony for the Feeble-minded and Epileptic provided for in Article 13 of said Chapter. The institution at Marshall is not a State Hospital and the only way in which persons are admitted thereto is contained or provided for in section 12391, Revised Statutes 1919. It follows, therefore, that the restraint and control over petitioner by the respondent, as Superintendent of the Colony for Feeble-minded, is without authority of law, and she should be discharged therefrom.

Admission to the Missouri State School for Feeble-minded can only be obtained pursuant to the laws of 1931, p. 218, Section 8696, which reads:

"There shall be received and gratuitously supported in the Missouri state schools, feeble-minded and

epileptics residing in the state who, if of age, are unable, or if under age, whose parents or guardians are unable to provide for their support therein, and who shall be designated as state patients. Such additional number of feeble-minded and epileptics, whether of age or under age, as can be conveniently accommodated, shall be received into the school by the managers on such terms as shall be just; and shall be designated as private patients. Feeble-minded and epileptics shall be received into the school only upon the written request of the persons desiring to send them, stating the age, place of nativity, if known, christian and surname, and the town, city or county in which such persons respectively reside, and the ability of the respective parents or guardians or others to provide for their support in whole or in part, and if in part only, stating what part; and stating also the degree of relationship or other circumstances of connection between the patients and the persons requesting their admission; which statement, in all cases of state patients, must be verified by the affidavit of the petitioners and of two disinterested persons, and accompanied by the opinion of two qualified physicians, all residents of the same county with the patient, and acquainted with the facts and circumstances stated, and who must be certified to be credible by the county court of that county, or, in the case of the city of St. Louis, by the hospital commissioner or the assistant hospital commissioner of said city; and such county court, or, in the case of the city of St. Louis, the comptroller of said city, must also certify, in each case, that such patient is an eligible and proper

candidate for admission to the colony. State patients, whether of age or under age, may also be received into the colony upon the official application of any judge of a court of record: Provided, that the county in which such state patients as are now inmates of said school, resided when they were admitted, and the county wherein such state patients hereinafter admitted may reside at the time of such admission, shall be liable for and shall pay into the treasury of said school the sum of five dollars per month for each of such state patients."

Section 8368 R. S. Mo. 1929, provides:

"The officer in charge of the institution, by and with the written consent of the president of said board, shall be authorized and empowered to return whence she came and any girl who shall be found to be incorrigible or an improper subject for admission; and thereupon the court or magistrate by whom the said girl was committed, or his successor in office, shall have power to pass such sentence as would have been legal in the first instance if said girl had not been sent to said industrial home."

Section 8470 R. S. Mo. 1929, provides:

"The commissioners of the department of pehal institutions shall have control of the institutions, determine the policy of the same and make necessary rules not inconsistent with the law, for the discipline, instruction, and employment, and release or transfer, of the inmates: cause to be kept proper records including those of the inmates; and audit the accounts of the superintendent monthly."

In the Laws 1937, p. 400, we find that the Board of Probation and Parole is now vested with the authority directed to the Commissioners of the department of Penal Institutions.

CONCLUSION.

The legislative purpose of the State Industrial Home for girls is to confine, away from hardened criminals, young girls found to be incorrigible and immoral, and at the same time guilty of an offense not punishable with imprisonment for life, or found guilty of a misdemeanor, and to reform said girls. The institution was not intended as an insane asylum.

Our State hospitals for the insane are for the purpose of confining insane persons, while the colony for the feeble-minded is established to confine the feeble-minded and epileptics.

Persons committed to Missouri penal institutions may be transferred to state hospitals for the insane pursuant to Section 8659, supra, but where the demented person be a fit subject for the colony for the feeble-minded at Marshall the provisions for transfer from penal institutions, set out in Section 8759, supra, have no application. Such is the holding in the Griggs case, supra. Admission to the colony for the feeble-minded is only legal after an inquiry and adjudication, finding the person to be feeble-minded and after affording the person afflicted an opportunity to be represented at a judicial sanity hearing.

The Legislature realized that inmates at the State Industrial Home for girls, through some oversight or misinformation, or in the quick natural dissipating process of nature, may be discovered committed to the Industrial Home for girls, and at the same time be insane or feeble-minded. When this insane condition be discovered the Legislature properly provided for removing the afflicted person in an orderly and human manner, either by transfer to state hospitals for insane, under the provisions of Section 451, supra, and when discovered an idiot and

October 18, 1937.

eligible only to the colony for the feeble-minded, then for the return of the afflicted person to the jurisdiction of the Court which committed the afflicted person, as set out in Sections 8368 and 8470, supra.

It was intended by the Legislature that insane or idiotic persons should never knowingly be received at the penal institution, and when this mental condition be discovered, steps should be immediately taken to see that the afflicted person be taken from the penal institution to a proper place of confinement, according to the particular mental ailment, and pursuant to the rules of the Board of Probation and Parole, and the written consent of the president of the Board.

We are of the opinion that, where the inmate be insane or idiotic it is always legal and proper, upon written consent of the Board and its president, to immediately return and deliver the afflicted inmate to the custody of the sheriff of the county in which the afflicted inmates was originally committed to be dealt with according to law.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

WOS:H

RAILROADS:

ASSESSORS: Distributable property assessed by State Tax Commission; non-distributable property is local property and is assessed by the county assessor

January 14, 1937

Honorable N. Elmer Butler
Prosecuting Attorney
Stone County
Galena, Missouri

2-4
FILED
13

Dear Sir:

We have received your inquiry, which is as follows:

"Will you please give me an opinion
on the following:

"In this County we have the Empire
District Electric Co. that owns
several acres of land, and most of
it in small rural school districts
that are usually short on school
revenue, this company being a
corporation is asking that the
land they own be placed on the
Rail Road book and taxed as such.
Is it compulsory that this be done
by the Assessor?"

For the purpose of assessing taxes on property owned by railroad corporations in this state the Legislature has provided in Article 13, R. S. 1929, the course to be followed. Broadly speaking, there are two classes of railroad property for the purpose of assessment and taxation; the one is what is termed distributable property, the other is all property that is not distributable property, it being sometimes designated as local property. The former class, that is, the distributable property, is subject to assessment at the average rate of all property in the county and is assessable by the State Board of Equalization; the local property is subject to the local rate and is assessed by the assessor but after assessment is subject to the method prescribed in said Article 13 as to the method of collection thereof.

In the case of State ex rel. School District v.

Waddill 330 Mo. 1118, the court was primarily considering the distributable property and the taxation thereof, but in that opinion some light is thrown on the non-distributable property and the assessment thereof. At page 1124 the court says:

"The provisions for the assessment and taxation of 'other railroad property' are outlined in Sections 10012, 10017, 10022, 10024, 10025, 10028 and 10029, Revised Statutes 1929. According to these the property of a railroad company is divided into two classes. The first consists of the railroad, side tracks, depots, water tanks, turntables, rolling stock, etc., all of which have been denominated by this court in construing the statutes as the distributable property of a railroad company. The second class consists of all property not included in the first, such as roundhouses, workshops, etc. referred to in Section 10025 as 'local property.' This latter class is required to be assessed by local assessing officer, and need not be further considered at this time. The method prescribed for the assessment and taxation of the distributable property is our immediate concern."

And at page 1125, speaking of the distributable property, the court said:

"On the aggregate value apportioned to a county, the county court of such county shall levy taxes for county purposes at the same rate levied on other property in the county for such purposes; on the apportionments made to municipal townships, cities and towns respectively, it shall levy taxes at the same rates levied on other property within the territorial

boundaries of those subdivisions and agencies for their respective purposes; and on the apportionment made to the county it shall make a further levy of taxes for school purposes - at the average rate as heretofore defined. The school taxes so levied shall be distributed when collected, not on a mileage basis to the school districts in which some part of the railroad is located, but to all the districts in the county, the fund to be apportioned among them according to their enumeration returns."

In the case of State ex rel. v. Hannibal and St. Joseph Railroad Company 110 Mo. 265, l. c. 272, the court said:

"The buildings of a railroad company are subject to taxation like other property, at the local rates fixed in the districts where they are situated."

Section 10025 prescribes the method of assessing local property so owned, and is as follows:

"All property, real, personal or mixed, including lands, machine and workshops, roundhouses, warehouses and other buildings, goods, chattels and office furniture of whatever kind, owned or controlled by any railroad company or corporation in this state not hereinbefore specified, shall be assessed by the proper assessors in the several counties, cities, incorporated towns and villages wherein such property is located, under the general revenue laws of the state and the municipal

laws regulating the assessments of other local property in such counties, cities, incorporated towns and villages, respectively, but the taxes on the property so assessed shall be levied and collected according to the provisions of this article."

Section 10029 provides the method of levying school taxes. It requires the levy on the

"roadbed, rolling stock and movable property of railroads in this state"

be taxed by adding up the total school district rate for taxes and levying the average rate thereon, but as to "all

"all lands, workshops and warehouses, and other buildings and personal property belonging to such railroad company lying in any school district,"

that

"shall be taxed at the same rate as other property in such district, and the school taxes, and taxes for the erection of public buildings and for other purposes, thereon, shall go to the district in which such lands, depots, workshops or buildings are situate."

In the case of State ex rel. v. Hannibal and St. Joseph Railroad Company 135 Mo. 618, the Supreme Court of this State, in Banc, while holding that the local property owned by the railroad and not used in the usual operation of the road should be locally assessed throws considerable light on the question of what property held by the railroad is local property, it holds that a coal yard owned by the railroad and located along the side of the right-of-way and leased out is local property and should be locally assessed, saying, at l. c. 648,

"The local assessor had no power to assess the land of defendant which was used as a yard. The tracks in a yard may properly be termed side tracks, and include the ground necessary for the convenient and safe movement of cars and for loading and unloading them. But defendant had no right to lease out for private purposes a portion of the yard, and for taxing purposes still call it a part of the yard. State ex rel. v. Railroad, 117 Mo. 6.

"The assessment of lot number 10 by the local authorities was therefore proper and is sustained."

Section 10026 requires the railroad to furnish a sworn list to the county clerk of each county in which the railroad has property.

Section 10028 provides the method for levying the taxes, except for the school taxes which are provided for in Section 10029, supra.

Section 10066, Laws of Missouri 1933, pages 422 and 423, reads, in part:

" * * * and all property, real and personal, including the franchises owned by telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, gas pipe lines, gasoline pipe lines, and express companies, shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, and the county and state boards of equalization

are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization have or may hereafter be empowered with in assessing, equalizing, and adjusting the taxes on railroad property; * * * *."

The above section provides that the property owned by telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, gasoline pipe lines and express companies shall be subject to taxation to the same extent as the property of private persons, and shall be levied and collected in the same manner as now or may hereafter be provided by law for the taxation of railroad property in this state.

In the case of State v. Gehner, 286 S. W. 1. c. 119, the Court copied with approval an opinion given by the Attorney General's office, as follows:

"There is no question about how railroad property should be assessed. Section 13001, R.S. 1919, may be said to be the index finger of authority pointing to the right to assess railroad property, and section 13002 enumerates certain specific property in pointing out the manner of such assessment. This has been called the distributable property of a railroad company, a sworn list of which must be furnished the state auditor within a stated time, to be assessed by the state board of equalization.

"Section 13027, R.S. 1919, provides that all property of the railroad company not particularized by section 13002 shall be assessed locally, and it will be seen that this section also particularizes somewhat the local property by saying what it includes such as land, machine, and workshops, roundhouses, warehouses, and other buildings, goods and chattels and office furniture of whatever kind or character.

These sections seem to be an undertaking to set forth in contradistinction what shall be termed distributable property and what may be termed the non-distributable property of railroads, and the sections named the assessing authority for each. The underlying principle characterizing the distinctions so made would seem to be that the distributable property consists of that which is used directly in the operation of the railroad, and the non-distributable property consists of such property whose use may be only indirectly involved.

"I take it that the particularization employed in sections 13002 and 13027 was not intended by the Legislature to be the conferring of a power with limitations upon that power to tax only what was therein specified, but that the undertaking to particularize was intended to be illustrative of the method or manner of handling the property for taxation purposes; that the property known as the distributable property of the railroad company, from its character and manner of its use, could be better handled for taxation purposes through the state board of equalization and a more nearly just assessment accomplished; and that for this reason the Legislature made it the state board's duty to make the assessment, while it left to the local authorities the right to assess purely local property. * * * *

"There was no such particularization in providing for the assessment and taxation of bridges, telegraph, telephone, and express companies, electric power and light companies, electric transmission lines and oil pipe lines, as was made by the Legislature in pointing out the method for taxing railroad property, but the section was made to refer back to the railroad statutes for the manner of taxation, and the two groups of statutes, I think, should be read together in order to arrive at the legislative meaning.

"In the light of all these statutes, when read together, it is the opinion of this department that section 13056, R. S. 1919, as amended by the act of 1923, means

that such of the properties named therein as may be used distributably, including franchises, are to be assessed by the state tax commission, and that the remainder, or nondistributable property, is to be left to the local authorities for assessment according to the practice followed by the tax commission prior to the opinion of July 31, 1923."

We do not attempt to classify the particular piece of property in the class of local or in the class of distributable, but from the rules as announced by the courts and as hereinabove set forth, you will exercise your sound judgment as to which class it belongs in.

While you do not ask the question definitely, yet it appears that you desire to know the procedure in levying these taxes.

Section 10030, R. S. Mo., 1929, providing for the making of the railroad tax book, is as follows:

"Within ten days after the county court shall have levied the taxes on railroad property, as prescribed in the two preceding sections, the county clerk of such county shall extend the same on a separate tax book, to be known as the railroad tax book, in which he shall place, first, the total valuation of the roadbed and rolling stock of each railroad company, as equalized and apportioned to such county by the state board of assessment and equalization, with the amount of state, county, municipal township, city, town or village school taxes, and taxes for the erection of public buildings and for other purposes, levied thereon by the county court, stated separately; second, a description of each tract of land, town lot, or other real estate, including the machine and workshops and other buildings in numerical order, and per-

sonal property, as returned by local assessors, and the amount of state, county, municipal, city, town or village school taxes, and taxes for the erection of public buildings, and for other purposes, levied thereon, stating each separately, and crediting school taxes and taxes for the erection of public buildings, and for other purposes, to the proper district or municipality."

If the property is local and non-distributable, then the school taxes are levied at the rate of other property in the school district, and the taxes collected on it go locally to the district in which it is located as though owned by a private individual.

If the property is in the class known as distributable, the course to be followed is as follows, as set forth in the case of *State ex rel. School District v. Waddill*, supra, where the court said, l. c. 1125:

"The State Tax Commission shall assess the aggregate valuation of such property, regardless of its location in this State. The State Board of Equalization shall then equalize such aggregate valuation and apportion it, on a mileage basis to the counties, municipal townships, cities and towns in which the property or some part of it is located, and certify the result of its action to the county courts of the proper counties. On the aggregate value apportioned to a county, the county court of such county shall levy taxes for county purposes at the same rate levied on other property in the county for such purposes; on the apportionments made to municipal townships, cities and towns respectively, it shall levy taxes at the same rates levied on other property within the territorial boundaries of those subdivisions and agencies for their respective purposes, and on the apportionment made to the county it shall make a further levy of taxes for school purposes--at the

January 14, 1937

average rate as heretofore defined. The school taxes so levied shall be distributed when collected, not on a mileage basis to the school districts in which some part of the railroad is located, but to all the districts in the county, the fund to be apportioned among them according to their enumeration returns."

In either event, and regardless of whether the property is local or distributable, the tax is levied and the books extended under the provisions of Section 10030, supra.

CONCLUSION

It is our opinion that real estate owned by a railroad but not a part of the right-of-way and not used for side tracks and not such property as is usually used in the immediate operation of a railroad, is non-distributable or local property of the railroad and should be assessed by the local assessor of the county.

If the property you inquire about is owned by an electric power and light company or a transmission line, the same rules apply as to the assessment of its property as apply to railroads.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

DW:HR

COUNTY COURT: Franklin County Court has authority to convey tract of land for Memorial site to City of Union, Missouri.

March 9, 1937.

3-9



Honorable Otto Buchholtz
Presiding Judge of the County Court
Franklin County
Union, Missouri

Dear Judge Buchholtz:

This is to acknowledge your letter of March 3, 1937, together with certified copies of the proceedings of the county court of Franklin County, consisting of five pages, with reference to the matter of a site for the Soldiers', Sailors' and Marines' Memorial in Franklin County, Missouri.

From the statements in your letter, and the appended records of the county court, we find that in 1922 there was purchased a site for the erection of a Memorial Building or Monument in appreciation of the services rendered by the citizen soldiery of Missouri in the War against Germany and her allies, and that said site was purchased with money raised by the Union Post of the American Legion at Union, Missouri, and funds derived from an appropriation of the State of Missouri, found at pages 78, 79 and 80, Laws of Missouri, 1919. At the time of the purchase of said site, namely, March, 1922, the title to same was lodged in the County of Franklin. By an order of record made by the county court of Franklin County, Missouri, December 7, 1936 the title to said tract of land was ordered transferred by the County of Franklin to the City of Union to be used for the purpose of erecting Soldiers, Sailors' and Marines' Memorial and that a deed of transfer be made upon a proper showing that said property will be used for said purpose. We find nothing in the Act of 1919 which required that the title to the site for the erection of the memorial be actually lodged in the county.

From the statement in your letter we note that it is the present purpose to erect an Auditorium and Community

Center, and in furtherance of that worthy object the city has voted bonds in the amount of \$40,000 and has made application for a PWA grant of \$32,727, and the building is to be termed a "Memorial Auditorium", the plans of which are to be approved by the City Council of Union and the Union Post of the American Legion, which latter organization contributed \$600.00 of the purchase price of the Memorial site. In such building, according to the plan outlined in your letter, there is to be kept and maintained a Memorial Foyer, approximately 22 by 35, which will serve as a memorial to the Soldiers, Sailors and Marines of the World War. One of your requirements, according to your letter, is that the title to the block of land must be vested in the City of Union before the expenditure of the bond money and PWA funds are expended. We note further that the county contributed nothing to the purchase of said site.

Your question is, has the county court, under the circumstances as detailed in your letter and as set forth in the certified copies of the record, the authority to convey said tract of land to the City of Union for the purposes mentioned therein?

The county in the original acquirement of the tract of land was merely a trustee and seemingly nothing has been done toward the furtherance of the worthy purpose of the American Legion Post of Union and the State of Missouri in contributing and appropriating the funds for that purpose, other than the purchasing of a site.

Under the above circumstances, we can see no legal objection to the county court conveying the property to the City of Union for the purpose of erecting a "Memorial Auditorium" so long as there is set aside in said memorial building suitable space for the original purpose as provided by the act of 1919 and for the purposes which actuated the Union American Legion Post to contribute the sum of \$600.00 for said purposes. We know of no more useful and worthy purpose for which the funds contributed by the American Legion and the State of Missouri could be used than set forth in your letter of March 3, 1937. We understand that the American Legion Post, the City of Union, and the County Court of Franklin County, all approve the plan of transferring the property to the City of Union, and that the only question is, has the County Court the power and authority to transfer the site to the City of Union for the purposes aforementioned?

Mar. 9, 1937.

It is, therefore, under all the facts and circumstances, our opinion that the county court has the authority to convey said property to the City of Union with such reservation as it desires to make relative to the perpetuating the memory of those who rendered service in the World War.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

CRH:EG

GAME AND FISH
DEPARTMENT:

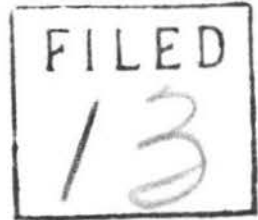
Fees earned by the Commissioner before
July 1, 1937, should be placed in the
Game Protection Fund.

Bills and accounts made prior to July 1st
should be paid from the Game Protection Fund.

June 29, 1937

6-30

Honorable Wilbur C. Buford
Commissioner
Game and Fish Department
Jefferson City, Missouri



Dear Mr. Buford:

Your letter of June 18th, submitting the
following question for an opinion, is acknowledged:

"Will the income for licenses
sold in June and which is re-
mitted to this Department in
July, be placed to the Game
Protection fund or the Conser-
vation Commission fund?

The last paragraph of Amendment No. 4 is
as follows:

"The general assembly may enact
any laws in aid of but not in-
consistent with the provisions
of this amendment and all exist-
ing laws inconsistent herewith
shall no longer remain in force
or effect. This amendment shall
be self-enforcing and go into
effect July 1, 1937."

Honorable Wilbur C. Buford

-2-

June 29, 1937

Amendment No. 4, although adopted at the general election of 1936, remains inoperative until July 1, 1937. The fees in question being collected under the laws in existence prior to July 1st would naturally be amenable to said laws, and as a result when remitted should be placed in the Game Protection Fund and not in the Conservation Commission fund.

Likewise the same result would apply to bills and accounts incurred prior to July 1st, the same being incurred under the laws existing prior to the effective date of Amendment No. 4, and being bills and accounts incurred under the statutes then existing.

Therefore we are of the opinion that the bills and accounts should be paid out of the Game Protection Funds, and any surplus funds remaining after the bills and accounts are paid should be delivered to the Conservation Commission.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN/R

STATE PARKS: Control and management of state parks,
where vested.

July 9, 1937

7-26



Honorable W. C. Buford
Secretary
Conservation Commission
Jefferson City, Missouri

Dear Mr. Buford:

This will acknowledge receipt of your letter of recent date requesting an opinion from this office which reads as follows:

"It is my desire to have your opinion as to what state parks, or parts of state parks, come under the new Conservation Commission. Also those that come under the State Park Board. I am enclosing a list of our state parks.

"I am not asking for this opinion for the Commission, but for my own personal knowledge."

At the general election held in November, 1936, the people of this state adopted a constitutional amendment designated number 4, which vested the control, management, restoration, conservation and regulation of the birds, fish, game, forestry and all wild life resources of the state in a Conservation Commission consisting of four members, to be appointed by the Governor. This amendment went into effect July 1, 1937. Said Constitutional Amendment provides, in part:

"The control, management, restoration, conservation and regulation of the bird, fish, game, forestry

and all wild life resources of the State, including hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of the same, and the administration of the laws now or hereafter pertaining thereto, shall be vested in a commission to be known as the Conservation Commission, to consist of four members to be appointed by the Governor, not more than two of whom shall be members of the same political party."

From a reading of said amendment it is plain that the control and management of all hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes, whether in state parks or not, are now vested in the Conservation Commission. No provision is found in said amendment, however, giving the Conservation Commission the control or management of the recreational parks of this state or the recreational areas contained in parks used in part for conservation purposes.

The Fifty-ninth General Assembly, recognizing that there was no provision providing for the control, regulation and management of the state parks since the adoption of Constitutional Amendment No. 4, passed House Bill No. 184 which creates a State Park Board and vests the control and management of state parks in said board. The fact that the Legislature recognized that Constitutional Amendment No. 4 did not give the Conservation Commission authority over the recreational parks of this state is clearly evidenced by the emergency clause of House Bill No. 184, which reads:

"Sec. 4. Because of the fact that since the adoption of Amendment No. 4 to the Constitution of the

State of Missouri at the general election held November 3, 1936, there is no law in this State which adequately provides for the ownership, control and regulation of several of the state parks in the State of Missouri an emergency is declared to exist within the meaning of the Constitution and this Act shall be in full force and effect from and after its passage and approval."

While House Bill No. 184 vests the control and regulation of the state parks in the State Park Board it cannot be said that said Act gives the park board control and management of hatcheries, sanctuaries, refuges, reservations, and of the birds, fish, game and wild life resources contained in said parks, for the reason that to so construe said act would render it unconstitutional as being in conflict with Constitutional Amendment No. 4, which gives the Conservation Commission the control and regulation of these things. Bearing in mind that an act should never be construed as unconstitutional if a reasonable construction of same can be given which will render it constitutional, it is our opinion that House Bill No. 184 does not attempt to give the State Park Board any jurisdiction over hatcheries, sanctuaries, refuges, reservations and wild life contained in said parks.

From the above, we think it plain that the control and management of all wild life resources, including hatcheries, sanctuaries, refuges, reservations and all other property used for said purposes, whether located in a state park or not, are vested in the Conservation Commission. It necessarily follows that all state parks used exclusively for the restoration, conservation and regulation of the bird, fish, game and wild life resources of the state are now under the exclusive jurisdiction of the Conservation Commission. We think it equally clear that all state parks used solely for

recreational purposes are now under the exclusive control and management of the State Park Board.

The question then arises as to the control and management of state parks that are used both as recreational areas and which also have fish hatcheries, bird sanctuaries, game refuges and other wild life resources. In these parks, as pointed out above, the control and management of the wild life resources, including hatcheries, sanctuaries, refuges, etc., contained in said parks, are clearly under the control and management of the Conservation Commission. Nothing is found, however, in Amendment No. 4, giving said Commission the control or management of the recreational areas of these parks, that is, the cabins, picnic grounds, swimming pools and beaches, concessions, etc.

As stated above, House Bill No. 184 gives the control and management of state parks to the State Park Board with the exception, in view of Constitutional Amendment No. 4, that the fish, game, birds and other wild life resources, including hatcheries, sanctuaries, refuges and reservations contained in said parks are under the control and management of the Conservation Commission.

It is, therefore, our opinion that the recreational areas contained in said parks are under the control and management of the State Park Board and that this construction does not, in any way, conflict with Constitutional Amendment No. 4 vesting the control and management of the wild life resources, contained in said parks, in the Conservation Commission.

CONCLUSION

In view of the above, we conclude as follows:

1. That the control and management of state parks used exclusively for conserving and restoring the wild life resources of this state are vested in the Conservation Commission.

Honorable W. C. Buford

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July 9, 1937

2. That the control and management of state parks used solely for recreational purposes are vested in the State Park Board.

3. That in state parks containing both wild life resources and recreational areas the wild life resources contained in said parks, including game, fish, birds, hatcheries, sanctuaries, refuges and reservations, are under the control and management of the Conservation Commission, and the recreational areas contained in said parks, including cabins, picnic grounds, swimming pools and beaches, concessions, etc., are under the control and management of the State Park Board.

Respectfully submitted,

J. E. TAYLOR
(Acting) Attorney General

JET:LC

GAMBLING: Bingo and corn games constitute gambling.
LOTTERY: Bingo and corn games.

9-4

September 3, 1937.



Honorable N. Elmer Butler
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

We have your request for an opinion which is as follows:

"In the various counties in this part of the state at carnivals and picnics we sometimes have games called "Bingo" or corn games, and wheels of different kinds which I believe comes within the prohibited gambling law, also 'penny pitch' etc. Are these different concessions violations of the law?"

In the above type of games it appears that a prize is awarded for a consideration on the turn of a wheel, towit: The element of chance. Similar contests, such as guessing, have been held to be lotteries. Huddleston v. State 94 Ind. 426; Stevens v. Cincinnati Times--Star Company 73 N. E. 1058.

The Supreme Court of the United States in Dillingham v. McLaughlin, 68 L. Ed. 742, 1. c. 747, said:

"What a man does not know and cannot find out is chance as to him, and is recognized as chance by the law."

Lotteries are prohibited by the Missouri Constitution, Article XIV, Section 10, and by Section 4314 R. S. Mo. 1929.

Hon. N. E. Butler

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September 3, 1937.

It is, therefore, the opinion of this office
that bingo and other similar games are a lottery and
in violation of the criminal laws of this State.

Respectfully submitted

FRANKLIN E. REAGAN
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

FER:AH

COUNTY COLLECTOR: Increases in compensation, if any, given
SALARIES AND FEES: County Collectors by 1933 laws may be retained
by them even after the taking away of additional duties as ex officio treasurers.

November 13, 1937.



Hon. Elmer Butler,
Prosecuting Attorney,
Stone County,
Galena, Missouri.

Dear Sir:

This is to acknowledge your letter which is as follows:

"Will you please give me an opinion on the following:

"Is it legal for the County Collector in a county of less than forty thousand inhabitants to retain the increase in salary given him by the 1933 Legislature now that he no longer has the Treasurers office?"

Stone County does not have township organization, and has a population of 11,614 inhabitants, according to the last United States decennial census. Official Manual State of Missouri 1935-1936, p. 284. Prior to 1933, Stone County elected a County Treasurer. Section 12130, R. S. Mo. 1929. However, in 1933, the 57th General Assembly repealed Section 12130 and enacted a new section in lieu thereof. Laws of Missouri 1933, p. 338. The effect of new Section 12130, found in Laws of Missouri 1933, p. 338, abolished the office of County Treasurer in counties under 40,000 inhabitants and not having township organization. Section 12132a, Laws of Missouri 1933, p. 338, provided that the County Collector in counties such as Stone County should be ex officio treasurer and to serve as such ex officio treasurer without additional remuneration. Said section reads in part as follows:

"Such collector shall act as ex officio treasurer and perform the duties attached thereto with no additional remuneration

November 13, 1937.

other than such moneys as are allowed
by law for his services as county
collector * * *."

In 1937 the 59th General Assembly repealed, among other sections, Sections 12130 and 12132a. Laws of Missouri 1937, pp. 424-427, inclusive. Therefore, at the present time Stone County has a County Treasurer, and the duties formerly performed by the County Collector as ex officio treasurer are now performed by the County Treasurer. In other words, the two offices are again separated and placed in the same status as though the 1933 law was never enacted.

As repealed Section 12132a, Laws of Missouri 1933, p. 338, did not provide for additional remuneration to the County Collectors when acting as ex officio treasurers, it is our opinion that increases in compensation, if any, given County Collectors by the 1933 Legislature may be retained by them even after the taking away of the additional duties as ex officio treasurers by the 1937 statutes.

Yours very truly,

AUBREY R. HAMMETT, Jr.,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

ARH:HR

COUNTY BUDGET ACT: County court must use surplus funds of the year 1935 after all classes of the budget act have been properly cared for, for the purpose of paying outstanding warrants of previous years

August 28, 1937

Honorable Henry Cain
Prosecuting Attorney
Stoddard County
Bloomfield, Missouri



Dear Sir:

This Department is in receipt of your letter of August 13, 1937, wherein you make the following inquiry:

"The County Court of Stoddard County has asked me to secure your opinion on the following state of facts, to-wit: The County Court of Stoddard County, at the proper time, set up its budget for the year 1935, and in pursuance to that budget specified the amount of warrants which could be drawn on each class provided by law, and issued the full amount authorized under the budget for each of the first five classes. Since that time sufficient revenue has been collected to pay off all of the 1935 warrants issued, and there is in addition a surplus of some four or five hundred dollars in the 1935 revenue account over and above the amount of outstanding warrants, which amount was the

full amount authorized under the budget.

"Two sets of claimants are claiming this surplus money together with any other surplus monies which may come into the 1935 County revenue account. The first set of claimants are the parties holding 1928 county revenue warrants, and which 1928 county revenue warrants are the oldest outstanding unpaid obligations of Stoddard County. The second set of claimants are parities who furnished services to the county during the year 1935, and who were not paid, by the County Court, in warrants for the reason that 1935 budget allowance for each of the classes therein for the year 1935 had been exhausted at the time of the presentment of the bill.

"The warrant holders contend that the budget law was passed for the specific purpose of making the County, not only live within its expected revenue and thereby putting its current position in a businesslike shape, but that the budget was also passed for the specific purpose of making the county get its past finances in a businesslike shape by applying all surpluses over and above the budget allowance to the oldest outstanding obligations. In other words they contend that Section 5, dealing with class 6 warrants, of the County Budget Act of the Laws of Missouri for the year 1933, means that only class 6 warrants could be issued by the County Court for the payment of any bill over and above

that specifically set up in the first five classes of the budget, and that these class 6 warrants cannot be issued if there is any outstanding warrants of prior years remaining unpaid.

"The holders of the bills for 1935, which have not been paid or allowed, for the reason that they were not within the budget limit for 1935, contend that it does not make any difference how much a county may spend for any particular year, provided it has the money with which to pay therefor, even though the county may have run into debt for large amounts during any prior year. In other words the question is whether or not the holders of bills for services rendered in 1935 shall receive the surplus over and above the budget, or whether the holders of the oldest outstanding warrants will receive the money? If the surplus money goes to the payment of the oldest outstanding warrants, there is some hope that the indebtedness of Stoddard County will some day be paid off, and the finances of the county placed in the condition which was apparently intended by the legislature when it passed the budget act. If however, the surplus money goes to pay the outstanding bills, there may never be any reduction in this indebtedness. Please advise to whom this surplus money should be paid - warrant holders or claim holders."

The main question involved is, in effect:

That surplus money, to the amount of approximately \$500.00, remains from the revenue of 1935 after all warrants issued in said year have been paid for all expenditures anticipated and estimated under the County Budget Act.

Warrants for 1928 remain unpaid.

Parties performing services for the county in 1935 but no warrants issued in payment of such services for the reason that the budget had been exhausted at the time claims for such services were presented.

Which parties are entitled to the surplus money?

Under the Constitution of 1875, Sections 11 and 12, of Article X, were included. The purpose of including the two sections was to remedy an evil which existed prior to the Constitution of 1875, to the effect that county affairs and business were conducted so loosely and inefficiently that most counties in the State were overwhelmingly in debt. The effect of the above mentioned provisions of the Constitution was that warrants were issued and the warrants so issued each year must be paid out of the revenue provided and collected for that year. In other words, the courts have construed the provisions in the Constitution to place counties on a cash basis to avoid excessive debts. The wisdom of the sections has been demonstrated through experiences of counties for a number of years, but in recent years, perhaps due to the strained economic conditions which have existed in the State for the past six or seven years, the Legislature, in 1933, sought to promote further efficiency and economy in county expenditures by enacting the Budget Act, Laws of Missouri 1933, page 340, et seq. The Legislature of 1937 made slight amendments to Sections 2 and 5 of the

Act, neither of the amendments having any bearing on the question at hand. The decisions with reference to the warrants that were to be issued, the validity of same, and how the same were to be paid under the Constitution of 1875, Sections 11 and 12 of Article X, have been interpreted in several instances by the courts.

A decision which has been followed which clearly sets forth the effect of Sections 11 and 12 of Article X, is that of *Kansas City, Fort Scott & Memphis Railroad Company v. Thornton*, 152 Mo. 1. c. 575.

Other decisions bearing on the same question and holding to like effect are *State ex rel. V. Johnson*, 162 Mo. 621, and *State ex rel. v. Allison*, 155 Mo. 325.

With these decisions before us, and applying the same to the fact that there are surplus funds remaining from the revenue of 1935, then, under the above decisions, we should be of the opinion that the claimants of 1935 would be entitled to the surplus money. But the Budget Act of 1933 must be considered in connection with the contentions of both parties. Your letter states that the county court carried out its duties by making an estimate and set up a budget dividing the expenditures into the five classes and expended the money in accordance with the estimate as made in the classes, all of which is in conformity with the provisions of the Act.

The county court must follow the County Budget Act and cannot ignore its provisions. The Budget Act being only four years old there have been few decisions interpreting its effect. However, the Supreme Court of Missouri, on August 26, 1937, rendered a decision in the case of *Harry Traub v. Buchanan County, Missouri*, Number 34883, regarding claims filed in the County Court of Buchanan County for services rendered during the year 1934. Buchanan County is a county of more than 50,000 population, your county less than 50,000. Therefore, the financial set-up with reference to the Budget Act differs

in the county according to the population. However, we think that the above mentioned decision is determinative of the question. We quote from the opinion, as follows:

"No contention was made that the persons named in the forty-one counts did not render the service as represented. The county pleaded various defenses, among which was, that the county budget law, Laws 1933, page 340, etc., Mo. St. Ann., page 6434, was not complied with in any one of the contracts or orders forming the basis of the various claims. The county, therefore, takes the position that it was not legally obligated to pay any of the claims for which suit was brought. Respondent asserted, at the trial, that the budget law was unconstitutional. The reply filed by respondent, to the answer of the county, contained the following:

"That said section 12218 at page 352 of the Laws of Missouri for the year 1933 is also unconstitutional and void as in conflict with and contravention of section 36, article VI of the Constitution of Missouri in that said section undertakes to deprive the County Court of its right and power to transact the business of the county and to vest said power in the county auditor of defendant county and that said section 12218 at page 352 of the Laws of Missouri for the year 1933 is unconstitutional and void as in violation of Section 28 of Article IV of the Constitution of Missouri in that the matters undertaken to be legislated upon in said section are not clearly expressed in the title of said act."

"Since this case was lodged here on appeal, several cases involving the budget law have been decided by this and other courts. The case of Graves v. Purcell, 85 S. W. (2d) 543, 337 Mo. (en banc) 574, disposed of respondent's second contention, that the title of the act was defective. It was there decided that the title of the act was not defective. Without discussing the question again, we rule the point adversely to respondent upon the authority of that case. "

* * * * *

"The effect and intent of the budget law, as we understand it, is to compel, or at least to make it more expedient for the county courts to comply with the constitutional provision, sec. 12, art. 10, Mo. Constitution, which provides that a county shall not contract obligations in any one year in excess of the revenue provided for that year. The budget law leaves the transaction of business to the county courts."

* * * * *

"The budget officer simply determines whether sufficient money is provided with which to pay the obligation intended to be incurred by any contract or order presented to him for indorsement. This is a mere matter of book-keeping. If the cash is on hand or has been provided for, it is the duty of the auditor or budget officer to make such indorsement upon the order or contract. If not, he merely refuses to make the indorsement. Prior to the enactment of the budget law, a

county court had no right to incur obligations in any one year in excess of the revenue provided for that year. By the enactment of the budget law the legislature has merely provided ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income. The power of the county court not having been curtailed by the enactment of the budget law, the point made by respondent is without merit and is ruled against him."

* * * * *

"If respondent means, by the argument advanced, that the county court was estopped to assert the invalidity of the contracts, then we are confronted with the proposition that the authorities are against that contention. We need not discuss this question at length, because in a recent case, decided by the United States Circuit Court of Appeals, 8th Circuit, this identical situation was fully considered. See *Layne-Western Co. v. Buchanan County, Missouri*, 85 Fed. (2d) 343. There, a contractor, who had performed his contract, sued the county to recover the contract price. Non-compliance with the budget law was the principal defense of the county. The court discussed the doctrine of estoppel and held that the established rule in Missouri is, that the county was not estopped to make the defense in question. Judge Stone, in *Layne-Western Co. v. Buchanan County, Missouri*, 85 Fed. (2d) 343, 1. c. 350, 351, a concurring opinion, had the following to say:

"The situation is that section 19 of the Budget Act (Mo. St. Ann., sec. 12126s, p. 6434) expressly states that "no contract or order imposing any financial obligation on the county shall be binding on the county unless * * * there is a balance otherwise unencumbered to the credit of the appropriation to which the same is to be charged and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligation thereby incurred and unless such contract or order bear the certification of the accounting officer so stating". (Italics added.) Concededly, none of these quoted requirements was here present.

"The Missouri rule is that, where a statute expressly states that, unless certain things are done, a contract by a political subdivision or a municipal corporation shall be invalid, there can be no estoppel urged to support the contract. *Mullins v. Kansas City*, 268 Mo. 444, 459, 188 S. W. 193; *Seaman v. Levee District*, 219 Mo. 1, 26, 117 S. W. 1084; *Edwards v. Kirkwood*, 147 Mo. App. 599, 614, 127 S. W. 378; *W. W. Cook & Son v. City of Cameron*, 144 Mo. App. 137, 142, 128 S. W. 269, 270; Also see *Phillips v. Butler County*, 187 Mo. 698, 86 S. W. 231." "

It would appear from the above decision that the terms of the Budget Act are mandatory and must be followed strictly. The extra income of 1935 can be used for any lawful purpose, according to Class Six, page 342; the conditions under which the same can be used are explained under Section 5, page 344, as follows:

"Amount available for all other expenses after all prior classes have been provided for. No expense may be incurred in this class until all the prior classes have been provided for. No warrant may be issued for any expense in class 6 unless there is an actual cash balance in the county treasury to pay all prior classes for the entire current year and also any warrant issued on class six. No expense shall be allowed under class six if any warrant drawn will go to protest. Provided, however, if necessary to pay claims arising in prior classes warrants may be drawn on anticipated funds in class six and such warrants to pay prior class claims shall be treated as part of such prior funds. Nor may any warrant be drawn or any obligation be incurred in class six until all outstanding lawful warrants for prior years shall have been paid. The court shall show on the budget estimate the purpose for which any funds anticipated as available in this class shall be used."

In view of the decision quoted extensively above, and the provisions of Class six herein quoted, we are

Honorable Henry Cain

-11-

August 28, 1937

of the opinion that the surplus money in question must be used in the discharge of outstanding warrants of 1928.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN LC

TAXATION--COSTS: Taxes more than five years delinquent
may be deducted from criminal cost fees.

October 2, 1937.

10-17



Honorable Henry Cain
Prosecuting Attorney
Stoddard County
Bloomfield, Missouri

Dear Sir:

This department is in receipt of your request for
an opinion which reads as follows:

"At the request of the Collector
of Stoddard County, I am writing
you for an opinion upon the follow-
ing questions, to-wit:

"(1) Where real estate was offered
for sale for the third time under
the Jones-Munger Law in November,
1936 and there was no purchaser of
the tax certificate offered at that
third sale, shall the property be re-
offered again at the 1937 sale or
what should be done.

"(2) Under the provisions of the law
at is now stands for the offering of
tax certificates, the collector under-
stands or believes that, for publica-
tion purposes, all fees including
publication fees should be figured
on a one hundred per cent basis, but
in event the tax payer elects to pay
his taxes before the tax sale in
November he should be permitted to
pay his taxes in accordance with
House Bill 70, commonly known as the
remission of tax penalty bill. In
other words the tax certificate bill
says that these certificates must be
offered in November and that all fees,
penalties, etc., shall be figured in
full up to that time and that amount

October 2, 1937.

inserted in the notice of sale of tax certificates, but the remission bill seems to have the collector bothered and he desires to know just how the notices should be figured.

"(3) A party owes taxes for 1930 and 1932. The same party has criminal cost fees due him, and the money for the payment of these fees is now in the hands of the Treasurer. The party to whom the fees are due is willing that the fees should be applied on the payment of the 1932 taxes but as there will be a surplus over and above the 1932 taxes he is unwilling that the balance should be paid on the 1930 taxes which he claims are outlawed under the five year statute of limitations for bringing suits on delinquent taxes. I have advised the Collector that in my opinion Section 3854 R. S. Mo. 1929 does not mean that the taxes must be within the five year period but that the tax payer must have paid all his taxes, whether they are within the five year period or beyond. I would appreciate your opinion in this matter which will be communicated to the collector."

In answer to your first question you will find enclosed a copy of an opinion rendered by this department to Honorable Wm. C. Kerckhoff, Collector of Revenue, Jefferson County, Hillsboro, Missouri, on November 25, 1936, the conclusion of which reads as follows:

"It is, therefore, the opinion of this office that at the next sale of lands and lots for delinquent taxes, following a sale at which the tract or lot of land has been offered for the third time without any bid, you should offer the certi-

ificate of purchase on such lot or tract of land for all taxes which are not outlawed, to-wit, which did not become delinquent more than five years prior to the date of such proposed sale."

In answer to your second question, this department on September 17, 1937, in an opinion to the Honorable Andy W. Wilcox, State Tax Commissioner, sets forth the procedure to be followed in the sale of land for delinquent taxes, under the Jones-Munger law, in view of the Remission Statute, Laws of 1937, p. 572. A copy of this opinion is also enclosed.

Your third question is whether a person who owes taxes, which are more than five years delinquent, is subject to have these taxes deducted from criminal cost fees due him.

Section 3854 R. S. Mo. 1929, provides in part as follows:

"The county treasurers shall pay out all such fees to the proper owners as the same may be called for: Provided, that before any such fees shall be paid the party to whom the same is due shall furnish satisfactory evidence to the treasurer that he or she, as the case may be, is not at the time indebted to the state or county, on account of delinquent back taxes, or is indebted to the state or county on account of any fine, penalty, forfeitures or forfeited recognizances, or costs for violation of any criminal statute of this state, or for contempt of any court, no matter if the same shall have been paid by oath of insolvency as provided by law; or is indebted to the state or any county on account of any funds coming to his hands by reason of any public office: * * *."

Section 9940 R. S. Mo. 1929, states the limitations on the collection of personal taxes and provides in part as follows:

"* * * * and suits thereon may be instituted after the expiration of said first day of January, and with-
in five years from said day. * * * *"

Laws of Missouri, 1935, p. 405, Section 9961, provides the limitations for instituting initial proceedings for the sale of land for delinquent taxes, and reads as follows:

"No proceedings for the sale of land and lots for delinquent taxes under the provisions of Chapter 59, Revised Statutes of Missouri, 1929, relating to the collection of delinquent and back taxes and providing for foreclosure sale and redemption of land and lots therefor, shall be valid unless initial proceedings therefore shall be commenced within five (5) years after delinquency of such taxes, and any sale held pursuant to initial proceedings commenced within such period of five (5) years shall be deemed to have been in compliance with the provisions of said act in so far as the time at which such sales are to be had is specified therein, Provided further, that in suits or actions to collect delinquent drainage and/or levee assessments on real estate such suits or actions shall be commenced within five years after delinquency, otherwise no suit or action therefor shall be commenced, had or maintained."

The application of statutes of limitation in regard to the state is given in *United States v. Whited and Wheless*, 62 L. ed. 879, 246 U. S. 552, where the Court through Mr. Justice Clark said:

"Fundamental to the interpretation of the statute which the answering of this question renders necessary lies the rule of law settled 'as a great principle of public policy' that the 'United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound' (*United States v. Nashville, C. & St. L. R. Co.* 118 U. S. 120, 125, 30 L. ed. 81, 83, 6 Sup. Ct. Rep. 1006), and also the fact that this principle has been accepted by this court as requiring not a liberal, but a restrictive, a strict, construction of such statutes when it has been urged to apply them to bar the rights of the government."

To the same effect is *State ex rel Wyatt v. Cantley*, 26 S. W. (2d) 976, 325 Mo. 67.

It will be noted that the statute of limitations in regard to the sale of land provides that "no proceeding shall be valid unless commenced within five years", and the statute dealing with personal taxes provides that suits may be instituted within five years.

Both statutes quoted only bar the right to institute proceedings to collect such taxes, but do not in any way extinguish the taxes. This fact is recognized in 37 C. J. p. 698, Section 18, which reads in part as follows:

"* * * Except where the statute by its terms absolutely extinguishes the debt or demand itself, the general rule with respect to debts or mere

October 2, 1937

money demands is that statutes of limitation are regarded as barring the remedy, and not as extinguishing the cause of action. * * * * *"

The delinquent taxpayer owes the tax, but it can not be collected by the State in an affirmative action. However, it is a well settled rule that the statute "can only be used as a shield and not as a sword," Bryne v. Byrne 289 Mo. 109. Therefore, while the statute could be pleaded as a defense to any action by the State to recover delinquent taxes, still the taxpayer cannot affirmatively invoke such statute in a demand on the State for cost fees. The strict construction of the application of the statute required by the fact that it is in derogation of sovereignty does not allow this.

CONCLUSION

It is, therefore, the opinion of this department that taxes which are more than five years delinquent may be deducted from criminal cost fees due such delinquent taxpayer.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

AO'K:H

COUNTY BUDGET ACT -- County treasurer should preserve priority payment according to classes. Not necessary to retain funds in any one class to the detriment of other classes in advance of the time payments are due if the priority can be preserved; not necessary for County Treasurer to determine amount of salary court reporter should receive under Sec. 11720; County Treasurer incurs no liability under Sec. 8 of County Budget Act if warrant is legal on its face and comes within the terms of the Act.

November 3, 1937

Honorable Worth Caughron
County Treasurer
Christian County
Ozark, Missouri

146
FILED
15

Dear Sir:

We are in receipt of your letter of October 21, wherein you present several questions. In reply thereto, we shall undertake to answer your questions in separate paragraphs.

I. Your first question is as follows:

"In your opinion should all warrants in Class I of the County Revenue be paid before paying warrants in the other Classes? It has been the custom of the County Court to apportion an amount in each Class according to the budget and pay out of each class as funds become available."

On June 21, 1934, this department rendered an opinion to Miss Carrie Williams, Treasurer of Barry County, Cassville, Missouri, which discusses the question, and, we believe, answers your question. We are enclosing herewith copy of that opinion.

II. Your second and third questions are as follows:

"The Court Reporter for the 31st judicial circuit receives judge's certificates for a maximum annual salary calculated upon a \$3,000.00 rate for the entire circuit. Section 11720, R. S. Mo. provides that in circuits of more than 45,000 population and less than 60,000 that the maximum salary of a court reporter shall be \$2,500.00. The population of the 31st judicial circuit as determined by section 11808, Laws of Missouri 1933, page 370, is 57,146. In your opinion, what is the proper maximum salary for the court reporter in this circuit?"

"The Christian County Court appropriated the proportional amount Christian County would pay toward a court reporter's maximum salary of \$3,000.00. Does this fact create any legal right to salary which would be in excess of the amount provided under Section 11720, R. S. Mo. 1929?"

We are enclosing herewith copy of an opinion rendered on October 29, 1935, to Honorable Lewis A. Duval, Prosecuting Attorney, Macon, Missouri. It would appear from the opinion that it is not a question for you, as County Treasurer, to determine the legal amount that the court reporter is entitled to receive. The certificate the circuit judge presented to you, as County Treasurer, for payment of the Court Reporter's salary, is sufficient authority for you to pay the same. The fact that the county court appropriated a certain amount for the Court Reporter's salary does not create any legal right to a salary which would be in excess of the amounts as provided in Section 11720, R. S. Mo. 1929.

In other words, if the Reporter does not receive the legal amount to which he is entitled, he does not waive his right to additional amount, nor does the county waive its rights by paying the Court Reporter more than he is legally entitled under Section 11720, and may sue to recover same. Consolidated School District vs. Cooper, 28 S. W. (2d) 384.

III. Your fourth question is as follows:

"As Treasurer of Christian County, what are my duties and liabilities under the Budget law for paying on a circuit judge's certificate in excess of the amount provided under Section 11720, R. S. Mo. 1929?"

We assume that you refer to the penalty section under Section 8 of the County Budget Act, page 346:

"Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be

void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

The general rule with respect to County Treasurers' paying county warrants regularly issued by the county and presented for payment is discussed in the case of the County of Jackson vs. Fayman, 329 Mo. l.c. 441:

"Much is also said as to the heavy penalties imposed on county treasurers as ministerial officers in refusing to pay county warrants regularly issued by the county and presented for payment. It is true that such ministerial officers are not and should not be required to investigate and determine for himself the legality or validity of such warrants and should ordinarily pay same without question. Here, however, the constituted authority which had caused this warrant to be issued, and whose order gave it birth and vitality, had taken on itself the responsibility of annulling its action and stamping out its life. The whole trouble here arises from the fact that this ministerial officer undertook to decide for himself that the action of the county court in issuing this warrant was a judicial act and a finality and that such court did not have the judicial power to set aside or modify its judgment after the term. That ministerial officers are not generally visited with penalties or held personally responsible when acting in good faith is held in State ex rel. v. Diemer, 255 Mo. 336. That they must at times assume some risk in the performance of judicial duties is unavoidable, and we commend defendant's action in taking a bond for his own protection on paying this warrant."

Honorable Worth Caughron

-4-

November 3, 1937

Therefore, we are of the opinion that you incur no liability under the Budget Act with respect to paying a Court Reporter or the amount that he is to receive or the determination of his salary if the warrant presented to you is regular on its face and is properly presented for payment. It does not devolve upon you, as County Treasurer, acting in good faith and in the absence of fraud, to determine the correct amount of salary the Court Reporter should receive.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:FE
Enc. 2

- (1) CRIMINAL LAW: A person discharged by justice on preliminary examination for felony may be brought before another justice in the county and another preliminary held.
- (2) A person may be committed to the School for Feeble Minded whether under or over age.

February 24, 1937

2-26



Mr. Paul N. Chitwood
Prosecuting Attorney
Reynolds County
Centerville, Missouri

Dear Mr. Chitwood:

This department is in receipt of your letter of February 18th containing two specific questions. The facts surrounding your first question are as follows:

I.

"The above defendants were prosecuted for killing deer out of season, a felony, under section 8236 Act of Mo., for 1931. They were given a preliminary examination before R. S. Hiltibidal one of the justices for this township, and after what appeared from the records to be a regular preliminary, the defendants were discharged.

Several interested persons here, who would like to see the wild life protected, and violations of our game laws punished, have asked me to start prosecution against these same parties on the same charge, as a number of people feel that the defendants should have been bound over to our Circuit Court. I am not personally familiar and cannot give you the details of the evidence, and having mentioned

since my predecessor, Mr. J. L. Huett, who was then prosecuting attorney filed the suit.

I would like your opinion as to whether I may legally prosecute these defendants on the same charge as mentioned after they have been discharged by the examining justice."

The purpose of a preliminary hearing is for the benefit of the defendant. In holding preliminary examination, it is the duty of the justice to determine first whether or not a crime has been committed, second, as to the probable cause for thinking that the defendant committed the crime. The question which you propound has been decided by the Supreme Court in the case of State vs. Cooley, 12 S. W. 2nd, 1. c. 468, wherein the court said:

"While it is not expressly provided in section 3848 that an information cannot be filed until the magistrate has found 'that a felony has been committed and that there is probable cause to believe the prisoner guilty thereof,' such is the clear intent of the statute. Otherwise the according of an examination before a magistrate is a useless preliminary step and affords no protection to the accused. The lawmakers are guilty of no such absurdity. The examination by a magistrate before an information can be filed by the prosecuting attorney takes the place of an examination by a grand jury before the return of an indictment and prevents an abuse of power by the prosecuting attorney. On a discharge of the accused a complaint may be filed before another magistrate, or the charge may be investigated by a grand jury."

We are, therefore, of the opinion that you may file another

complaint before any justice in the county to hold another preliminary hearing. Of course, as stated in the above decision, the matter could be brought before the grand jury and if the defendants were indicted, the fact that they were released, or discharged, at a previous preliminary hearing, would not affect the indictment.

II.

"I would also like your opinion as to whether the Superintendent of the Missouri State School for Feeble Minded and Epileptics at Marshall, Mo., in the absence of statute has any authority to fix an age limit of 25 years on applicants who are epileptic patients. All the necessary preliminary steps have been taken to commit one Arnold Davis, an epileptic person, age 27, of Reynolds County, and who is badly in need of treatment, but the Superintendent informs us that he will not take this patient into his institution since he is 'too old', please advise, in above cases, thanking you, I am * *"

We have examined statutes relative to the Missouri Colony for Feeble Minded, or known as the Missouri State School, and are unable to locate any provisions to empower the Board of Managers, or the management of the school, to fix the age limit of the inmates. The statutes cover the same in Sections 8691 to 8696, inclusive, as amended, Laws of 1931, page 218 and the pertinent part referring to your question is as follows:

"There shall be received and gratuitously supported in the Missouri state schools, feeble-minded and epileptics residing in the state who, if of age, are unable, or if under age, whose parents or guardians are unable to provide for their support therein, and who shall be designated as

February 24, 1937

state patients. Such additional number of feeble-minded and epileptics, whether of age or under age, as can be conveniently accomodated, shall be received into the school by the managers on such terms as shall be just; and shall be designated as private patients."

The statute, itself, states that persons are to be admitted, if of age or if under age. The other statutes contain no reference to the power of the board of managers to make reasonable rules and regulations governing the receiving of inmates.

Therefore, we are of the opinion that the person which you state to be 27 years of age, if properly committed by the court, is entitled to receive treatment at the Missouri State School, if such person can be conveniently accommodated.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

OWN:RT

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MOTOR VEHICLE FUEL TAX: Right of State Inspector to disregard corporate fiction in refusing to grant application for dealer's license.

3-20

March 17, 1937.

Hon. Roy H. Cherry,
State Inspector of Oils,
Jefferson City, Mo.



Dear Sir:

A request for an opinion has been received from you under date of March 1, 1937, such request being in the following terms:

"Section 7820, of the Motor Vehicle Fuel Tax Act reads in part as follows:

'After a license shall have been revoked, no new license shall be issued to such licensee unless such person, distributor or dealer shall pay all taxes, penalties and interest in arrears or due the state and all fines and costs assessed against such licensee for any violation of this article, and shall also enter into bond to the state of Missouri in a sum to be fixed by said inspector and equal to the total amount of such license tax paid or due from said licensee on motor vehicle fuels received, manufactured, compounded or handled by such licensee for distribution or sale in this state, or sold by him in this state, during a period of six months preceding the date of default, but in no event less than ten thousand dollars, with good and sufficient sureties approved by said inspector and conditioned for the faithful performance of all obligations under all the provisions of this article and for the payment of all taxes, penalties, interest and costs that may thereafter become due the state, at the time and in the manner provided by law, and said inspector may commence and prosecute, or cause to be commenced and prosecuted, an action at law on said bond for the recovery of any tax, penalty, interest or cost that may be due the state, at any time such person, distributor or dealer

March 17, 1937.

may be in default.'

Will you please furnish me with your opinion as to whether the state inspector is required to issue a license based on the following statement of facts?

On August 14, 1936, the license of the Power Oil Corporation, 600 South Vandeventer Avenue, St. Louis, Missouri, was revoked for its failure to pay tax and penalties to the state of Missouri according to law. This corporation in its last application for license listed as its officers, J. O. Sampson, President; H. D. Sampson, Vice-President; and E. B. Connelly, Secretary. The application was signed by J. O. Sampson, as are the road tax reports on file in this office.

The Atlas Oil Company, Inc., 700 South Vandeventer Avenue, St. Louis, Missouri, in its application for license for the year 1936 listed as its officers, J. O. Sampson, President; H. D. Sampson, Vice-President; and Z. A. Pennington, Secretary. This corporation failed to file a road tax report for the month of December, 1936, and according to our records owes tax and penalties on three tank cars of gasoline received and distributed by it during the month of December. This company did not file an application for 1937 license; therefore, there was no license to revoke for failure to pay this tax and penalties.

Since January 1, 1937, the oil station at this location, 700 South Vandeventer Avenue, St. Louis, Missouri, has been operated by J. O. Sampson as an individual registered with the Secretary of State as the Keystone Oil Company under the fictitious name law. On February 18, 1937, an application for license under the name of Keystone Oil Company signed by J. O. Sampson, 700 South Vandeventer Avenue, St. Louis, Missouri, was received by this department. Therefore, you can readily see that this plant at 700 South Vandeventer Avenue, St. Louis, Missouri, has been operated from January 1st to February 18th by Mr. Sampson in violation of the law, without even filing his application for license.

On February 25, 1937, a letter was received by this department from the Keystone Oil Company,

March 17, 1937.

signed by J. O. Sampson, requesting blanks on which to make application for dealer's license for station to be operated at 600 South Vandeventer Avenue, St. Louis, Missouri, the site of the old Power Oil Corporation.

The question is whether or not the state inspector of oils is required by law to issue a license under conditions as stated above. Your early opinion will be appreciated."

Section 7820 quoted in your letter is the only statute which we have discovered which gives you any specific authority to refuse applications for licenses. This section does not give you any broad discretionary powers in this regard, such as those vested in the State Board of Health in passing on applications to practice medicine (R.S. Mo. 1929, sections 9113, 9120), or those relating to admission to the Bar (Revised Rules of the Supreme Court of Missouri, Rule No. 38). Section 7820 forbids you to issue licenses to certain persons, but the prohibition is restricted to such persons as have previously had their licenses, as dealers in motor vehicle fuels, revoked for violations of law. Without passing upon the question of whether you have any implied power to refuse a license to a person who had never been licensed before, it is plain that this statute does not give you any express power to refuse a license to such person. To come within the language of this statute a person whose application for a license can be refused, must be a person who had previously been licensed.

From the facts stated in your letter we assume that J. O. Sampson and H. D. Sampson are the principal owners of, and dominate, the corporations mentioned in your letter. On this assumption it appears that they have attempted to use the corporate device offered by the laws of this state for the purpose of evading motor vehicle fuel taxes. The question then is, whether you have a right to disregard the corporate fiction and take into account the fact that an applicant for a license as an individual would be disqualified from obtaining a license in the name of a corporation which he had formed and which had been revoked for violation of the laws administered by your department.

In the case of Southern Electric Securities Co. v. State, 91 Miss. 195, 44 So. 785 (1907) the court said

March 17, 1937.

that the "fiction that the corporate existence and corporate functions are distinct from that of stockholders * * * is introduced for convenience, and to subserve the ends of justice; but, when invoked in support of an end subversive of its policy, should be and is disregarded by the courts".

In U. S. v. Milwaukee Refrigerator Transit Co., 142 Fed. 247 (1905) the court said:

"If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity, as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

In Kendall v. Klappertal Co., 202 Pa. 596, 52 Atl. 92 (1902) the court held that where practically the same persons own the stock of several corporations which have been organized as branches of a single development scheme, and advances have been made by certain of the directors, and there have been various issues of stock and bonds, a court of equity will deal with the matter between the individuals interested as if there were but a single concern.

In St. Louis Stamping Co. v. Quinby, Fed. Cas. No. 12240a, 4 Bann. & Ard. 192 (1880), the court stated that the "Missouri statute as to private corporations, and the formation of corporations thereunder, cannot be interposed as a shield by the corporators, to protect them against wrongful acts."

The case of State v. Miner, 233 Mo. 312, 135 S. W. 483 (1910) might seem in apparent conflict with the above doctrine because of certain language used therein to the effect that the corporate existence cannot be ignored simply because a corporation is acting outside the scope of its charter, and that is a matter for the state to deal with in a direct proceeding. In that case a conviction for operating a bucket shop was reversed, but a careful study of the case shows that the reason for the reversal was a faulty indictment which attempted to charge the president of the corporation as the principal when, under the statute, he should have been charged as the agent of the corporation,

#5 - Hon. Roy H. Cherry

March 17, 1937.

the evidence failing to show that he was the controlling spirit of the enterprise or that any trades were made by him in person or by his direction.

Under the facts stated in your letter, it appears that the individual in question incorporated two companies and secured licenses on applications signed by this individual as president of these companies, and that after these licenses were revoked for violations of law, this individual is attempting to secure licenses in his own name to operate the same kind of business at the same locations. According to your letter, this individual has also operated without a license in the interim, in violation of law, without attempting to secure such license. It appears to us that these facts constitute an attempted use of the Missouri Corporation Laws for the purpose of evasion of the motor vehicle fuel tax laws which would warrant you, if you are satisfied that this individual is substantially the sole owner of these corporations, in disregarding the corporate fiction.

In conclusion it is our opinion that under the facts stated in your letter you would not be acting improperly in refusing a dealer's license applied for by J. O. Sampson, doing business as Keystone Oil Company, unless this applicant cures the previous defaults, under the motor vehicle fuel tax law, of himself and his corporations referred to in your letter.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

J. E. Taylor
(Acting) Attorney General

GENERAL ASSEMBLY: If a bill is reconsidered and is again voted upon and defeated the subject is finally disposed of, under Section 35, Article 4, of the Constitution of Missouri

4-21
April 20, 1937



Honorable J. G. Christy
Speaker
House of Representatives
Jefferson City, Missouri

Dear Mr. Speaker:

This Department acknowledges receipt of your letter of April 16, wherein you request an opinion based on the following facts:

"May I ask for a decision upon the following question:

"A House Bill was brought up for third reading and final passage and defeated. Within the three days limit the vote by which the bill was defeated was reconsidered and again defeated upon third reading and final passage. The next day a motion was put to suspend the rules and again bring the bill up for reconsideration. A point of order was raised under Section 35, Article 4, of the Constitution, which reads as follows: 'When a bill is put upon its final passage, and failing to pass, a motion is made to reconsider the vote by which it was defeated, the vote upon such motion to reconsider shall be immediately taken and the subject finally disposed of before the House proceeds to any other business.'

"As Speaker, I upheld the point of order, taking the stand that the

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House had the right to suspend its rules but could not suspend the Constitution. I interpreted Section 35, Article 4, of the Constitution to mean that when they had reconsidered the vote by which the bill was taken and again voted upon the matter that 'the subject was finally disposed of' and my interpretation of the word 'finally' was that they meant the end and conclusion of the matter.

"An appeal was taken from the ruling of the Chair and the Chair was not sustained upon the point of order.

"As this matter will undoubtedly come before the House again, I would like your interpretation of Section 35, Article 4, of the Constitution."

Each Branch of the General Assembly is empowered, by Section 17, of Article IV, of the Constitution of Missouri, to determine its own proceedings, except as herein provided. The pertinent part of said Section being as follows:

"Each house shall appoint its own officers; shall be sole judge of the qualifications, election and returns of its own members; may determine the rules of its own proceedings, except as herein provided; * * * "

Therefore, in the absence of any other Constitutional provision restricting rules of procedure the House of Representatives could make its own rules of parliamentary procedure relating to the point of order which you mention in your letter. Section 35, of Article IV of the Constitution appears to be a

limitation on that power, said section being as follows:

"When a bill is put upon its final passage in either house, and failing to pass, a motion is made to reconsider the vote by which it was defeated, the vote upon such motion to reconsider shall be immediately taken, and the subject finally disposed of before the house proceeds to any other business."

The troublesome words in Section 35 are the meaning and intention of the clause "finally disposed of before the House proceeds to any other business." Section 35 being in the nature of a procedural limitation on the Legislature, has never been construed by the courts of Missouri.

The author of "Legislative Procedure," Robert Luce, devotes a chapter to "reconsideration." The paragraph, from which is herewith quoted, throws light upon the purpose of such a section being in the Constitution; we call your attention to the specific reference to the condemnation of this section by the author in our Constitution:

"Mississippi put into her Constitution of 1890 the requirement that 'all votes on the final passage of any measure shall be subject to reconsideration for at least one whole legislative day, and no motion to reconsider such vote shall be disposed of adversely on the day on which the original vote was taken, except on the last day of the session.' Whether or not the evil at which this was aimed should be dignified by constitutional provision, there can be little question that it ought somehow to be met. In altogether too many

assemblies it is permitted to move reconsideration immediately after a vote has been taken, with the avowed hope that the motion will not prevail, or as in Congress to make the motion and then move to lay it on the table. This foils the legitimate and admirable purpose of reconsideration, which is properly to be secured by giving the assembly a night to 'sleep on it.' Votes are sometimes carried by the influences of passion or excitement that pass away after a few hours, and the calmer deliberations of the next morning may produce wiser results. Furthermore, if the decision has been reached in a small house and if the matter is of real consequence, a full attendance may be secured at the following session, and that generally conduces to better lawmaking. For this reason I seriously question the wisdom of the provision Missouri put into her Constitution of 1875, requiring that when a bill is put upon its final passage and fails, a vote upon a motion to reconsider shall be immediately taken and the subject finally disposed of before the House proceeds to any other business."

Coming closer to the question, that is, what is the import or effect of the words, "finally disposed of, we shall consider the meaning of the words individually.

" 'Final' means conclusive, from which there is no appeal. Blanding v. Sayles, 49 Atl. 992."

"The ordinary definition of the word 'final' is 'last.' Johnson v. City of New York, 1. N. Y. S. 254."

"Final is defined in Burrill's Law Dictionary, part 1. p. 490, to be that which terminates or ends a matter or proceeding."

25 Corpus Juris, page 1129, defines "final" as,

"A word of well understood and accepted meaning derived from the Latin 'finis,'. In its ordinary signification, last; latest; relating to the end; ultimate."

The words "disposed of" mean as follows:

"To dispose of means 'to part with; to relinquish; to get rid of - as to dispose of a house.' Webster's Dictionary."

The words "final disposition" which we consider as equivalent and having the same meaning as "finally disposed of," have been defined as follows:

"The phrase 'final disposition of the case,' in 19 Stat. 102, allowing an application for discharge in bankruptcy, where there are no assets, 'at any time after the expiration of 60 days, and before the final disposition of the cause,' means the settlement of the estate and the discharge of the assignee or trustee. In re Heller (U.S.) 9 Fed. 373. It means the final disposition of the administration of the estate. In re Brightman (U.S.) 4 Fed. Cas.136, 137."

"The final disposition of a matter submitted to arbitration is a determination so that nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation is

required or can arise on the matter. It is such an award that the party against whom it is made can perform or pay it without any further ascertainment of rights or duties. It is not absolutely necessary that the award should state in figures the exact amount to be paid. It is sufficient if there is such reference in the award to documents or other matters that nothing remains but mere arithmetical computation to render the award final and conclusive. *Colcord v. Fletcher*, 50 Me. 398, 401."

"The expression 'final disposition' as used in Act June 25, 1868, sec. 2, allowing the court of claims at any time while any suit or claim is pending before or on appeal from the said court, or within two years next after the final disposition of any such suit, or claim, on motion on behalf of the United States to grant a new trial in any such suit or claim, means the final determination of the suit on appeal, if an appeal is taken, or, if none is taken, then its final determination in the court of claims. *Ex parte Russell*, 80 U. S. (13 Wall.) 664, 667, 20 L. Ed. 632."

In Jefferson's Parliamentary Manual, page 93, while rather ancient on parliamentary law, contains the following paragraph which would indicate the real purpose of such a section in our Constitution.

"The rule permitting a re-consideration of a question affixing to it no limitation of time or circumstance, it may be asked whether there is no limitation?

April 20, 1937

If, after the vote, the paper on which it has passed has been parted with, there can be no reconsideration: As if a vote has been for the passage of a bill, and the bill has been sent to the other House. But where the paper remains, as on a bill rejected, when, or under what circumstances, does it cease to be susceptible of re-consideration? This remains to be settled, unless a sense that the right of re-consideration is a right to waste the time of the House in repeated agitations of the same question, so that it shall never know when a question is done with, should induce them to reform this anomalous proceeding."

CONCLUSION

We are of the opinion that if Section 35, Article IV, of the Constitution of the State of Missouri, has any rational meaning it is to the effect that when a bill is reconsidered and the matter is again voted upon the subject is finally disposed of, and that means the end and final conclusion of the matter. To hold otherwise would defeat the purpose of the Constitutional section and cause dissipation and waste of time of the House in repeated agitation of the question and make of the Constitutional section a nullity.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

TAXATION: Coal or other minerals in place subject to taxation as real estate, and when owned separately ~~from~~ surface estate must be separately assessed. Assessor should assess omitted property for all years it was omitted. County Board of Equalization can only assess omitted property for current year.

April 28, 1937.

57
FILED
16

Handwritten:
Mailed
Apr. 29
7-29-37

Honorable Richard Chamier,
Prosecuting Attorney,
Moberly, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion, which reads as follows:

"The County Court of this County has asked that you advise them of their right to assess coal that has been sold where the owners retain the surface land.

"If the coal can be assessed against the owners thereof, the Court desires further information as to how far back the assessments can be run."

Section 9742, R. S. Mo. 1929, provides as follows:

"For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Section 9977 of Article 11, Chapter 59, R. S. Mo. 1929, which relates to taxation and revenue, provides in part as follows:

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"The term 'real property,' 'real estate,' 'land' or 'lot,' wherever used in this chapter, shall be held to mean and include not only the land itself, whether laid out in town or city lots or otherwise, with all things contained therein, but also all buildings, structures and improvements and other permanent fixtures, of whatsoever kind thereon."

Section 9779, R. S. Mo. 1929, reads:

"Real estate shall be assessed at the assessment which shall commence on the first day of June, 1893, and shall be required to be assessed every year thereafter."

Section 9780, R. S. Mo. 1929, reads in part as follows:

"In all counties, except in the city of St. Louis, the assessor's books shall be arranged or divided into two parts only, part first to be known and denominated 'the land list,' which shall contain all lands by him assessed * * * with the owner's name."

It is well settled in Missouri that the owner of land containing minerals may segregate one from the other by a proper conveyance so that there is a complete severance of title and separate estates are created.

Gordon v. Million, 248 Mo. 155, 154 S.W. 99;
Snoddy v. Bolen, 122 Mo. 479, 25 S.W. 933;
Gordon v. Park, 219 Mo. 612, 117 S.W. 1167;
Wardell v. Watson, 93 Mo. 107, 5 S.W. 605.

As was said in Young v. Young, 307 Mo. 218, 270 S. W.
653:

"Coal and other minerals in place are land and may be conveyed as such, and, when thus conveyed constitute a separate and distinct estate and inheritance."

As was aptly stated in *Graciosa Oil Co. v. Santa Barbara*, 155 Cal. 140, 99 Pac. 483:

"For the purpose of separate ownership, land may be divided horizontally as well as superficially and vertically."

However, whether the coal and coal rights may be assessed and taxed separately from the surface land when such minerals are owned by a different person than the one who owns the surface, has not been decided in Missouri.

We have been informed and take cognizance of the fact, in view of an opinion rendered by this department to G. C. Beckham, Prosecuting Attorney of Crawford County, which is titled, "The procedure for the sale of mineral rights for delinquent taxes," that such a practice has been carried on in this state. A copy of said opinion is herewith enclosed for your information. Also, in the Assessor's Manual issued by the Missouri State Tax Commission in 1931, the following may be found on page 35:

"Q. How is a mineral reservation assessed--as real or personal property?

A. If mineral reservations have been reserved in a deed of conveyance or if a person is the grantee of mineral reservations by deed of conveyance, the reservation is to be valued and assessed to the owner thereof as real estate."

In *State ex rel. Ziegenhein v. Mission Free School*, 162 Mo. 332, 62 S. W. 998, the Supreme Court upheld the right to tax as realty a building which was owned by a person other than the one who owned the land. The court said:

"It is thus evident that, as between the said Mission School and said Thompson, Thompson is the owner of the leasehold and building and is liable for the taxes thereon * * *. All property except such as is specifically exempted by the Constitution and the statute made in

April 28, 1937.

pursuance thereof, is subject to taxation, and we can see no difficulty in assessing the separate and distinct property of Thompson in this building any more than would be encountered in assessing the property of any other individual. * * * * The assessment against the Mission Free School of the value of Thompson's building, in which it has no interest under its lease, is illegal."

The fact that our statutes do not specifically provide for the assessment and taxing of the severed estate does not in any way militate against the contention that such separate interest is taxable. As was stated in *State ex rel. Ziegenhein v. Mission Free School*, 162 Mo. 332, 62 S. W. 998, supra, a building owned by one other than the person who owns the land is assessable and can be taxed. This procedure is not specifically provided for by the statutes. The Circuit Court of Appeals of the Tenth Circuit, in the case of *Central Coal & Coke Co. v. Carseloway*, 45 Fed. (2d) 744, 1. c. 746, pointed out:

"And, if the mineral estate is exempt from tax because the taxing statutes are silent as to severed estates, why not the surface? No reason appears why one interest, the surface, should be taxed, and the other, the coal, should escape. The truth is that, if the contention of plaintiffs is sound, all interests in real estate, the surface, the minerals, the improvements, are automatically exempted from any taxation the moment a severance of the interest therein occurs, either by grant or reservation, for there is no more statutory authority for taxing the surface estate, after severance, than there is the mineral estate, after severance."

Taking all the above statutes and cases into consideration, we find that all real property must be assessed and taxed (Sections 9742 and 9779), the same to be in the name of the owner (Section 9780). Real property is defined as land

with all the things contained therein (Section 9977), including coal in place, which may be owned as a separate estate and distinct from the surface estate (Cases cited, supra). Therefore, coal in place owned separate from the surface would be assessable and taxable as real property.

This seems to be the universal rule in other jurisdictions, that mineral and mineral rights in land are real property, and when segregated by the owner from the surface estate by proper conveyance, the same become the subject of taxation separate and apart from the surface estate.

In some states such taxation is expressly provided for by statute.

Big Creek Co. v. Tanner, 303 Ill. 297, 135 N.E. 433;
Cherokee v. Pittsburgh Coal & Mining Co. v. Crawford
County, 71 Kan. 276, 80 Pac. 601;
Stuart v. The Commonwealth, 94 Ky. 595, 23 S.W. 367;
Washburn v. Gregory Co., 125 Minn. 491, 147 N.W. 706;
Hadley v. Hadley, 114 Tenn. 156, 87 S. W. 250;
Tiller v. Excelsior Coal Corp., 110 Va. 151,
65 S. E. 507;
Low v. County Court, 27 W. Va. 785.

In other jurisdictions the taxation of the separate estate has been upheld because the statute stating what is to be considered real property or land for the purpose of taxation defines land as including minerals or mineral rights.

Central Coal & Coke Co. v. Carseloway, 45 Fed. (2d)
744, which interprets the Oklahoma statute;
Mercantile Trust Co. v. Hopkins, 103 Cal. App. 473,
284 Pac. 1072;
Union Pac. R. Co. v. Hanna, 73 Colo. 162,
214 Pac. 550;
Smith v. New York, 68 N. Y. 552;
State v. Downman, 134 S. W. 785.

However, other jurisdictions hold that even where it is not so provided by statute, that a separate mineral interest owned separate from the other part of the land is independently taxable as real estate.

Board of Commissioners of Greene Co. v. Lattas
Creek Coal Co., 179 Ind. 212, 100 N.E. 561;
In re Colby, 184 Ia. 1104, 169 N.W. 443;
Washburn v. Gregory Co., 125 Minn. 491,
147 N.W. 706;
Rockwell v. Warren County, 228 Pa. 430,
77 Atl. 665;
Waterman v. Davis, 66 Vt. 83, 28 Atl. 664.

In re Colby, 184 Ia. 1104, 169 N. W. 443, cited above,
the court said:

"Section 1308 of the Code declares that
all property, real and personal, is
subject to taxation, and paragraph 8 of
section 48 of the Code defines land, real
estate, and real property as including
'lands, tenements, hereditaments, and all
rights thereto and interests therein,
equitable as well as legal.'

"2. It is equally well sett led that,
when the fee in the mineral has been
separated from the fee in the surface,
the fee or interest in the former is
assessable and taxable to the owner there-
of as real estate. This much is settled
by the statutes heretofore referred to, for
surely the title to minerals in situ con-
stitutes an interest in the land. See In
re Major, 134 Ill. 19, 24 N. E. 973;
Kansas Natural Gas Co. v. Board of Com-
missioners, 75 Kan. 335, 89 Pac. 750;
Wolfe County v. Beckett, 127 Ky. 252,
105 S. W. 447, 32 Ky. Law Rep. 167, 17
L. R. A. (N.S.) 688, and note collecting
cases."

In Board of Commissioners of Greene County v. Lattas
Creek Coal Co., 179 Ind. 212, 100 N. E. 561, the Supreme Court
of Indiana held:

" * * * where there has been a severance,
resulting in a divided ownership, the
owner of the fee is properly assessable
with the value of the surface, and owner
of the mineral with its value." (Citing
cases.)

This view is upheld by most of the authorities.

Judge Cooley, in his excellent work on Taxation, says (4th Ed., Vol. 2, par. 566):

"Sometimes one person owns or holds the surface rights of land while another owns or holds the mineral rights. This may result from a deed, lease, or other transfer of greater or less rights. In such a case, the question arises as to whether the holder or owner of the mineral rights can be separately taxed because of such interest. Sometimes such taxation is expressly provided for by statute, but even where not so provided, it is generally held that the separate mineral interest, where transferred, is independently taxable as real estate, and payment of a tax on the land does not preclude a tax against another person on a mining right in such land. This separate ownership of mineral interests, so as to be taxable, may result from a reservation to the grantor of the mineral interests, on conveying the land as well as from a conveyance by the owner of the surface to another of the minerals."

The same rule is stated in 61 C. J. 180; Morrison's Mining Rights, par. 322; Barringer & Adams Law of Mines and Mining, par. 115, and White Mines and Mining Remedies, par. 410. The reason behind this rule, as suggested in the case of State ex rel. v. Mission Free School, supra, is that everyone should pay taxes on his property, and no one should be forced to pay taxes upon the property of someone else.

As the Circuit Court of Appeals said in Central Coal & Coke Co. v. Carseloway, 45 Fed. (2d) 744:

"The plaintiffs own the coal in question; it cannot be taxed to the owner of the surface, because he does not own it, any more than the plaintiffs can be taxed for the surface which they do not own. Either this valuable property must be taxed to plaintiffs or not be taxed

at all. * * * No reason appears why one interest, the surface, should be taxed, and the other, the coal, should escape."

As was said in Board of Commissioners of Greene County v. Lattas Creek Coal Co., 179 Ind. 212, 100 N. E. 561:

"We think that our legislation contemplates that no one shall be required to pay taxes on property that he does not own, and that no one shall escape taxation on property he does own."

Most jurisdictions that have held that such separate estate can not be taxed have done so under express direction of their constitution or statutes.

Barthold v. Dover, 153 So. 49 (La. App.);
In re Winton Lumber Co., 63 Pac. (2d) 664 (Ida.);
Superior Coal Co. v. Mussellshel County, 98 Mont.
501, 41 Pac. (2d) 14.

The only other case that seems to hold that such separate taxation is not permissible is Curry v. Lake Superior Iron Co., 190 Mich. 445, 157 N. W. 19, 1. c. 20, in which the court held that:

"All of the estates in any particular description must be assessed together, and it is unimportant whether the assessment is made to all or to but one of several owning interests or estates therein."

This holding would seem to indicate that the surface estate and the mineral estate must both be assessed in one assessment, and only one tax paid thereon. However, the court recognized that both estates are taxable and it was pointed out at 1. c. 20:

"It must be presumed that the assessing officer, in obedience to the statutory mandate, each year included in the assessment against the complainant the value of the estate owned by the defendant

in the description. This being true, it was no more the duty of the complainant to pay the entire tax, a portion of which was assessed against the defendant's estate, than it was the duty of the defendant to make such payment of the entire tax a portion of which was properly chargeable against complainant's interest. The owner of neither estate could protect his own property without paying an obligation properly chargeable against the owner of the other."

Therefore, the court held that while the owners are liable for the taxes on their separate estates, yet since both estates are assessed together, that one, in order to protect his own estate, must pay the entire assessment and then seek proportionate part from the other owner. This rule is peculiar to Michigan and is contrary to the great weight of authority, including the Missouri case of *State ex rel. Ziegenhein v. Mission Free School*, 162 Mo. 332, 62 S. W. 998, *supra*, and other authorities cited above, especially *Washburn v. Gregory Co.*, 125 Minn. 491, 147 N. W. 706, in which the court said at l. c. 707:

" * * * it was not only proper to tax the mineral interest separately, but it was plainly an irregularity to assess to one owner as one property both the surface and the mineral rights, when they were owned separately."

We next turn to your question as to how far back such assessment may run. Section 9789, R. S. Mo. 1929, provides as follows:

"If by any means any tract of land or town lot shall be omitted in the assessment of any year or series of years, and not put upon the assessor's book, the same, when discovered, shall be assessed by the assessor for the time being, and placed upon his book before the same is returned to the court, with all arrearages of tax

which ought to have been assessed and paid in former years charged thereon."

Section 9961, Laws of Missouri, 1935, page 405, provides:

"No proceeding for the sale of land and lots for delinquent taxes under the provisions of Chapter 59, Revised Statutes of Missouri, 1929, relating to the collection of delinquent and back taxes and providing for foreclosure sale and redemption of land and lots therefor, shall be valid unless initial proceedings therefor shall be commenced within five (5) years after delinquency of such taxes, and any sale held pursuant to initial proceedings commenced within such period of five (5) years shall be deemed to have been in compliance with the provisions of said act in so far as the time at which such sales are to be had is specified therein, Provided further, that in suits or actions to collect delinquent drainage and-or levee assessments on real estate such suits or actions shall be commenced within five years after delinquency, otherwise no suit or action therefor shall be commenced, had or maintained."

This point is decided in State ex rel. Hammer v. Vogelsang, 183 Mo. 17, 81 S. W. 1087, in which taxes on certain real estate for the years 1885 to 1890, inclusive, had been omitted from the current assessments of those years. The omission was discovered in 1896 and the assessment then made. The court quoted Section 7562, R. S. Mo. 1889, which is the same as Section 9789, R. S. Mo. 1929, cited supra. The court held that:

"The suit is not barred by the statute of limitations. No right of action accrued until the taxes were assessed and had become delinquent. The assessment was made in 1896, the taxes were

April 28, 1937.

therefore not delinquent until January, 1897. The five years' limitation expired January 1, 1902. The suit was brought December 16, 1901.

"The case of State ex rel. v. Fullerton, above referred to, was a suit under this statute to collect taxes on land that had been omitted from the assessor's books in former years, just as was the defendant's land in this case, and the court in that case held that the statute of limitations did not begin to run during the years the land was omitted from the assessor's books and not until after the discovery of the omission and the assessment of the taxes as required by section 7562, Revised Statutes 1889, and until they became delinquent after that assessment. And so we now hold."

It is plain from the above that it is the duty of the assessor, when he discovers that real property has been omitted in the assessment of any year or series of years, to assess said property for all the years it has been omitted. The tax on the omitted property does not become delinquent until January 1st, following the year it is assessed, and initial proceedings for the collection of such delinquent tax may be commenced at any time within five years of the date of delinquency.

We have held, however, in an opinion given to Hon. Barker Davis, Prosecuting Attorney of Lewis County, that the County Board of Equalization, under the provisions of Section 9816, R. S. Mo. 1929, can only assess property omitted from the assessor's books for the current year. A copy of said opinion is enclosed.

April 28, 1937

CONCLUSION

It is therefore the opinion of this department that coal or other mineral rights in place are real property and may by proper conveyance be severed from the land by the owner thereof, and when so severed the same becomes the subject of taxation, separate and apart from the surface estate, and the taxes should be assessed against the owner of said coal or other mineral rights.

It is the further opinion of this department that where coal or other mineral rights owned separately from the surface estate have been omitted in the assessment of any prior year or series of years, that the assessor, when he discovers the omission, should assess said property for all the years it has been omitted. The taxes on said omitted property would not become delinquent until January 1st, following the year it was assessed, and initial proceedings could be commenced at any time within five years of the date of delinquency.

However, it is the opinion of this department that the County Board of Equalization is only authorized, under the provisions of Section 9816, R. S. Mo. 1929, to assess omitted property for the current year only.

Yours very truly,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

AO:HR

FISH AND GAME: It is possible to charge a crime under
Section 8265, Revised Statutes Mis-
souri, 1929.

May 13, 1937



Honorable Paul N. Chitwood
Prosecuting Attorney
Reynolds County
Centerville, Missouri

Dear Sir:

This Department is in receipt of your request
for an opinion which reads as follows:

"I have been receiving a number
of complaints against a party in
Reynolds County, Missouri, for an
alleged violation of the Fish and
Game Laws, particularly Section
8625, R. S. 1929, relating to
the Contamination of Streams, and
which has been declared invalid
in the case of State v. Light,
etc. Co. 212 Mo., 101, which
reads in part as follows:

" 'Section 28 of the Game and
Fish Law of 1905, Laws 1905, p.
163, providing that it shall
be unlawful for any person or
persons, firm or corporation to
suffer or permit any dyestuff,
coal tar, oil, sawdust, poison
or deleterious substances to
be thrown, run or drained into
any waters of this State in
quantities sufficient to in-
jure, stupefy or kill fish
which may inhabit the same at or
below the point where any such
substances are discharged or

permitted to flow or thrown in such waters, is void, for the reason that it does not intelligently describe or define an offense. It only punishes the person or company that permits those things to be done, and not the person that does them. Nor does it require the persons doing the wrongful act to be in the employ or under the control of the person or firm permitting the act to be done. Besides the court cannot supply the essential and necessary provisions which would impress as wrongful and criminal the acts designated in the statute, such as its failure to impose on those committing the acts the duty to prevent the throwing of poisonous substances into the waters of the State, or to declare that they occupy any position that would impose upon them either the moral or legal obligation of not permitting the commission of such acts.'

"Being unable to find any later cases, or any further legislation supplying the necessary and essential parts of this law, I was just wondering what your opinion is as to whether or not a demurrer would be sustained as to the information in the particular case referred to, which I am planning on filing in the near future.

"Will you please give me your opinion in this matter at your

earliest convenience, if possible
as long a time before May 24th,
(when our Circuit Court meets)
as can be arranged?"

Section 8265 was amended in 1915 so that it
contains its present form. Originally, the statute
read as follows:

"It shall be unlawful for any
person or persons, firm or corpora-
tion to suffer or permit any dye-
stuff, coal tar, oil, sawdust,
poison or deleterious substances
to be thrown, run or drained into
any of the waters of this State in
quantities sufficient to injure,
stupefy or kill fish which may in-
habit the same at or below the
point where any such substances are
discharged or permitted to flow or
thrown in such waters. Any person
or persons, firm or corporation
offending against any of the pro-
visions of this section shall be
deemed guilty of a misdemeanor,
and upon conviction shall be fined
not less than \$200 nor more than
\$500 for each offense."

Section 8265, concerning which you have requested
a construction, is as follows:

"It shall be unlawful for any
person or persons, firm or cor-
poration to cause any dyestuff,
coal tar, oil, sawdust, poison
or deleterious substances to be
thrown, run or drained into any
of the waters of this state in
quantities sufficient to injure,
stupefy, or kill fish which may
inhabit the same at or below
the point where any such sub-

stances are discharged or caused to flow or be thrown into such water: Provided, that it shall not be a violation of this section for any person, firm or corporation engaged in any mining industry to cause any water handled or used in any branch of such industry to be discharged on the surface of the land where such industry or branch thereof is being carried on under such precautionary measures as shall be approved by the state game and fish commissioner. Any person or persons, firm or corporation offending against any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction, shall be fined not less than two hundred dollars (\$200.00) nor more than five hundred dollars (\$500.00) for each offense."

The changes which the Legislature enacted in 1915 were to the effect that, whereas, the original section contained the words "to suffer or permit," whereas, Section 8265 uses the words "to cause," and the original section contained the words "where any such substances are discharged or permitted to flow or thrown in such waters," whereas, the present section contains the words "or caused to flow or be thrown in such waters," and, in addition thereto, has the above proviso which is in the nature of an exception.

As stated in your letter the court has interpreted the original section as being void for the reason that it did not intelligently describe or define an offense. The logic and reason for the same is contained in the case of State v. Light, 212 Mo. 1. c. 106;

"It will be observed that the provisions of that section undertake to create and define an offense by simply saying that any person or persons, firm or corporation who shall suffer or permit any poisonous or deleterious substances to be thrown, run or drained into the waters of this State in quantities sufficient to injure, stupefy or kill fish, shall be deemed guilty of a misdemeanor. No one can read the provisions of that section and escape the conclusion that it is a marked departure from the usual legislation along that line which undertakes to define criminal offenses. It will be observed that the provisions of this section do not condemn the act of throwing poison or deleterious substances into the waters of this State, but is simply directed against those who suffer or permit such act to be done. In other words, A may throw the poison or deleterious substances into the waters of this State, but his act is not embraced within the provisions of this section. On the other hand, if B. suffers or permits A to do this act, he is guilty of a criminal offense. As it is very tersely stated by the learned Attorney-General in his brief now before us, 'a person who actually and flagrantly does place poison or deleterious substances in the waters of this State escapes punishment, and the one who suffers or permits it to be done is punished.' Another marked feature of this statute is the omission of necessary provisions which are absolutely essential in order to

stamp the acts of persons permitting or suffering substances to be thrown into the waters of this State as a wrongful or criminal act. It nowhere provides that the permission or suffering of the acts to be done must be upon premises or in the operation of a plant under the control of the persons, firm or corporation designated by the statute, or that the persons committing the act are in the employ of such persons, firm or corporation. In other words, there is an entire absence from that section of provisions which in any way impose the duty upon the persons, firm or corporation designated by the statute to prevent the throwing of poisonous substances into the waters of this State or that such persons, firm or corporation as mentioned in the statute occupied any position which would impose upon either the moral or legal obligation of not suffering the commission of such acts. Manifestly the provisions of this section were intended to be directed towards persons, firms or corporations operating sawmills or other plants along streams of water in this State where poisonous refuse matter from such plants might be thrown, run or drained into such streams of water, but the difficulty in holding that this statute intelligently defines a criminal offense is that the court cannot supply the essential and necessary provisions which would impress the acts committed by those designated in the statute as wrongful or criminal."

Evidently, by the present statute, namely, Section 8265, it was the intention of the legislature to correct the defect in the original section, and hence, the words

"permitted or suffer" were changed, and in lieu thereof the word "cause" was inserted.

The court, in the Light decision, pointed, indirectly, the way for curing the defects in the original statute. We are, therefore, concerned with the meaning of the words "to cause." An interpretation of the effect of these words is contained in the case of *Huffman v. United States*, 259 Fed. l. c. 38:

"For the purpose of a construction of this statute, it would seem that Webster's definition, 'to cause a thing is to effect it as an agent; to bring it about' - is sufficient, and therefore, in the determination of the sufficiency of the evidence to sustain the verdict, the question becomes one of whether or not under all the testimony, with the reasonable inferences that the jury might logically and reasonably draw therefrom, there was sufficient to sustain this allegation of the indictment that the defendant 'caused' the transportation of this girl in interstate commerce from the point named to Denver, Colo., for the purpose therein set forth."

In the decision of *Stance v. San Luis Valley Land and Milling Company*, 166 Fed. 220, the Court, in referring to the word "cause", states:

"An allegation in the complaint that defendant caused the affidavits charging the offense to be filed and plaintiff to be arrested and prosecuted is a sufficient charge that defendant initiated the prosecution."

In the decision of *Webb v. Strobach*, 143 Mo. App. 459, the court defines the word "cause" in the following

manner:

"The word 'cause', in Rev. St. 1899, sec.5989, providing that, when a city of the fourth class desires to pave its streets, the board of aldermen shall by resolution declare such improvement to be necessary and 'cause' the resolution to be published in some newspaper, etc., is used in its common meaning, 'to effect,' 'to produce,' 'to bring about,' and the mode in which publication is to be effected, produced, or brought about is not specifically designated."

In the decision of State ex rel. Watts v. Cain, 58 S. E. 937, is further enlightenment on the word "cause," and its meaning is as follows:

"To 'cause' means to act as a cause or agent in producing; to effect, bring about, be the occasion of, make, force, or compel; to effect as an agent; to produce or bring into existence. The power given to the county dispensary board, before permitting any dispensary to offer liquor for sale, to cause it to be put into packages of specified quantities involves the power of bottling it through such agencies as they deem best and authorized it to establish a bottling plant of its own for that purpose."

CONCLUSION

As stated in your letter, and we find the same to be true, there are no later decisions relating to

May 13, 1937

Section 8265 since the amendment of the original section, yet, we are of the opinion that by the changes made in the statute the defects, as set forth in the Light decision, are cured; that by changing the words "permit or suffer" to "cause" and the legal effect of the words "to cause" will supply the essential necessary provisions which impress as wrongful and criminal the acts designated in the statute.

We are not in possession of the facts in your case, which might have been of valuable assistance to us in determining the question. We are of the opinion that you should be in a position to draw an information under Section 8265 and that a demurrer should not be sustained on the grounds that it was impossible to charge a crime under Section 8265.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

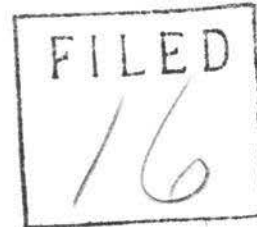
OWN:LC

LOTTERIES: Cleo Colo Bottle Caps.

October 4, 1937

107

Hon. G. R. Chamberlin
Prosecuting Attorney
Cass County
Harrisonville, Missouri



Dear Sir:

We have your request of September 25, 1937, for an opinion relative to the distribution of prizes (money), by inserting in Cleo Colo bottle caps a piece of cork, properly lettered, showing the holder thereof is entitled to receive five cents to One dollar in cash prizes for presenting this to a dealer.

We assume that all bottle caps are not so stamped and that the corks used in the various bottles of Cleo Colo vary in value according to the stamps placed upon them. Under these circumstances a person who buys a bottle of Cleo Colo also buys a chance on getting no prize, or a prize varying in size from five cents to One dollar in cash.

Without burdening this opinion too much with citations of authorities we refer you to State vs. Emerson, 1 S. W. (2) 109; State ex rel. vs. Hughes, 299 Mo. 529; 253 S.W. 229; 28 A.L.R. 1305; State vs. Becker, 248 Mo. 555, 154 S.W. 769.

It is therefore the opinion of this office that the awarding of prizes by this method is a lottery prohibited by Section 4314 R. S. Missouri 1929, and Article IV, Section 10 of the Missouri Constitution.

Hon. G. R. Chamberlin

-2-

October 4, 1937

If dealers are conducting such a lottery in your County, it becomes your duty to institute prosecutions, as per an opinion of this Department written by Mr. Covell R. Hewitt, which is enclosed herewith.

Respectfully submitted

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM
Enclosures.

NEWSPAPERS: Officers under Section 13774, R. S. 1929, are not compelled to accept bids from newspapers, but may accept bids in the interest of efficiency and economy and not violate any statute.

October 14, 1937.

10-16



Honorable Paul N. Chitwood
Prosecuting Attorney
Reynolds County
Centerville, Missouri

Dear Sir:

This Department acknowledges receipt of your letter of October 13th, in which you make the following inquiry:

"Under the terms of Section 13774 can the County Court or the Public Officers mentioned in Section 13773 accept bids from newspapers when the same does not conflict with other statutes and the bids be considered the most advantageous terms that can be obtained?"

The statute mentioned, Section 13774, R. S. Mo. 1929, is as follows:

"In procuring the publication of any law, proclamation, advertisement, order or notice, as in the next preceding section mentioned, the public officers shall accept of the most advantageous terms that can be obtained, not exceeding the rates limited in the preceding section."

The above quoted section refers to the rates for public advertisements as contained in Section 13773, R. S. Mo. 1929. The effect of the two sections and the close relation of the same are commented on by the court in State

v. Westhues, 9 S. W. (2d) 612, 1. c. 619, as follows:

"The rates herein specified' are the rates specified in the first sentence comprising eleven lines of new section 10401. Such rates may not be higher than \$1, etc. We are unable to perceive any conflict between new section 10401 and section 10402, R. S. 1919. Hence the latter section must be deemed to be in full force and effect. New section 10401 and section 10402, R. S. 1919, must be read together and construed as if they read: There shall not be allowed for such publication a higher rate than \$1 per square, etc., but, in procuring such publication, the public officers shall accept of the most advantageous terms that can be obtained, not exceeding \$1 per square, etc."

At the outset we are concerned with the meaning of the expression in the statute, "shall accept of the most advantageous terms that can be obtained, not exceeding the rates limited in the preceding section." The Legislature has not seen fit to define what is meant by "the most advantageous term" nor has it placed any limitation on the exercise of an administrative officer's right to use his discretion in determining the most advantageous terms. This fact is commented upon in the case of Bakersfield News v. Ozark County, 92 S. W. (2d) 1. c. 605.

The question as to whether or not under Section 13774, supra, the administrative officer, or officers to which the publication is intrusted, must accept bids in order to obtain the most advantageous terms, is decided also in the above case of State v. Westhues, 1. c. 619, in the following language:

"The requirement of section 10402, R. S. 1919, that the officer 'shall accept the most advantageous terms that can be obtained,' imposes upon such officer the right and duty to exercise an official

discretion. Respondent held that the secretary of state was under no duty to submit the publication of the proposed constitutional amendments to competitive bidding or even to accept the lowest bid, if any such bids were received. The statute does not define the words 'most advantageous terms.' It left it to the secretary of state to determine for himself what terms are most advantageous and to accept the terms he deems to be most advantageous. The statute has not provided that the advantageousness of the terms offered to the officer shall be determined by the number of readers of the given newspaper, nor by its circulation in a particular county, nor by the price to be charged for the publication, nor by the relation of that price to the maximum price authorized by new section 10401; nor does section 10402, R. S. 1919, provide at what time the secretary of state shall determine the advantageousness of the terms offered to him, nor even that the secretary of state shall peddle the publication from one newspaper office in the county to another in order to ascertain all or any of these facts. In short, the General Assembly has not defined the words 'most advantageous terms.'

"Respondent held that the secretary of state had a discretion, which it was his right and duty to exercise. Respondent then proceeded to advise the secretary of state how he should exercise such discretion, to wit:

"That he must exercise that discretion and select those papers that give the widest publicity at rates which are reasonable and in exercising this discretion he must protect the interests of the state financially, as well as otherwise.'

"It may be that the secretary of state should take all the things specified by respondent into consideration in exercising his official discretion, but the declaration of his duty in that respect must come from the legislative and not the judicial department of our state government.

"The legislative department has intrusted to an administrative officer the right and duty to exercise his discretion in determining what terms are 'most advantageous,' and up to this time the General Assembly has seen fit neither to define what it means by the words 'most advantageous terms' nor to rebuke any secretary of state for the manner in which he has exercised such discretion in the past. Reference need only be made to the Session Acts of Missouri from the date of the adoption of the initiative and referendum amendment to the present time to learn that the General Assembly has placed the seal of its approval upon the manner of the exercise of such discretion by all of our secretaries of state when it uniformly passed appropriations to pay for such publications on the terms accepted by them. The appropriation for that purpose by the General Assembly in 1927 is particularly significant (Laws of 1927, p. 69, Sec. 80), in view of the facts that the secretary of state was at that time enjoined from approving bills for such publications. See *Fugel v. Becker* (Mo. Sup.) 2 S. W. (2d) 743."

Conclusion.

We are of the opinion that it is not incumbent or mandatory on the administrative officer, being the county court,

Oct. 14, 1937.

county clerk and other officers of such nature, to whom it is made the duty, as mentioned in Section 13774, supra, to publish proclamations, notices, etc., to accept bids from the various newspapers of the county in order that the most advantageous terms may be obtained. However, we are of the opinion that any of the officers, as mentioned in said section, are at liberty to use bidding as a method to determine the most advantageous terms, providing that the newspaper has the essentials which make it desirable in which to publish a proclamation or other publication; that if such a method is employed in the interest of efficiency and economy the said method does not in anywise violate any statute nor is it contrary to any decision.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

CITIES - Under special Charter, Legislature cannot amend a charter of a city under special charter, but enactment of a law uniformly to apply to all cities under special charter permitting the levying and collecting of taxes.

January 26, 1937

1-28



Honorable Geo. D. Clayton Jr.
Senator 13th District
Missouri Senate
Jefferson City, Missouri

Dear Senator:

This is to acknowledge your letter as follows:

"The City of Hannibal, which operates under a special charter issued in 1873, is anxious to have the charter amended so that its taxing powers will be broadened.

Will you please advise me if in your opinion the charter can be amended?"

Appended to your letter was a copy of a resolution passed by the city council of the City of Hannibal. Said resolution in part reads as follows:

"NOW THEREFORE BE IT RESOLVED; That the Council authorize and instruct the proper City, County and State Officials to take whatever steps are necessary to amend Section 6 Article IV of the Charter of the City of Hannibal so that it will read the same as Section 6840, Article 4, Chapter 38 as the same appears on Pages 277-8, Laws of Missouri, 1931,"

As stated in your letter the City of Hannibal operates under a special charter issued in 1873. We do not have a copy of the charter and do not know what section 6, article IV of the charter provides. However, it is not essential to a determination of your question. The present Constitution of Missouri was adopted

in 1875 and Section 7 of Article IX provides:

"The General Assembly shall provide, by general laws, for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the power of each class shall be defined by general laws, so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. The General Assembly shall also make provisions, by general law, whereby any city, town or village, existing by virtue of any special or local law, may elect to become subject to, and be governed by, the general laws relating to such corporations."

Pursuant to Section 7 of Article IX, the Legislature classified cities into cities of the first, second, third and fourth classes. Chapter 38, Revised Statutes 1929. Hannibal has a population, according to the 1930 United States Census, of 22761 inhabitants. Official Manual, State of Missouri 1935-36. The City of Hannibal has a population sufficient to enable it to be a city of the Third Class. Sections 6092, 6095.

Article 13, Chapter 38 relates to "Cities and towns under special charters". As the City of Hannibal was granted a charter in 1873 (prior to the adoption of the constitution in 1875), we assume that it has never operated other than as a city under special charter. While it has the right to take advantage of the article relating to cities of the Third Class, it has not done so. Article IV, Chapter 38. In *Kansas City et al v. Scarritt et al* 127 Mo. 642 the Supreme Court of Missouri in 1895 reviewed the history of the present Section 7, Article IX of the Constitution and observed at page 652 as follows:

"The record of legislation prior to 1875, contained in the session acts, furnishes the facts from which it is easy to infer the reasons that led to the adoption of those sections of the constitution."

"City charters were the favorite ground for special legislation. The constant tinkering to which those instruments were subjected, not only created confusion and uncertainty in construing the law, but covered the state with specimens of incongruous pieces of patchwork legislation,
* * * * *.

The object of the constitution of 1875, in dealing with this topic, was to secure some uniformity in the organization and action of municipal corporations in the state. Hence the strict limitations laid down in regard to the classification of cities, and the prohibition of more than four classes of city charters (even when created by general laws of incorporation) under the new constitution. Leaving, however, special charters granted previously to continue in operation."

The legislature is restricted to the enactment of laws that are uniform. Special legislation is not permitted.

"It is well settled that a law which includes all persons who are in or who may come into like situations and circumstances is not special legislation." *Elting et al v. Hickman et al*, 172 Mo. 237, 257.

Thus the legislature cannot amend the present charter of the City of Hannibal because it would be special legislation. However, the legislature could enact a law which would be general and applicable in scope to all cities of the size of Hannibal. To illustrate, the legislature could enact a law providing that any city having a special charter and containing 30,000 inhabitants and not less than 10,000 could by ordinance authorize the levying and collection of taxes. Thus, the legislature could enact Section 6840 found in Laws of Missouri 1931, pages 276, 277 and 278 and make it apply to cities under special charter. The

statute could be drawn so as to include it under Article 13, Chapter 38 R. S. Mo. 1929.

From the above it is our opinion that the charter of the City of Hannibal cannot be amended. In *Kansas City ex rel v. Scarritt*, 127 Mo. 642 l. c. 653, 654, the court said:

"The act under review relates solely to matters of internal municipal government. It seeks to amend the existing charter of Kansas City in a number of ways; and its last passages indicate plainly that such is its main design. It can not be supported without nullifying the guaranty which the fundamental law gives, in section 16, above quoted, against invasion of the right of local self-government in the internal affairs of such cities.

While we should never pronounce an act of the general assembly void for want of conformity to the constitution unless it is very clearly so, yet, when such is the case, our duty requires us to declare it, and thus vindicate the supremacy of the organic law as the paramount expression of the will of the people of the state.

We consider that the act in view is a palpable departure from the precepts of the constitution, and that it can not stand."

However, it is our further opinion, the legislature could by statute authorize cities under special charters with the same population as the City of Hannibal, to levy and collect the same taxes as is authorized by Section 6840 supra, for cities of the Third Class.

Yours very truly,

JAMES L. HORNBOSTEL
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JLH:SW

INHERITANCE TAX: 1) A step child considered a stranger in blood.
2) A Half-brother entitled to some exemptions as a brother of the whole blood.

May 10, 1937

Mr. James D. Clemens
Attorney at Law
Farmers Bank Building
Bowling Green, Missouri



Dear Sir:

This department is in receipt of your request for an opinion as to the following:

"I have been appointed tax appraiser in estates involving the following questions as to exemptions:

1. Does a half-brother have the same status as a full brother?
2. Does a step-son (never legally adopted) have any exemption other than as a stranger?

Your rulings on these points will be greatly appreciated."

I.

Under the Inheritance Tax Laws of Missouri, a step child is considered as a stranger in blood.

On January 22, 1935, this department ruled that under the inheritance tax laws of Missouri, a step child is to be considered as a stranger in blood, and the inheritance tax must be paid upon the succession provided by the statute for a stranger in blood. A copy of this opinion is attached hereto for your consideration.

II.

Under the Inheritance Tax Laws of Missouri, a half-brother is to be treated as a brother of the whole blood.

Sub-section 2 of Section 572 R.S. Mo. 1929, provides:

May 10, 1937

"(2) Three per cent.- Where the person or persons to whom such property or any beneficial interest therein passes shall be the brother or sister, or the descendant of a brother or sister of the decedent, the wife or widow of a son, or the husband of a daughter of the decedent, at the rate of ~~three~~ per centum of the clear market value of such property or interest therein."

Section 575, R. S. Mo. 1929, provides, in part, as follows:

"The following shall be exempt from taxes provided for in this article: ***** all transfers of property or any beneficial interest therein of the clear market value of Five Hundred Dollars to each of the persons described in the second subdivision of Section 572 of this article ****."

There is no language in these statutes that would indicate any legislative intent to exclude half-brothers and half-sisters from the exemption provided for whole sisters and whole brothers. While there are no Missouri decisions construing this section of our laws, we may, in the absence thereof, have recourse, as persuasive, to decisions of the Courts of other states. In the case of *People v. Elliff* (Colorado) 219 Pac 224, the precise question here presented was before the Supreme Court of Colorado. Judge Campbell, in speaking for the Court, said:

"To require brothers and sisters of the half blood to pay a higher rate of inheritance or succession tax than those of the full blood would be to discriminate in favor of the latter. Our General Assembly did not, in the succession or inheritance tax statute, indicate, either explicitly or impliedly, that any discrimination or distinction, as between brothers and half-brothers, or sisters and half-sisters, was intended. In construing the statute we are, therefore, bound to presume that the words "brother" and "sister" were intended to, and they did, include half-brother and half-sister respectively, since no qualifying or limiting words or expressions are found in the statute."

In view of the decision of the Supreme Court of Colorado, and in the absence of any language in our statutes indicating a legislative intent to exclude half-brothers and half-sisters from the exemptions provided in Section 575, it is the opinion of this

Page #3

May 10, 1937

department that a half-brother is entitled to an exemption of \$500.00.

Respectfully submitted,

JOHN W. HOFFMAN
Assistant Attorney General

APPROVED:

(Acting) Attorney General

SALES TAX
COUNTIES

LIABILITY FOR TAX FOR PURCHASES:

)
) ^{No 7} Counties/liable for sales tax
) for purchases for institutions
) for indigent poor.

July 27, 1937

Mr. Paul J. Clay
Clerk of the County Court
St. Francois County,
Farmington, Missouri



Dear Sir:

This office is in receipt of your request as follows:

"The question has arisen as to whether or not Counties would be liable for the two per cent sale tax, now in effect, upon goods purchased for the County maintained institutions for indigent poor. For instance, our County has been paying the sale tax on goods purchased by the County and used at the County Infirmary. We wish to know if we should continue to pay this tax."

The Legislature by Sub-section (a) of Section 1, of the Sales Tax Act, defines the word "person" as used in said Act to include county, political subdivision, etc.

Sub-section (e) of Section 1 of the Act defines the word "purchaser" as follows:

"The word 'purchaser' whenever used in this Act means a person who purchases tangible personal property or to whom are rendered services, receipts from which are taxable under Section 2 of this Act."

Sub-section (a) of Section 2, is as follows:

"Upon every retail sale in this State of tangible personal property a tax equivalent to two (2) per cent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to two (2) per cent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange".

Section 6 of the Act is as follows:

"It shall be the duty of every person making any purchase or receiving any service upon which a tax is imposed by this Act to pay the amount of such tax to the person making such sale or rendering such service; any person who shall wilfully and intentionally refuse to pay such tax shall be guilty of a misdemeanor."

Special Rule No. 3 provides in part as follows:

"There is hereby specifically exempted from the provisions of this Act and from the computation of the tax levied, assessed or payable under this Act such retail sales as may be made between this state and any other state of the United States, or between this state and any foreign country, and any retail sale which the State of Missouri is prohibited from taxing under the Constitution or laws of the United States of America, and such retail sales of tangible personal property which the General Assembly of the State of Missouri is

July 27, 1937

Prohibited from taxing or further taxing by the Constitution of this state".

Section 46 of the Sales Tax Act which is in words as follows:

"In addition to the exemptions under Section 3 of this Act there shall also be exempted from the provisions of this Act all sales made by or to religious, charitable, eleemosynary institutions, penal institutions and industries operated by the Department of Penal Institutions or educational institutions supported by public funds or by religious organizations, in the conduct of the regular religious, charitable, eleemosynary, penal or educational functions and activities, and all sales made by or to a State Relief Agency in the exercise of relief functions and activities."

The above section makes exemptions as to eleemosynary institutions and charitable institutions. By a special rule No. 4 of the rules and regulations relating to the Missouri Sales Tax Act of 1937, the State Auditor has ruled that sales by or to charitable or eleemosynary institutions are exempted from the provisions of the Sales Tax Act.

Such rules and regulations as are made and promulgated by the officers whose duty it is to administer and to enforce the provisions of the Legislative Acts are to be given the most respectful consideration (Boyer Campbell Company vs. Frye, 260 N. W. 165).

This leads us to the question of whether or not county institutions maintained for the aged poor persons are eleemosynary or charitable institutions and if they are, whether the purchases made by the county for the support of such institutions are exempt from the provisions of the sales tax.

Eleemosynary institutions as are used and defined in New York Poor Laws, means a place for the poor, maintained at the public expense and are called Almshouses. (People vs. Lyke, 53 N. E. 802). Under Words and Phrases, Series One, almshouse is defined by Webster as a house operated for the poor. Under Words and Phrases, Second Series, the word "eleemosynary" is defined as relating to charity, alms or almsgiving. A poorhouse and the farm connected for the employment and maintenance of the poor of a county, is purely a public charity, because it is devoted to the employment and support of the poor of the county without regard to sex,

Mr. Paul J. Clay

4
75-
July 27, 1937

race or creed: (Township of Comru vs. Directors of Poor for County of Berks - 112 Pa. Sta. Reports, 1. c. 270).

By Article 4, Chapter 70 R. S. Mo. 1929, the Legislature has set up a system for the taking care of the poor persons of the county and has imposed the duties upon the county court to provide for the proper support of such persons from the public funds. Although the county is one of the Political subdivisions of the State that is included, within the definition of the word "person" in Sub-section (a) of Section 1 of the Sales Tax Act, and seems to be included with those which are liable for the payment of the tax unless it is exempt by some other section of the Act.

In view of the fact that by Section 46 of the Sales Tax Act, it is provided that, eleemosynary and charitable institutions are exempt from the provisions of the Sales Tax Act and in view of the fact that county infirmaries or poor houses, are classed as eleemosynary or charitable institutions, this office is of the opinion that goods purchased by the county and used at the county infirmaries are exempt from the payment of the 1937 Sales Tax.

In consideration of the foregoing, this office is of the opinion that the county Infirmaries and County Farms come within the classification of Eleemosynary or Charitable Institutions which are included within the classes exempted from the Sales Tax, and that the sales by or to the County for the use of the Infirmaries and County Farms are exempt from the Sales Tax Act.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:LB

2-16
February 15, 1937.

INHERITANCE TAX:

- I. Probate Court not entitled to Appraiser's fee
- II. Nephews of an intestate decedent entitled to exemption of \$500.00 each.



Honorable E. L. Colton,
Probate Judge of Wright County,
Hartville, Missouri.

Dear Sir:

This department is in receipt of your letter of February 10th, requesting an opinion as to the following:

"There are two questions relative to the Missouri Inheritance Tax Laws about which I am having difficulty in establishing a fixed opinion in my mind, and am therefore writing this asking for your assistance in the matter.

Under Section 585 of the Revised Statutes for 1929, which authorizes a Probate Judge to appraise an estate for the purpose of determining the amount of tax due, by performing the same duties required of an appraiser, can he also legally charge the per diem fee allowed an appraiser for such services?

My other problem can best be stated by an hypothetical case. If an intestate decedent leaves as his only heirs three brothers, and two nephews, the two nephews being sons of a fourth brother, who is deceased, are each of the two nephews entitled to \$500.00 exemptions, or should their combined exemptions be \$500.00?

Trusting that you can straighten me out on these points, without too much trouble to yourselves, I am, "

February 15, 1937.

I.

THE PROBATE COURT NOT ENTITLED TO APPRAISER'S FEE.

Section 585, R. S. Missouri 1929 provides that the Probate Court shall have jurisdiction to determine the amount of tax provided under the inheritance tax law and to determine any question that may arise in connection therewith. It further provides that the Court may, on its own motion or on the application of any interested person, including the State Treasurer, the Prosecuting Attorney or the Attorney General, appoint some qualified tax-paying citizen of the county as appraiser. If an appraiser be appointed under this Section he is entitled to \$5.00 per day for the time he is actually engaged in the performance of his duties. Section 589 R. S. Missouri 1929. The question here before us is as to whether the Probate Court, acting as appraiser under Section 585, can collect this fee. We think not and for the following reasons:

In the first place, we do not believe that it was the intention of the Legislature in enacting this law that the Probate Court should be entitled to a per diem as appraiser. For instance, it is provided in section 585 that the appraiser shall file with the court an oath, and, further, shall file a notice with the court appointing him of the time and place for hearing the evidence. In Section 586, it is provided that he shall make a report of his appraisement to the Court, in writing. Section 587 provides that exceptions may be filed to this report and such exceptions determined by the Court in a summary manner. These and other sections clearly show that it was the intention of the Legislature that the Court and the appraiser appointed by the Court are to be separate and distinct offices.

In addition to the above, it is a principle too familiar to need citation that a public officer seeking a fee must be able to point to a statute granting to him the fee in question. In the case here at hand the \$5.00 per diem is granted by statute to the appraiser, a qualified tax-paying citizen of the county, appointed by the Court. It is against the policy of the law for an officer to use his appointing power to place himself in office. "Other reasons might be given, but it is sufficient to say, and we so hold, that it is against the policy of the law to allow a member of an appointing body in a case like this where the appointive office is a lucrative one to become the beneficiary of the appointment". State v. Bowman, 184 Mo. App. 549, 1. c. 558.

February 15, 1937.

II.

NEPHEWS OF AN INTESTATE DECEDENT ENTITLED TO EXEMPTION
OF \$500.00 EACH.

Section 575 R. S. Missouri 1929 grants an exemption of \$500.00 to each of the persons described in the second subdivision of Section 572. The second subdivision of Section 572 provides:

"Where the person or persons to whom such property or any beneficial interest therein passes shall be the brother or sister, or the descendant of a brother or sister of the decedent, the wife or widow of a son, or the husband of a daughter of the decedent, at the rate of three per centum of the clear market value of such property or interest therein."

In view of this Section, the two nephews in the case at hand are entitled to an exemption of \$500.00 each.

Respectfully submitted,

JOHN W. HOFFMAN, JR., ASSISTANT
ATTORNEY GENERAL.

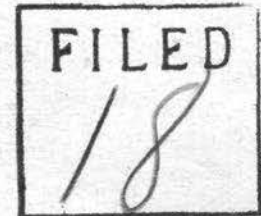
APPROVED:

(Acting) Attorney General

ELECTIONS:) Re prosecution for bribing voter in city election.
BRIBERY:)

May 12, 1937.

5-13



Honorable J. Carrol Combs
Prosecuting Attorney
Barton County
Lamar, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of April 23d in which you enclose a copy of an information which you propose to file in the Circuit Court of Barton County, charging a violation of the election laws. Your letter is as follows:

"During the city election here in Lamar, on April 6th, there was some evidence presented to me concerning the buying of votes at said election, or the attempt to purchase votes, and on the complaint of one, Cora Walters, I filed an information under the Corrupt Practice Act and Sec. 10473 thereof, charging the defendant with attempting to influence one, Mary Ellen Boss to vote at said election. I have been unable to find any cases setting out an information in the same.

"It is my intention to charge this man only with a misdemeanor and punish him under the provisions of Sec. 3938 of the Revised Statutes of 1929. I would like to have your opinion upon the sufficiency of this information in cases of this kind and whether or not the information, as drawn under the provisions of the first sub-division of Section 10473 of the Corrupt Practice Act, charges the defendant with a crime punishable under Section 3938 or with a crime punishable under sub-division

Hon. J. Carrol Combs -2- May 12, 1937.

five of that section provided for a felony, as there has been a difference of opinion between attorneys in our locality on this subject."

From your letter we take it that you desire to charge the defendant with a misdemeanor, and if such is the fact, we suggest that you proceed under the provisions of Section 3938, R. S. Mo. 1929, which covers the crime of bribing, or attempting to bribe a voter, instead, as you suggest, of a combination of Section 3938, supra, and Section 10473, R. S. Mo. 1929.

We are very doubtful if the information which you enclose charges an offense under the statute. If you will examine Kelly's Criminal Law and Procedure, 4th Edition, Section 866, page 804, you will find an indictment which seems to follow the language of Section 3938, supra. We have been unable to find an approved information which fits your case, but the one set out in Kelly's, which has not been approved, seems to meet the situation.

We have prepared and are enclosing a copy of an information which we think charges the misdemeanor of an attempt to bribe a voter under the provisions of Section 3938, supra. The facts upon which we base it are from your letter and also from the proposed information which you sent us.

If there is anything further in connection with this, or if we have not answered your question, please advise.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

CRH:EG

APPROVE :

J. E. TAYLOR
(Acting) Attorney-General

I N F O R M A T I O N

State of Missouri)
County of Barton) ss.

IN THE CIRCUIT COURT OF BARTON
COUNTY, MISSOURI,

SEPTEMBER TERM, 1937.

AT LAMAR, MISSOURI.

STATE OF MISSOURI,
Plaintiff,

vs.

WALT WILKERSON,
Defendant.

J. Carroll Combs, Prosecuting Attorney within and for the County of Barton in the State of Missouri, upon his oath informs the court and charges that on or about the 6th day of April, 1937, in the County of Barton and State of Missouri, an election was duly holden, the same being duly authorized by the laws of the State of Missouri, and that _____ and _____ were severally candidates and voted for at said election for the office of _____, and that said Walt Wilkerson then and there well knowing that said election was being holden as aforesaid, and that said _____ and _____ were candidates and being voted for at said election for the office of _____ as aforesaid, did then and there unlawfully and corruptly by offering a sum of money, to-wit, One Dollar (\$1.00) to one Mary Ellen Boss, as a gift, bribe and reward, attempt to corrupt, influence and procure the said Mary Ellen Boss to give and cast her vote at said election, so holden as aforesaid, to and for the said _____ candidate as aforesaid, for the office of _____ as aforesaid, she the said Mary Ellen Boss then

and there having and claiming to have, the right to vote at said election aforesaid, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State.

Prosecuting Attorney within and
for the County of Barton and
State of Missouri.

STATE OF MISSOURI,)
County of Barton) ss.

J. Carrol Combs, Prosecuting Attorney within and for the County of Barton, in the State of Missouri, being duly sworn upon his oath says that the facts stated in the foregoing information are true according to his best information and belief.

Prosecuting Attorney of Barton
County, Missouri.

Subscribed and Sworn to before me this _____ day of _____
1937.

Circuit Clerk of Barton County,
Missouri.

SCHOOLS: Voters may dispose of property not needed for school purposes, or the Board of Directors may sell a schoolhouse or site by providing a new schoolhouse and site.

June 11, 1937.



Mr. D. G. Cole
Sumner, Missouri

Dear Sir:

This is to acknowledge your letter of May 26, 1937, as follows:

"In reference to the conference Mr. L. O. Allen and myself had with Mr. Taylor, Tuesday, May 25, in regard to the disposal of the school building in Cons. Dist. No. 1. Mr. Taylor asked us to go to the Recorder's office and see whether this deed was deeded to the Dist. outright, or reverted back to the owner when no longer needed. Enclosed find report as requested.

"What we want is a ruling on whether we, as a Cons. Dist, can dispose of this property, or what proceeding we should take to clear it up.

"This was one of the three buildings in the three original Districts consolidated in 1913. We have been told that the directors of the Cons. Dist. have no legal right to sell this property. The other two buildings were sold several years ago. No question ever arose."

We understand the facts to be that a consolidated school district owns a piece of property which was acquired by quit claim deed, and that said district does not have any further use or need of the schoolhouse and desires to sell same.

Section 9269, R. S. Mo. 1929, reads as follows:

"The title of all schoolhouse sites and other school property shall be vested in the district in which the same may be located; and all property leased or rented for school purposes shall be wholly under the control of the board of directors during such time; but no board shall lease or rent any building for school purposes while the district schoolhouse is unoccupied, and no schoolhouse or school site shall be abandoned or sold until another site and house are provided for the school district."

Section 9284, R. S. Mo. 1929, reads in part as follows:

"The qualified voters assembled at the annual meeting, when not otherwise provided, shall have power by a majority of the votes cast:

* * * * *

"Seventh-- To direct the sale of any property belonging to the district but no longer required for the use thereof, to determine the disposition of the same and the application of the proceeds. *** "

Mr. D. G. Cole

-3-

June 12, 1937.

The above statutes are the only ones we can find relating to the right of a school district to dispose of its property. Section 9284 gives the qualified voters the right to direct the sale of any property belonging to the district, but no longer required for use by the district. However, Section 9284 contains the words "when not otherwise provided", and Section 9269 vests the title to school property in the district and restricts the board to the sale or abandonment of a schoolhouse or a school site until another site and house are provided.

There is no question but what the title to school property vests in the school district. School District of Oakland v. School District of Joplin, 102 S. W. 909.

It is our opinion that the voters under Section 9284, at an annual meeting may dispose of the property, or that the Board of Directors, by virtue of Section 9269, may sell same if another site and house are provided. In other words, two methods are provided for in the statutes for the disposing of school property, either one of which would be adequate. Therefore, if the Board desires to dispose of its property, then it must affirmatively be shown that another site and house are provided for the school district. While if the voters, assembled at the annual meeting, vote by a majority of the votes cast to sell property no longer required, then such action would also dispose of the property. You may pursue either method.

Yours very truly,

James L. HornBostel
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

JHH/R

NEWSPAPERS: Must be published in a regular, continuous and unbroken established mode for three years before legal notices are valid.

October 20, 1937

Hon. Sam V. Cochran
Judge of Probate Court, Cooper County
Boonville, Missouri



Dear Sir:

This department is in receipt of your letters of September 30 and October 19, 1937, in which you request an opinion as follows:

"I am desirous of an opinion from your office with reference to the legality of inserting Notices of Letters of Administration and Notices of Final Settlement in a certain newspaper which is being published in this county.

I note that Section 13775 of the laws of 1937 repeals a number of the sections of the Revised Statutes of Missouri, of 1929, and sets forth some new qualifications for a newspaper eligible to receive legal publications.

The facts in this instant case are as follows: The Pilot Grove Weekly Record has been published in Pilot Grove, Missouri for fifty-seven years. Until recently it was individually owned by George B. Harlan of Pilot Grove, Missouri. A short time ago a new corporation was formed which is owned by several stockholders and is headed by George B. Harlan, the owner of the Pilot Grove Weekly Record at the time it suspended publication on September 24, 1937. The new corporation has Boonville, Missouri, as its residence and its principal place of doing business.

The name of this new newspaper being published by the aforesaid corporation is the

October 20, 1937

"Cooper County Record". Underneath the name appears the statement that it is a continuation of the Pilot Grove Weekly Record. I am told by Mr. Harlan that the Cooper County Record will use the same mailing list as the Pilot Grove Weekly Record, and that the volumes and numbers used in the Pilot Grove Weekly Record will continue in this new publication.

It is apparent that the name, the city of publication and the ownership have been changed. The county of publication, Cooper County, is the same. The first issue of the Cooper County Record was published on September 30, 1937, and therefore, has not been in existence three years as provided in section 13775 of the Laws of 1937, unless one may regard the fifty-seven years of continuous publication of the Pilot Grove Weekly Record as satisfying that requirement. The Cooper County Record, like the Pilot Grove Weekly Record, is a newspaper which is published once each week, and has been admitted to the Post Office in the city of Boonville as second class matter, and will have a general circulation in the county.

A statement in the September 30 issue of the 'Cooper County Record' reading as follows: 'With this issue The Pilot Grove Weekly Record becomes the Cooper County Record, published at 203 Main Street, Boonville, and entered at the post office in the county seat. As the name implies, its scope is broadened to include all of Cooper County.'

I would appreciate very much your giving me an opinion on the legality of notices published by the Probate Judge in the Cooper County Record."

Section 13775, Laws of 1937, page 431, is as follows:

"All public advertisements and orders of publication required by law to be made and all legal publications affecting the title to real estate, shall be published in some daily, tri-weekly, semi-weekly or weekly newspaper of general circulation in the county where located and which shall have been admitted to the postoffice as second class matter in the city of publication; shall have been published regularly and consecutively for a period of three years; shall have a list of bona fide subscribers voluntarily engaged as such * * *, and further provided that every affidavit to proof of publication shall state that the newspaper in which such notice was published has complied with the provisions of this act. Provided further, that the duration of consecutive publication herein provided for shall not affect newspapers which have become legal publication prior to the effective date of this act * * * * *."

From your letter, it is clear that the Cooper County Record does meet a part of the requirements made by the above section in that it is a weekly newspaper of general circulation in Cooper County, has been admitted to the postoffice as second class matter in the City of Boonville, and has a list of bona fide subscribers. The question here seems to be: Has the Cooper County Record complied with the statute wherein it is provided that a newspaper, in order to be a legal publication, as contemplated by this act, "shall have been published regularly and consecutively for a period of three years?"

Words & Phrases, Vol. 7, First Series, page 6040, defines "regularly" as follows:

"Webster defines 'regularly' to mean a uniform order at certain intervals or periods, as by day and night. Zulich v. Bowman, 42 Pa. (6 Wright) 83, 87.

* * * * *

The word 'regularly' is defined as meaning in a regular manner; in a way or method accordant to rule or established

mode; in uniform order; methodically; in due order. Such is its signification in an ordinance requiring a railroad company to operate the road regularly, etc. City of Belleville vs. Citizens' Horse Railway Co., 38 N.E. 574, 587; 152 Ill. 171; 26 L.R.A. 681."

Words & Phrases, Vol. 2, First Series, page 1437, define "consecutive" as follows:

"'Consecutive' is synonymous with 'successive', and these words are often used interchangeably; so that a decision that a publication for 3 successive weeks must be made for a period of 21 days authorizes such holding as to a publication required to be made for 3 consecutive weeks. Dever vs. Cornwell, 86 N.W. 227, 230; 10 N.D. 123.

* * * * *

While the term 'consecutive days' primarily means that many days directly following one another, it is also defined as meaning successive; but in cases of contracts that significance should be given it which the parties intended it should have. A contract providing for publication in a paper for 10 consecutive days must mean publication in consecutive numbers as such paper was published. We do not regard the word 'consecutive' as any more forcible than the word 'continuous'. Both signify 'unbroken' and the fact that the newspaper published no issue on Sunday did not render the publication other than consecutive. City of El Paso vs. Ft. Dearborn Nat. Bank (Tex.) 715 W. 799, 802."

In view of the above definitions, it is clear that the meaning of this act is that the newspaper must be published in a regular, continuous and unbroken established mode for the statutory period of three years.

It will be noticed that the legislature used the term "shall have been". In State ex rel Stevens vs. Wurdeman,

246 S.W. 1.c. 189, it is said:

"Usually the use of the word 'shall' indicates a mandate, and unless there are other things in a statute it indicates a mandatory statute."

In *Ex Parte Brown*, 297 S.W. 1.c. 447, it is said:

"Where a fair interpretation of a statute directs acts or proceedings to be done in a certain way shows that the Legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, then such statute is mandatory."

✓ We think this section is mandatory wherein it provides what qualifications a newspaper must have to publish legal publication, and it is to be further noticed that the affidavit to proof of publication must state that the newspaper has complied with the provisions of this act for the publication to be a valid one.

The Cooper County Record, even though it has a new name, owner and location is, under the facts furnished this department, only a continuation of the Pilot Grove Weekly Record. It has the same subscribers, serves the same territory and uses the same volumes and numbers of publication. It is to be noticed that the statute does not prohibit the sale, changing of name or location of a newspaper. The time which elapsed between the date the Pilot Grove Weekly Record published its last issue and the date the Cooper County Record published its first issue is from September 24 to September 30, 1937. It cannot be said, the one being a continuation of the other, that this is not publication in a regular, continuous and unbroken mode.

In *Rutter vs. Carothers*, 223 Mo. 1.c. 643, in stating a rule to be applied in construing statutes, it is said by the court:

"that those who interpret the laws must not impute injustice to the lawmaker by so interpreting his language as to unnecessarily produce harsh and unreasonable results, or impute to him a disposition callous to natural justice."

October 20, 1937

In Perry vs. Strawbridge, 209 Mo. l.c. 639, it is said by the court that:

"A statute should be construed with reference to its spirit and reason; and the courts have power to declare that a case which falls within the letter of a statute is not governed by the statute, because it is not within the spirit and reason of the law and the plain intention of the legislature."

Applying the above rules of construction to the facts in the instant case, we believe that in order to further the ends desired by the legislature in this act and to avoid a harsh and unreasonable result and promote natural justice that the Cooper County Record is in fact only a continuation of the Pilot Grove Weekly Record and that there has been no suspension of publication within the reason and spirit of the law which breaks the regular and consecutive publication required by statute.

CONCLUSION

Therefore, it is the opinion of this department that the Cooper County Record meets the requirements of the statute and is a legal publication.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED By:

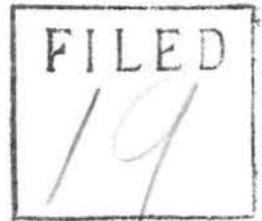
J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

SOCIAL SECURITY - Social Security Act does not repeal, expressly or impliedly, the Act creating Social Welfare Boards in counties having a city or cities of the first class.

November 16, 1937.

Honorable J. E. Corby, President
Social Welfare Board
St. Joseph, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion reading as follows:

"Last week when Mr. George I. Harworth was in St. Joseph we discussed what effect, if any, the passage of the last Legislature of the act creating the Social Security Commission has on the Social Welfare Board of this city. It was agreed that the writer should bring the matter to your attention with the request that your Department make a ruling on this point.

"In the preamble of the Social Security Commission law a number of Sections are specifically mentioned as being repealed, but no specific mention is made of those Sections covering the Social Welfare Board law. The Social Welfare Board law is contained in Sections 12938 to 12945, incl., it being Article II of Chapter 90 of the Revised Statutes of Missouri for 1929."

In determining your request for an opinion, we point to the general law and cases construing inconsistent act or parts of acts that have been repugnant to one another. In this respect we have also considered the modes of repeal and whether or not one act repeals another act without express mention.

Your attention is directed to 59 C. J., page 900, Section 501, which reads:

"In the absence of any constitutional restraint, a state legislature may exercise the power of repeal in any form in which it can give a clear expression of its will. There are two ways of repealing a statute or part thereof; one is by express terms, the other is by necessary implication. While ordinarily the legislature may be expected to employ express terms to give effect to its intent to repeal a statute, it is under no obligation to do so, and in a proper case a repeal may be effected by implication. The question of repeal is one of intent and must be solved by determining as near as may be the intent of the legislature. ** "

Then again, at page 902, Section 506, it is stated:

"A statute which in general terms repeals all other laws within its purview repeals an earlier statute covering the same subject; and the repeal is not confined merely to such parts of the former act as are inconsistent with the provisions of the repealing act; but there is no repeal of the provisions of former laws as to cases not provided for by the repealing statute; and where some of the provisions of the prior are within the purview of the repealing act, while others are not, and to hold the former repealed and the latter not would lead to an absurdity, none of the provisions upon the subject will be held repealed."

And Section 507 reads in part:

"Instead of carefully scrutinizing the existing statutes and specifying in terms which are repealed, it is a

common practice for the legislature, in enacting a statute, to insert a clause that all laws and parts of laws in conflict, or all acts and parts of acts inconsistent, with the statute are repealed. Such a provision indicates a legislative intent and undertaking to repeal some statutory provision, but it leaves open the question of what acts are inconsistent, and frequently it leaves the question of repeal in doubt. ** "

In considering whether or not the Social Security Act, Laws of Mo. 1937, page 467, is repugnant to Article 2 of Chapter 90, R. S. Mo. 1929, we have assumed that the Legislature must have had in mind the latter act at the time the former was passed.

In the case of State vs. Bader, 78 S. W. (2d) 835, 839, the Supreme Court, in speaking of the presumption that the Legislature had in mind a previous act or an act in *pari materia*, said:

"It is not to be presumed that the same body of men would pass conflicting and incongruous acts. The presumption is that they had in mind the whole subject under consideration; that, whilst the one general subject is touched in several separate acts, yet the legislative intent was that of a harmonious whole. In such case, it is the duty of the courts to so construe all the act in such manner that each and every part thereof may stand, if such construction can be attained, without doing violence to the language used in the several acts."

Attention is directed to Section 25 of the Social Security Act, Laws of Mo. 1937, at page 478, reading:

"All provisions of law in conflict with this Act are hereby repealed. If any provision of this Act, or the application thereof to any person or circumstance is held invalid the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby."

In the case of State vs. Smith, 67 S. W. (2d) 50, 57, the Supreme Court has aptly stated the rule to be, in quoting Lewis-Sutherland on statutory construction and 25 R.C.L., Section 169, 170, as follows:

"It is the established rule of construction that the law does not favor repeal by implication but that where there are two or more provisions relating to the same subject matter they must, if possible, be construed so as to maintain the integrity of both. It is also a rule that where two statutes treat of the same subject matter, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although later in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject matter as far as coming within its particular provisions.

"In many of the cases just cited (under the passage quoted supra) there was a general repeal of all inconsistent acts and parts of acts. As a general rule the insertion of this general repealing clause does not add anything to the effect of the general act to repeal local or special laws.

"The same text states in section 275:
'The general law can have full effect beyond the scope of the special law, and by allowing the latter to operate according to its special aim, the two acts can stand together. Unless there is a plain indication of an intent that the general shall repeal the other, it will continue to have effect, and the general words with which it conflicts will be restrained and modified accordingly.' "

We deduce from the authorities cited that where a statute or act is inconsistent or repugnant to another, that such statutes or acts should be construed so as to permit both to stand. The reason for this is apparent, because the Legislature would not pass conflicting or incongruous acts, and we should indulge in the presumption that they had the whole subject under consideration. However, this rule in the construction of inconsistent or repugnant acts is not always to be followed, because in some instances while repeals by implication are not favored, acts totally repugnant must necessarily be repealed by implication.

While the Social Security Act is intended to be comprehensive in its scope within the purview of the designated purposes outlined in Section 1, it does not follow from this observation that the Legislature intended a repeal of the Act providing for Social Welfare Boards. A reading of the Act providing for Social Welfare Boards clearly indicates that such Board or Boards may function without conflicting with the operation of the Social Security Act. This may be illustrated by reference to Section 12944, R. S. Mo. 1929, which provides in part, in substance, that the Board shall make a concentrated attack on social causes of hardship, unsanitary housing, child labor, extortionate charges of pawnshops, salary loan and chattel mortgage agreements. Other duties imposed upon the Social Welfare Boards might be illustrated for which we have no useful purpose in this opinion. Nowhere is any duty expressed nor implied that would indicate the Social Security Commission is authorized to engage in the activities illustrated.

November 16, 1937

Without attempting to consider every provision of the Social Security Act to see whether or not any of such provisions are inconsistent or repugnant to the Act creating Social Welfare Boards, suffice it to say that the two Acts can be permitted to stand and function within the scope of their general plan.

CONCLUSION

In view of the above, it is our opinion that the Social Security Act, Laws of Mo. 1937, page 467, does not repeal, expressly or impliedly, Article 2 of Chapter 90, R. S. Mo. 1929 relating to Social Welfare Boards in counties having a city or cities of the first class.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS:FE

ROADS AND BRIDGES:

SPECIAL BENEFIT ROAD DISTRICTS: May contribute district funds to purchase of right-of-way within the district of roads, but may not do so outside of the district

January 14, 1937

Honorable Joseph C. Crain
Prosecuting Attorney
Ozark, Missouri



Dear Sir:

We have received your inquiry, which is as follows:

"The Sparta-Monger Special Road District of Christian County, Missouri, a Special Road District organized under Article 10, Chapter 42, Section 8061 Revised Statutes of Missouri, 1929, wishes to contribute a sum of money for the purchase of right of way for a farm to market highway passing through their district.

"This proposed highway will relieve them of maintaining part of the roads within their district. They would also like to know if they can contribute anything toward the purchase of right of way of this same highway in an adjoining district.

"There has been considerable discussion as to their authority to do this and I have been requested to ask your office for an opinion on this point."

Special Benefit Road Districts, under Chapter 42 of Article 10 R. S. 1929, are authorized by Section 8068 to spend money arising from the sale of bonds in the following way:

"The proceeds of the sale of such bonds shall be used for the purpose only of paying the cost of holding such election, and constructing, repairing and maintaining bridges and culverts within the district, and working, repairing, maintaining and dragging public roads within the district."

By Section 8072 they are authorized to spend money raised by special benefit taxes in the following way:

"All money collected on special tax bills and all money the commissioners may so borrow, and all interest that may accrue thereon while on deposit in any county depository, shall be used, and warrants drawn on the treasurer therefor, for the following purposes only: To pay the cost and expense incurred by the commissioners, as found by the court, in the preparation of such plans, specifications, estimate, map and profile, and said list of lands, and a reasonable attorney's fee as found by the court, for such petitioners, and to pay the cost of improving said public road or part of a public road in accordance with the plans and specifications so filed with the clerk of the county court, and such working, administrative and incidental expenses, not otherwise provided for by law, as may be incurred in making such improvement and in procuring, collecting and paying the cost of such improvement, and the balance, if any, shall be used in paying expenses of maintaining such improvement."

further providing that the money borrowed by the commissioners

shall be repaid, with interest, out of the collection of such special tax bills as were unpaid at the time such money was borrowed.

Section 8073 authorizes the district to pay out of such funds for the following purposes only:

"To pay the costs and expenses incurred by the commissioners, as found by the court, in the preparation of said plans, specifications, estimate, map and profile, and said list of lands, and a reasonable attorney's fee, as found by the court, for such petitioners, and to pay the cost of improving said public road or part of a public road in accordance with the plans and specifications so filed with the clerk of the county court, and such working, administrative and incidental expenses, not otherwise provided by law, as may be incurred in making such improvements, and the balance, if any, shall be used in paying expense of maintaining such improvement."

By Section 8065, "Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts within the district, to construct, improve and repair such highways, bridges and culverts," and are required to keep such roads, bridges and culverts in as good condition as the means at their command will permit, and are authorized to employ hands and teams and to rent, lease or buy all things needed to carry on such work.

By Section 8066 it is provided that the poll tax and the taxes levied by the county court on the taxable property in the district shall be placed to the credit of the district and,

"All revenue so set aside and placed to the credit of any such incorporated district shall be used by the commis-

sioners thereof for constructing, repairing and maintaining bridges and culverts within the district, and working, repairing, maintaining and dragging public roads within the district and paying legitimate administrative expenses of the district, and for such other purposes as may be authorized by law."

By Section 8067, "The board of commissioners of any district so incorporated shall have power to levy, for the construction and maintenance of bridges and culverts in the district, and working, repairing and dragging roads in the district, general taxes on property taxable in the district."

By Section 8061 the county courts of counties not under township organization may divide their counties into road districts, and when so done they

"according to the provisions of this article shall be a body corporate and possess the usual powers of a public corporation for public purposes, and shall be known and styled ' _____ road district of _____ county,' and in that name shall be capable of suing and being sued, of holding such real estate and personal property as may at any time be either donated to or purchased by it in accordance with the provisions of this article, or of which it may be rightfully possessed at the time of the passage of this article, * * *."

In *Schmidt v. Berghaus* 205 Mo. App. 409, the Springfield Court of Appeals was construing Section 10585 R. S. 1909 under the Eight-mile District Road Law. Section 10585, there construed, is substantially the same as Section 8065, R. S. 1929, with reference to the powers of the commissioners, and the court in that case said, l. c. 413, that this section leaves "it to the discretion of commissioners as

to what roads in any district shall be improved and the manner of the improvement."

In the case of Sharp v. Kurth 245 S. W. 636, the St. Louis Court of Appeals, in discussing the liability of commissioners of such road districts, said, at l. c. 638:

"It is likewise clear that the individual defendants, being special commissioners of the road district, are not liable for their mistakes of judgment or their acts of negligence in doing work.

* * * * *

"Special road commissioners can only be held liable individually when their acts are maliciously and willfully committed."

The case of Cook v. Hecht 64 Mo. App. 273, 279, is there approved and quoted from.

We assume your county is not under township organization. We construe your inquiry to be that a joint effort is being made by others interested in the improvement of the road, and the special road district is, along with the others, agreeing to pay a part of the expense of procuring the right-of-way. We consider it well recognized that where one subscribes to a fund on condition that others do likewise said funds, when raised, to be paid over for the purpose for which raised; that a binding contract is made if not prohibited by law and no statute is contravened thereby.

Section 8065 seems to contemplate that said commissioners shall have only jurisdiction over the roads within the special road district. It says:

"Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts within

the district."

By this expression and the other provisions of this and the other above mentioned sections, it logically follows that their authority is limited to roads within the district. The fact that the Legislature used the above quoted words definitely stating the roads over which the commissioners have jurisdiction and thereby limited their authority to those roads, reasonably indicates that their authority is limited and may not go beyond the improvement of those roads.

In the case of *Keane v. Strodtman* 18 S. W. (2d) 896, 1. c. 898, construing a statute, the Supreme Court of this State, in Banc, in 1929 said:

"The familiar maxim of 'expressio unius est exclusio alterius' may also be invoked, for the maxim is never more applicable than in the construction of statutes. * * * *

"Certainly where, as at bar, the statute * * limits the doing of a particular thing to a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done."

Section 8061 contemplates authority in the commissioners to acquire and hold real estate; it enumerates among the district's powers that of "holding such real estate and personal property as may at any time be either donated to or purchased by it in accordance with the provisions of this article."

We are informed as a practical fact that the construction of many roads in this day and time is dependent upon procuring the right-of-way by the local authorities, that is, the county courts or the people or districts locally interested and benefited by the construction of such highways. It is, of course, as necessary to spend money in acquiring the right-of-way of a road as it is to spend money in acquiring or building the road itself.

In view of the decision of the case of Platte City Benefit Assessment Special Road District v. Couch, 8 S. W. (2d) 1003, it might be seriously contended that that part of the funds of the special road district arising from the special assessments could not be used for other purposes than the specific purposes for which the special assessments were made. However, that decision is not authority to the effect that the special road district can not expend other moneys it may have on hand from other sources for the purchase of highway right-of-ways.

Section 8131, R. S. Mo. 1929, under Article 12 of Chapter 42, dealing with the State Highway System, is as follows:

"Any civil subdivision as defined in this article shall have the power, right and authority, through its proper officers, to contribute out of funds available for road purposes all or a part of the funds necessary for the purchase of rights-of-way for state highways, and convey such rights-of-way, or any other land, to the state of Missouri to be placed under the supervision, management and control of the state highway commission for the construction and maintenance thereupon of state highways and bridges. Funds may be raised for the purpose of this article in such manner and such amounts as may be provided by law for other road purposes in such civil subdivision; provided that there shall not at any time be any refund of any kind or amount to said civil subdivision by the state of Missouri for lands acquired under this section."

Section 8132 thereof defines the term "civil subdivision" in broad enough terms that special benefit road districts appear to be included within that meaning.

The true object of the Legislature was to confer upon the commissioners of such a district the authority to use their best judgment in the manner and method of spending the district's funds, in order that the greatest good might come to

January 14, 1937

the improved road system of the district. That objective may sometimes be attained by contributing some of the funds of the district in the joint effort to procure the right-of-way, and may result in greater good to the improved road system of the district than would result if they did not so contribute.

CONCLUSION

We are of the opinion that the special road district has authority to pay out a reasonable amount of the funds of said district (except the funds arising from special benefit taxes) to go to the purchase, within the district, of the right-of-way of a farm to market road running through the district, if, in good faith, said commissioners, exercising their best judgment, believe it to be to the advantage of the road system within said district so to do. If the right-of-way sought is outside of the district, it appears to us the money of the district should not be expended for or toward the purchase thereof.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

DW:LC

LABOR: Commissioner of Labor can prosecute proprietor or owner of gasoline filling station under Section 13218, Revised Statutes Missouri 1929, for failure to pay inspection fee.

March 22, 1937

3-29

Mrs. Mary Edna Cruzen
Commissioner
Labor & Industrial Inspection Department
Jefferson City, Missouri



Dear Mrs. Cruzen:

This Department is in receipt of your letter of March 6 wherein you make the following inquiry:

"I hereto attach a file of correspondence with the Mid-Continent Petroleum, Tulsa, Oklahoma, in connection with my efforts to collect the fees covering the inspection of their service stations and bulk plants located in the various towns and cities of this State.

"Under date of July 10, 1933, you rendered to me, at my request, an opinion wherein you advised that I was authorized to make inspections of gasoling filling stations, under section 13218, Revised Statutes of Missouri, in cities of over three thousand population. This I have been doing, but the Mid-Continent Petroleum Corporation has protested payment of fees covering same. I would appreciate an opinion from you as to section 13219, Fees for inspection--owner or manager refusing to allow inspection guilty of misdemeanor-- penalty. "

"To me it does not appear that I have any authority to sue in an effort to force a collection of such fees, but I would like to be advised as to

Mrs. Mary Edna Cruzen

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March 22, 1937

whether or not it would be logical for me to prosecute for refusal to pay such fee.

"Thanking you for your consideration of this matter, and your opinion, I am."

This Department, as the correspondence attached to your letter indicates, has at one time ruled on the question in controversy between your Department and the Mid-Continent Petroleum Corporation, by holding to the effect that gasoline filling stations are mercantile establishments within the meaning of Section 13218, Revised Statutes Missouri 1929.

We have been unable to locate any authority by any court which would tend to make us change the original ruling of this Department. We note that Mr. Burckhalter, Assistant Tax Agent for the Mid-Continent Petroleum Corporation, insists that you furnish him with authority substantiating your position in the matter.

Since you have taken the position that the gasoline filling stations are liable for tax, we consider the burden on Mr. Burckhalter to furnish you with authority to the contrary, and that you are under no greater obligation to this effect than he is. If the gasoline filling stations are mercantile establishments within the meaning of Section 13218, then, we think, under the decision of State v. Vickers 186 Mo. 103, that you would have authority to prosecute and could charge the station owner with "wilfully and unlawfully refusing to pay the inspection fee." This decision, after disposing of constitutional questions raised, makes this pertinent conclusion, l. c. 107:

"As a police regulation the State has the unquestioned right to exact and demand an inspection fee for the inspection and certificate of inspection required by the act. It has never been ruled that an inspection fee pure and simple is a tax upon

March 22, 1937

property. (Cooley on Taxation, 586; State ex rel. v. Hudson, 78 Mo. 302; St. Charles v. Alsner, 155 Mo. 671; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345; Willis v. Standard Oil Co. 50 Minn. 290.)

"The inspection fee of one dollar for the inspection and certificate is so manifestly reasonable that it is clear that it is not objectionable on that ground.

"The very mention of an inspection law suggests the exercise of police power by the State and the requirement that the persons or things inspected shall pay for it. The fact that the manufacturers are required to pay the inspection fee provided by this act in no manner infringes any constitutional right of the defendant. "

Therefore, in answer to your question as to whether or not it would be logical for you to prosecute, we are of the opinion that you are in a position to take that course if you so desire.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

USURY: Construction of Criminal Statute on Usury.

April 7, 1937.

4-15



Honorable Joseph C. Crain
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Mr. Crain:

This is to acknowledge your letter of March 30th, in which you request the opinion of this Department. Your letter is as follows:

"I have a matter before me in regard to a prosecution for usury and I think an opinion from your office would settle the question.

"A local concern which hires a number of employees pays these employees on the first and fifteenth of each month. It has been the practice of some of these employees to assign their wages to an outsider at a discount a few days before pay day. For example; in one instance one employee made the following transaction: He was working for a salary of \$40.00 per month and received \$20.00 each pay day. On February 20, 1937, he received from John Jackson the sum of \$18.00 and made the following assignment to Jackson 'I hereby assign and sell to John Jackson, wages due me from Rhodes Manufacturing Company in the sum of \$20.00. Date February 20, 1937. Signature, Frank Harris.'

"Jackson presented the assignment to the Rhodes Manufacturing Company on March 1 and collected the \$20.00. The foreman of this plant has complained about the matter and contends that Jackson should be prosecuted for usury.

April 7, 1937.

"I would appreciate an opinion from your office as to whether or not Jackson has been guilty of usury."

Your question is whether or not the facts as set forth in the second paragraph of your letter of request would constitute the basis for an indictment or information for usury.

Section 4421, R. S. Mo. 1929, 4 Ann. Statutes, p. 4032, provides as follows:

"Every person or persons, company, corporation or firm, and every agent of any person, persons, company, corporation or firm, who shall take or receive, or agree to take or receive, directly or indirectly, by means of commissions or brokerage charges, or otherwise, for the forbearance or use of money or other commodities, any interest at a rate greater than two per cent per month, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail for a period of not less than thirty days nor more than ninety days. Nothing herein contained shall be construed as authorizing a higher rate of interest than is now provided by law."

This statute is an old one but there do not seem to have been very many prosecutions under same reaching the appellate courts. We find that the constitutionality of this law was attacked in *Ex parte Berger*, 193 Mo. 16, and its constitutionality upheld, and on page 32 the court said:

"We have no doubt whatever, when the whole act is read together, that it was the intention of the Legislature that it should apply to every person who should take any interest directly or indirectly by means of commissions or brokerage charges or otherwise in excess of a rate of two per cent per month, and, after all, the purpose of all rules of

April 7, 1937

construction is to arrive at the intent of the lawmaking power. The whole section when read together manifests an intention to cover the exaction of usurious interest which is direct and also an exaction of usurious interest of more than two per cent per month by means of commissions or brokerage charges, and hence this third constitutional objection to the act based upon verbal criticism is without foundation."

An information charging usury is found in State v. Haney, 130 Mo. App. 95, l. c. 97, and the case was affirmed and the information, as written, approved by the Springfield Court of Appeals.

We might suggest that under Section 2969, R. S. Mo. 1929, assignment of wages, salaries or earnings, not earned at the time the assignment is made, shall be null and void.

It is our opinion that, under the facts as set forth in your letter, under a sufficient indictment or information a submissible case could be made charging the crime of usury.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

CRH:EG

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

BUREAU OF LABOR: Under Section 13210 R. S. Mo. 1929, beauty shops are not included therein.

May 14, 1937.

5-14



Mrs. Mary Edna Cruzen
Labor Commissioner
Labor and Industrial
Inspection Department
Jefferson City, Missouri

Dear Mrs. Cruzen:

This department is in receipt of your request for an opinion which reads as follows:

"Does the Labor and Industrial Inspection Department have the authority to inspect beauty parlors under Section 13218, and to enforce Section 13210?

I am having quite a few complaints with reference to these establishments and would appreciate your kindness in rendering an opinion on same."

Section 13218 R. S. Missouri 1929, provides as follows:

"The state commissioner of labor and industrial inspection may divide the state into districts, assign one or more deputy inspectors to each district, and may, at his discretion, change or transfer them from one district to another. It shall be the duty of the commissioner, his assistants or deputy inspectors, to make not less than two inspections during each year of all

factories, warehouses, office buildings, freight depots, machine shops, garages, laundries, tenement work-shops, bake shops, restaurants, bowling alleys, pool halls, theaters, concert halls, moving picture houses, or places of public amusement, and all other manufacturing, mechanical and mercantile establishments and workshops. The last inspection shall be completed on or before the first day of October of each year, and the commissioner shall enforce all laws relating to the inspection of the establishments enumerated heretofore in this section, and prosecute all persons for violating the same. Any municipal ordinance relating to said establishments or their inspection shall be enforced by the commissioner. The commissioner, his assistants and deputy inspectors, may administer oaths and take affidavits in matters concerning the enforcement of the various inspection laws relating to these establishments; Provided, that the provision of this section shall not apply to mercantile establishments that employ less than ten persons that are located in towns and cities that have three thousand inhabitants or less."

Section 13210 R. S. Missouri 1929, states:

"No female shall be employed, permitted, or suffered to work, manual or physical, in any manufacturing, mechanical, or mercantile establishment, or factory, workshop, laundry, bakery, restaurant, or any place of amusement, or to do any stenographic or clerical work of any character in any of the divers kinds of establishments and places of industry, hereinabove described, or by any person, firm or corporation engaged in any express or

transportation or public utility business, or by any common carrier, or by any public institution, incorporated or unincorporated, in this state, more than nine hours during any one day, or more than fifty-four hours during any one week: Provided, that operators of canning or packing plants in rural communities, or in cities of less than ten thousand inhabitants wherein perishable farm products are canned, or packed, shall be exempt from the provisions of this section for a number of days not to exceed ninety in any one year: Provided further, that nothing in this section shall be construed and understood to apply to telephone companies; and be it further provided, that the provisions of this section shall not apply to towns or cities having a population of 3,000 inhabitants or less."

In determining what employers are within the meaning of statutes regulating the hours of labor, it has been said that the statutes should be "read in the light of the general purpose of the Legislature in enacting them." Commonwealth vs. Riley 210 Mass. 387, 97 N.E. 368, Aff., 232 U.S. 671, 58 L. Ed. 788.

In 59 C. J. 984, it is said in Section 582:

"Where a statute enumerates the things upon which it is to operate, * * * it is to be construed as excluding from its effect all those not expressly mentioned;"

As was said in State ex inf. Conkling ex rel. vs. Sweeney, 270 Mo. 685, 1. c. 692, 195 S. W. 714:

"To so hold would be to violate the well known canon of statutory construction, viz.: That the expression of one thing is the exclusion of another."

Therefore the right of the commissioner of labor to inspect a beauty parlor and to regulate the working hours of the women therein must be given by the statute.

As a definition of practitioner in such shops, we will take that given in Section 9090, R. S. Missouri 1929, which states:

"* * * Any person who engages for compensation in any one or any combination of the following practices, to-wit: arranging, dressing, curling, singeing, waving, permanent waving, cleansing, cutting, bleaching, tinting, coloring or similar work upon the hair of any person by any means shall be construed to be practicing the occupation of a hair-dresser. Any person who with hands or mechanical or electrical apparatuses or appliances, or by the use of cosmetic preparations, antiseptics, tonics, lotions or creams engages for compensation in any one or any combination of the following practices, to-wit, massaging, cleansing, stimulating, manipulating, exercising, beautifying or similar work, upon the scalp, face, neck, arms, or bust or removing superfluous hair by means other than electricity about the body of any person shall be construed to be practicing the occupation of a cosmetologist or cosmetician. Any person who engages for compensation in the manicuring of nails shall be construed to be practicing the occupation of a manicurist."

In sections 13218 and 13210, supra, the only words which might grant authority to inspect and regulate beauty shops are those general terms "manufacturing, mechanical and mercantile establishments," the other terms being specific and definite as to their application.

We think it is apparent that a beauty parlor is not a manufacturing establishment. Nor is it a mercantile establishment. As was said in *Cleve vs. Mazzone* (Ky.) 45 S.W. 88, "A barber shop is not a mercantile purpose", and in *State ex rel. Garrison vs. Reeve*, 103 Fla. 1204, 139 So. 817, it is stated:

"We can find no reason to differentiate in the application of law between the trade * * * of the barber and the beauty culturist."

The question then is, whether a beauty shop is a mechanical establishment. We believe the rule is aptly stated in *State vs. Crounse*, 105 Neb. 672, 181 N.W. 562, in which a statute practically identical with section 13210 was under consideration. The Court said:

"The definition of mechanical, as given by Webster's New International Dictionary is: '(1) Of, pertaining to, or concerned with, manual labor; engaged in manual labor; of the artisan class. (2) Of, pertaining to, or concerned with, machinery or mechanism; made or formed by a machine or with tools.'

"The statute is not directed specifically at mechanical labor wherever the same may be performed, but at all labor performed by women in those institutions only which are to be classed as mechanical establishments. For the general purpose of the law, it was evidently deemed best by the lawmakers to describe in what establishments female labor should be regulated, rather than to attempt to regulate certain kinds of labor in all establishments. Almost all business establishments employ some mechanical element in their operations. The mere fact that machinery or mechanical appliances, or mechanical or manual labor, is used, or found to be employed, does not

May 14, 1937

necessarily characterize the establishment as a mechanical establishment. It seems to us that, before the establishment can be said to be a mechanical establishment, the mechanical element must predominate. In such operations as mining, or in waterworks, where water is pumped and distributed to consumers, or in Laundries or repair shops, the mechanical element clearly does predominate, and the products of those enterprises can be readily said to be the products of mechanical effort. Such enterprises, though not manufacturing, would clearly be mechanical in their nature. *Cowling vs. Zenith Iron Co.* 65 Minn. 263, 33 L.R.A. 508, 60 Am. St. Rep. 471, 68 N.W. 48; *Ward vs. Norton*, 86 Kan. 906, 122 Pac. 881."

In view of the above rule it appears that a beauty parlor is not a mechanical establishment. While mechanical labor is used, such mechanical element does not predominate, as may be gleaned from the definition of beauty practitioner in Section 9090, *supra*.

Conclusion.

It is therefore the opinion of this department that the State Commissioner of Labor does not have the right, under section 13218, to inspect beauty shops, nor does section 13210, which restricts the hours of female employees, apply to women working in beauty shops.

Respectfully submitted,

OLLIVER W. NOLLEN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:MM

PRIVATE ROADS: County court may not issue warrant to the officer of the court directing him to build fence under Section 7850, R. S. Missouri, 1929

September 10, 1937

Honorable Brevator R. Creech
Prosecuting Attorney
Lincoln County
Troy, Missouri



Dear Mr. Creech:

This department is in receipt of your request for an opinion, as follows:

"I would like to have an opinion from your department on the construction of Section 7850, R. S. 1929, in this particular:

Does the County Court have a right to issue a warrant to the Sheriff of the County directing him to build and construct a fence found to be necessary in report of commissioners where damages were allowed under Section 7845 to the landowner whose lands were condemned for private road purposes where the landowner turns over the right-of-way as is provided by order of the court but fails and refuses to construct a fence in which he has been awarded and has accepted the moneys for building of fences by the commissioners appointed by the court under Section 7845."

Section 7845 of the 1931 Laws, provides for the appointment of commissioners by the county court to proceed to view the premises and cause a road (not exceeding forty feet wide) to be marked out * * *, and shall make a report to the county court at its next term * * * and shall also make and report an assessment of the items of damages sustained by each person through whose land said proposed road passes, including the erection of fences and

September 10, 1937

the kind of fences to be erected, if the land is already enclosed, and if in the opinion of the commissioners, the location of the road makes the erection of a fence or fences necessary.

Section 7849 of said statute provides that the owner has six months to vacate and is as follows:

"The county court shall, at the time of giving judgment for the establishment of the road, specify the time when the possession shall be given by the owner, giving the owner of the land a reasonable time, not exceeding six months, to erect fences, if the commissioners' report shows that the fencing is required, and also time to gather growing crops, if they are growing at the time on the premises, which time shall be stated in the judgment."

Section 7850 of said statute, provides a penalty for the failure to open the road and is as follows:

"If any owner of real estate, against whom final judgment has been given as designated in the preceding section, shall neglect or refuse to open said road within the time specified in the said judgment, he shall forfeit and pay to the person in whose favor judgment was given five dollars per day as a penalty for each day that it remains unopened, to be recovered in an action of debt before any court having jurisdiction; and the county court shall have power and it is hereby authorized, upon the application of the person interested, to issue its warrant, directed to the officer of its court, to open said road immediately, and the costs of the proceeding shall be paid by the person

Honorable Brevator
R. Creech

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September 10, 1937

so refusing to open said road; Provided, the damage shall have been previously paid to the county treasurer, as designated in this article."

The commissioners are required under Section 7845, to make a report as to the necessity of erection of fence or fences and Section 7849 provides that the owner be given a reasonable time, not exceeding six months to erect fences in case said commissioners' report shows that fencing is required.

According to your letter, a final judgment was rendered in the county court under the above sections wherein the commissioners found in their report that a fence was necessary and to which report the owner did not except. In your letter you further stated that the owner of the lands was paid the amount of the damages assessed by the commissioners for his right-of-way and a fence found necessary to be erected. As we understand it, you desire to know if the county court, under Section 7850, has a right to issue a warrant to the sheriff of the county directing him to build and construct a fence so found to be necessary in said report of commissioners.

Section 7850 is a penal section and there is no mention made therein of the court having a right to issue a warrant to the sheriff of the county directing him to build or construct a fence found to be necessary in the report of commissioners.

In the case of State ex Inf. L. L. Collins v. St. Louis San-Francisco Ry. Co., 238 Missouri l.c. 612, the court in defining a penal statute said:

"The provision is purely penal, and is to be strictly construed. (State to use v. Railroad, 83 Mo. 144). This means that it is

not to be regarded as including anything not within its letter as well as its spirit; which is not clearly and intelligibly described in the words of the statute, as well as manifestly intended by the Legislature."

The same rule was stated in *Eddington v. Western Union*, 115 Missouri Appeal l.c. 98, which reads as follows:

"A statute, such as the one here authorizing a recovery without any proof of actual damages, injury or pecuniary loss, is harsh indeed, when applied to those cases which fall properly within its provisions. It is highly penal and must be strictly construed and applied only to such cases as come clearly within its provisions and manifest spirit and intent."

In *State v. Gritzner*, 134 Missouri l.c. 527; in commenting on the strict construction of a penal statute, the court said:

"Moreover, as criminal and penal statutes are to be strictly construed, construed stricti, if not strictissimi, juris; as no one is to be made subject to such statutes by implication (*State v. Bryant*, 90 Mo. l.c. 537, and cases cited; *Bishop Stat. Crim.*, secs. 190; 193, 194, 227); as they are nonelastic, as only such transactions are covered by them as are within both their spirit and letter (*State v. Schuchmann*, 133 Mo. 111),"

Honorable Brevator
R. Creech

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September 9, 1937

CONCLUSION

Therefore, Section 7850 not requiring that the landowner shall construct the fence designated by the report of the commissioners and it being a penal statute and no provision is made therein for the county court to issue a warrant to the sheriff of the county directing him to build or construct a fence found to be necessary in the report of the commissioners, it is the opinion of this office that the county court has no right to issue such warrant.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

SVM MR

LOTTERIES: Theatre scheme similar to "Bank Night".

March 10, 1937

3-11



Hon. Barker Davis
Prosecuting Attorney
Lewis County
Canton, Missouri

Dear Sir:

We have your request for an opinion of this office dated February 22, which reads as follows:

"Enclosed please find plan of theatre drawing, called to my attention in this county. In view of your 'bank night' opinion and the fact that your opinion is being upheld in this county, will you please furnish me opinion on this plan of operation."

We note from the hand bill attached to your letter that persons are required to come to the theatre and register and a drawing is then held and the person whose name is drawn, if present, will be given a prize of Ten Dollars for "services". If the person is not present when his name is drawn, then the prize will go over to the following week wherein a Twenty Dollar prize is awarded for the same "services."

There is no fundamental distinction between this situation and "Bank Night".

This scheme involves the three elements of a lottery; (1) distribution of prize; (2) by lot; (3) for a consideration.

The awarding of the Ten Dollars or multiples thereof to winners is a distribution of prizes within the lottery law.

The selection of the winners by lot, or a drawing, constitutes the element of chance.

Requiring participants to register and be present at the drawing is sufficient consideration.

It appears from the hand bill that the participants are required to be inside the theatre at the time of the drawing, if so, this constitutes a direct money consideration. If participants are not required to purchase an admission ticket but are merely required to be present at the theatre then there is sufficient consideration.

Society vs. City of Seattle, 203
Pac. 21;

Central States Theatre Corporation
vs. Patz, 11 Fed. Supp. 566;

Maughs vs. Porter, 157 Va. 451,
161 S. E. 242;

Brooklyn Daily Eagle vs. Voorhies,
181 Fed. 579;

Featherstone vs. Independent Service
Station, 10 S. W. (2) 124 (Texas
Civil Appeals);

State of Washington vs. Danz,
250 Pac. 37;

George Washington Law Review (May
1936) pp. 475, 491;

City of Wink vs. Amusement Company,
(Texas) 78 S. W. (2) 1065;

Glover et al. vs. Malloska, 238
Mich. 216; 213 N. W. 107;

Commonwealth vs. Wahl, 3 N. E. (2)
328;

General Theatres vs. Metro-Goldwyn
Meyer Corp 9 Fed. Supp. 549.

There are many other authorities which I could cite you but which would merely burden this opinion.

It is therefore the opinion of this office that the scheme as outlined in your letter and contained in the hand bill with reference to distributing a job each week which pays the person Ten Dollars for "services" is a lottery prohibited by the laws of this state.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

SCHOOLS: Bond given by Treasurer of a consolidated school district cannot be paid by school district.

June 14, 1937

6-16

Honorable Donald B. Dawson
Prosecuting Attorney
Bates County
Butler, Missouri



Dear Sir:

This is to acknowledge your letter dated May 29, 1937 as follows:

"I would like an opinion from your office relative to a little problem which has arisen here in this county.

"The board of directors of a consolidated school district appointed one of their members treasurer of the District. In accordance with the provisions of the law applicable to his office he was required to give a bond in the sum of \$2,000.00. The cost of that bond, to be taken out with a Commercial Surety Co., was \$10.00. The board has previously agreed to pay the treasurer \$30.00 per year. Subsequently the board of directors decided to pay for the bond which the treasurer made. The question is can the board of directors legally pay for the bond of the treasurer appointed by them for the District, or must the treasurer furnish his own bond?

"I have looked through the Statutes relating to consolidated school districts and the cases pertaining to treasurers

Honorable Donald B. Dawson

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June 14, 1937.

thereof but have been unable to find any Statute which would directly or indirectly prohibit a board of directors for paying for such a bond. I would like an opinion from your office setting out whether or not a board of directors of a consolidated district can act in such a manner."

We agree with you that there is not a statute which decides your question. However, we invite your attention to Sections 9329, Laws of Missouri, 1931, page 333; Section 9355, R. S. Mo. 1929; and Section 9360, R. S. Mo. 1929.

Section 9329, supra, relates to the organization of a School Board in a consolidated district, and reads in part as follows:

"Within four days after the annual meeting the board shall meet, * * * * and the board shall, on or before the fifteenth day of July of each year, elect a secretary and a treasurer, who shall enter upon their respective duties on the fifteenth day of July. * * * * No compensation shall be granted to either the secretary or the treasurer until his report and settlement shall have been made and filed or published as the law directs."

Section 9360, supra, relates to the compensation that may be paid to a treasurer of a consolidated school district and reads in part as follows:

"No member of any public school board of any city, town or village in this state having less than twenty-five thousand inhabitants

June 14, 1937.

shall hold any office or employment of profit from said board * * * * except the secretary and treasurer who may receive reasonable compensation for their services; Provided the compensation of the * * * * treasurer shall not exceed fifty dollars for any one year."

Section 9335, supra, requires the treasurer to give a bond before entering upon the duties of his office. Said Section reads in part as follows:

"The treasurer * * * * shall enter into a bond with the State of Missouri with two or more sureties to be approved by the board.* * * "

From the above it is seen that the School Board in a consolidated school district has a right to employ a treasurer and give him compensation at a reasonable amount (not to exceed \$50. per year) and that the treasurer must give a bond before entering upon the discharge of his duties. Nowhere does it provide that the bond shall be paid by the School Board or out of school funds. However, the powers of a Board of Directors of a school district are limited to those expressed in the statute. Consolidated School District No. 6 vs. Shawhan, 273 S. W. 182. Boards of Directors are trustees of the funds in their care and custody, and if they cause an illegal payment from school funds such would be personally liable. Consolidated School District vs. Shawhan, supra.

In connection with the payment of premiums on bonds, which bonds are required of state officers and employees, we herewith enclose copy of opinion rendered by this Department on November 5, 1935, to Honorable Roy H. Cherry, State Inspector of Oils of Missouri, and the reasoning employed in that opinion, as far as pertinent to your question, is herewith adopted.

Honorable Donald B. Dawson

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June 14, 1937.

From the above and foregoing it is our opinion that a Board of Directors of a consolidated school district could not pay the premium of a surety bond given by the treasurer of the district.

Yours very truly,

James L. HornBostel
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JLH/R

SCHOOLS: What constitutes a quorum of the School Board. What notice of meeting necessary.

September 4, 1937.

Honorable Donald B. Dawson
Prosecuting Attorney
Bates County
Butler, Missouri



Dear Sir:

We have your request for an opinion dated August 21st, which reads as follows:

"A legal problem has been put before me that is unique in that there is, apparently, no settled law pertaining thereto. I would like to submit the proposition to your office for an opinion.

"The Amoret High School, Consolidated District No. 9, has a board of directors of six men. About a month ago the president of the board decided to call a special meeting of the board for the purpose of electing a superintendent and a janitor of the school building. The president called or notified all of the members but one. That one member was in Kansas City and wasn't expected back until midnight the day of the meeting. So the president did not call him. At the meeting five on the six board members were present and the board elected the superintendent and janitor. The sole legal question presented is: Can the president of the board of directors of a consolidated school district legally call a special meeting of the board without notifying all of the members?

"The statute states a majority of the board may transact business. The statute I read does not specify how the members are to be notified, but merely says the president shall notify each member of the special meeting, the place, the time, and the purpose of it. In this case over a majority were present and transacted business. In this case the president called the wife of the absent member and when told the member was out of town the president did not tell the wife to notify the member of the pending meeting.

"If the meeting was not legally called and was not a sufficient compliance with the statute, then the employment of the superintendent and janitor is void. But how about the bills that were paid that meeting?

"I have tried to give a complete picture of the situation in order to show you all the facts. You can readily comprehend the difficulties the board may have gotten itself into if the meeting was not a legal one.

" Since this board must know whether or not it has a superintendent and janitor so that the coming school year may be planned for, I would sincerely appreciate your taking care of this matter as soon as possible. I talked with Mr. Sawyers today, thinking the matter might have been passed on prior to this, but Mr. Sawyers was fairly certain the question had not been presented before."

Section 9209, Laws of Missouri, 1933, p. 387 provide:

"The board shall have power, at a regular or special meeting called after the annual school meeting, to contract with and employ legally qualified teachers for and in the name of the district; all special meetings shall be called by the president and each member notified of the time, place and purpose of the meeting. The contract shall be made by order of the board; shall specify the number of months the school is to be taught and the wages per month to be paid; shall be signed by the teacher and the president of the board, and attested by the clerk of the district when the teacher's certificate is filed with said clerk, who shall return the certificate to the teacher at the expiration of the term. The certificate must be in force for the full time for which the contract is made. The board shall not employ one of its members as teacher, nor shall the teacher serve as clerk of the district. All transactions of the board under this section must be recorded by and filed with the district clerk. Provided, that the board of Education of any first class high school may employ a superintendent either before or after the annual school election."

Section 9329, Laws of Missouri 1931, p. 333, provide:

"Within four days after the annual meeting, the board shall meet, the newly elected members be qualified

and the board organized by the election of a president and vice-president, and the board shall, on or before the fifteenth day of July of each year, elect a secretary and a treasurer, who shall enter upon their respective duties on the fifteenth day of July; said secretary and treasurer may be or may not be members of the board. No compensation shall be granted to either the secretary or the treasurer until his report and settlement shall have been made and filed or published as the law directs. A majority of the board shall constitute a quorum for the transaction of business, but no contract shall be let, teacher employed, bill approved or warrant ordered unless a majority of the whole board shall vote therefor. When there is an equal division of the whole board upon any question, the county superintendent of schools, if requested by at least three members of the board, shall cast the deciding vote upon such question, and for the determination of such question shall be considered as a member of such board. The president and secretary, except as herein specified, shall perform the same duties and be subject to the same liabilities as the presidents and clerks of the school boards of other districts."

In the case of Bauer, v. School District, 78 Mo. Ap. 442, that court said at l. c. 445:

"In our opinion a failure on the part of the directors to fill the

the vacancy as they are required to do by this statute, does not invalidate any official action taken by the board. The command of the statute is addressed to the remaining members of the board and no intention seems to be disclosed to make void any act done while the vacancy exists. If such had been the intention of the lawmakers on a matter so important, they would undoubtedly have expressed the intention in direct terms. The directors should obey the statute before performing any other official act. It may be that they could, by proper proceedings, taken in time, be compelled to do so. But if the board engages in its duties while the vacancy exists, the business transacted, if otherwise regularly done, will not be voided."

The above case differs from your facts, in that there was a three man school board, in which one member had resigned and the remaining two members transacted the business of the board.

In the case of *State ex inf. v. Bird*, 295 Mo. 344, 1. c. 352, the Court said:

"This court has held, however, in construing the intent and purpose of school laws that they were designed as a workable method to be employed by plain, honest and worthy citizens, not especially learned in the law; and that no strict and technical construction should be given to them."

The law of Illinois should be the law of Missouri. In *School Directors v. Sprague*, 78 Ill. App. 390, 1. c. 391, that Court said:

"John Buss, D. M. Roberts and W. H. McCaskill, were the directors for the district in 1896. Buss was president and Roberts was clerk. Appellee had taught the district. Buss and Roberts were in favor of re-employing her for a term of seven months, to begin in October of that year. McCaskill was opposed to her, and in conversation with the others had stated his ground of objection. Nothing definite was determined upon until the 7th of October, a few days before the time for the school to begin. Early in the morning of that day Buss sent his boy to McCaskill's house to notify him that there would be a meeting of the directors, at one o'clock of that day, at the house of Roberts, for the purpose of employing a teacher. When the boy reached McCaskill's he had gone from home and did not receive the notice until his return on that evening, after the hour for the meeting had passed. After waiting some time for McCaskill the other directors held a meeting at which it was decided to employ appellee. She was not regularly employed then, however, but the meeting was adjourned over until the following Monday, to enable her to secure a certificate extending over the full

term, at which time she was employed. She entered upon her term of seven months that day and taught to its conclusion. At the annual election in 1897, Finis P. Clark was elected in the place of Buss, whereupon he and McCaskill met and decided to dismiss appellee, and to discontinue the school. Clark so notified appellee, but she replied that she would complete the term, and did so with the knowledge of McCaskill and Clark. This suit was for the last month's wages.

"Appellants contend the contract of employment was void because it was not made at a meeting of the board as the law requires.

"The meeting on the 7th of October was legally called, and the only question for determination is whether, under the circumstances, the two directors present could make the employment in the absence of McCaskill. Had McCaskill received the notice, and declined to attend, it is clear the other two, constituting a quorum, could have made the contract. Trustees of Schools v. Allen, 21 Ill. 124; Scofield v. Watkins, 22 Ill. 72; Adkins v. Mitchell, 67 Ill. 511.

"We are clearly of the opinion that where an honest and reasonable effort has been made to notify the absent director, though unavailing, the other two directors may legally act.

"In this case we think such effort was made.

"The president, on account of sickness and death in McCaskill's family, and on account of his absence from home, had delayed calling a meeting until a few days within time for school to open. Early action was necessary, and we can not regard the calling and holding of the meeting as hasty. McCaskill's position in the employment of appellee was understood and his presence would have made no difference."

CONCLUSION.

We are of the opinion that where the law provides for a six director school board in Missouri, when any four of them, at a regular called meeting agree to let a contract, employ a teacher, approve a bill or order a warrant, their action shall be legal and valid.

In a six director board, a quorum to do business is reasonably interpreted as a two-third majority of the whole membership, or four, present at the meeting and voting. Such a meeting is a legally constituted meeting, where the facts show no fraud or collusion, and that reasonable effort was made to notify all members, but that two of the members were out of the district and could not reasonably be personally notified or present. In your case there were five members present and one member absent, and we believe a reasonable effort was made to notify him of the meeting.

Hon. D. B. Dawson

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September 4, 1937.

The Legislature intended a workable method of conducting the business of School Districts, and when the Legislature required things to be done to get a meeting called, such as requiring that all members be notified, and nowhere prescribes the results that shall follow if they were not done, the statutes to that extent is merely directory.

Should the statutes be interpreted to require notice to be mandatory instead of directory, then any one member could disrupt the whole meeting by hiding from service of the notice of the meeting, while at the same time his power after notice served and presence at the the meeting would not change the two-thirds majority vote one iota, affecting any proposition passed in his absence.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

WOS:AH

- COUNTY COURTS: 1. An order of the county court exonerating county officials under an audit, from charges of fraud and embezzlement and stating the officers are not liable for any shortage is not an estoppel or res adjudicata which prevents actions if it is found such officers actually are indebted to the county court.
2. Sec. 11816 must be followed in the event the county officers owe moneys to the county.
3. Sec. 12165, Laws Mo. 1933, p. 356 contains amount allowed county clerk or other person designated to prepare financial statement.
February 3, 1937

Honorable Jack H. Denny
Prosecuting Attorney
Howard County
Fayette, Missouri



Dear Sir:

This Department is in receipt of your recent letter wherein you present three questions for an opinion.

I

The substance of your first question is, as follows:

"The report of the State Auditors on the records of Howard County, Missouri, from January 1, 1934, to December 31, 1935, shows several of the county officers to owe sums of money to the County. The largest amount owing the County is in the sum of \$4,108.86, due from J.H. Gallemore, County Clerk. The records show that the County Clerk filed quarterly abstracts of fees collected; they were filed and approved by the Court; but instead of retaining the amount prescribed by law as salary for himself and deputy and turning the balance over to the County Treasurer, the full amount of fees collected was allowed the officer and his deputy as salary in disregard of the Statute fixing the salary of the County Clerk and his deputy.

(see Laws of 1933, Page 369.)

"At the November Term of the County Court, 1936, the following order was passed by the Court:

'IN THE MATTER OF THE COUNTY AUDIT.

Now on this 15th day of December the court takes up the report as recently submitted by the State Auditor's Office; and after carefully examining the same and after having talked to each of the officers concerning the alleged deficits in their accounts, the court is fully satisfied that there is no evidence of any fraud or embezzlement on the part of any county officer.

BE IT THEREFORE ordered that said report be accepted, made a part of the public records of this court and that each county officer be discharged from any financial liability to the County existant prior to January 1, 1936.

Approved this 15th day of December, 1936.

C. B. Biswell Yes. W. W. Walker Yes.
and Chas. Eaton No. '

"Since this order was made, the personnel of the Court has changed, and a new Board is now constituted.

"The question for decision is whether this order has an effect of releasing the County officer from his liability to the County for the amount of the deficit."

The main point involved in this question is whether or not the record of the court exonerating the various county officers of fraud or embezzlement, and that each county officer be discharged of liability

to the county prior to January 1, 1936, is an order or judgment of such a nature that you are precluded from any action against such officer.

It is stated in the decision of Bayless v. Gibbs 251 Mo. 492, that

"County courts are not the general agents of the counties of the state but are courts with only limited jurisdiction, and their acts outside of their statutory authority are null and void."

The first portion of Section 12162, Revised Statutes Missouri 1929, refers to the ordinary accounts which are filed with the county court. The last proviso is as follows:

"Provided, that if the county court finds it necessary to do so, it may employ an accountant to audit and check up the accounts of the various county officerx."

Assuming that the county court considered the audits and it was the finding of the court such audits did not reflect any shortage or embezzlement or fraud on the part of such officers, is the county estopped by the action of its court if such finding be determined as untrue and a mistake, and is the matter res adjudicata. We think not. The powers of the county court are strictly summed up in the case of State v. Diemer 255 Mo. 1. c. 351, as follows:

"In the allowance of claims against a county or in settling with county officers, county courts do not act so strictly as a court, or in the performance of a judicial function, that their allowance or disallowance of a claim is res adjudicata. Something of substance might be said in favor of the contrary theory, but at an early day this court considered

our statutes and announced the doctrine, on the reason of the thing and because of a good public policy, that county courts in the allowance of claims, as in settling with officers, acted as a mere public board of audit, as ministerial, administrative or fiscal agents for the county and not strictly as a court, hence we have uniformly refused to apply the doctrine of res adjudicata to their orders allowing or disallowing claims against the county, or to their settlements with county officers. That doctrine has always been adhered to and must be accepted as settled. (County of Marion v. Phillips, 45 Mo. 75 (in connection with which case the reasoning of In re Saline County Subscription, 45 Mo. 52, is pertinent); Phelps County v. Bishop, 46 Mo. 68; Reppy v. Jefferson County, 47 Mo. 66; Owens v. Andrew County Court, 49 Mo. 1. c. 376 et seq; State to use v. Roberts 62 Mo. 388; State to use v. Roberts 60 Mo. 1. c. 404; Cole County v. Dallmeyer, 101 Mo. 1. c. 63; State ex rel. v. Gideon, 158 Mo. 1. c. 338 et seq., and cases cited; Givens v. Daviess County, 107 Mo. 1. c. 607 et seq.; Scott County v. Leftwich, 145 Mo. 1. c. 32.)"

As to whether or not the order of the court constituted a judgment if the accounts of the officers are untrue, false or fraudulent, and the right to disregard the judgment, is discussed in the case of State ex rel. Christian County v. Gideon 158 Mo. 1. c. 338, as follows:

"Nor can the demurrer be sustained on the ground stated in the first

paragraph of the fourth objection, i. e., that 'the various settlements of said M.V. Gideon with the county court are in the nature of judgments, and are binding upon the county, and can not be set aside, modified or altered by the said county court nor by this court.'

"In Scott County v. Leftwich, 145 Mo. loc. cit. 32, it was ruled as to these quarterly settlements of the clerk under this statute, that 'the county court in passing upon these statements only acts in its administrative capacity, as it does in making settlements with other county officials, and no more sanctity is given to its decision in examining such statements than is accorded to its settlements with county officers, and it has been held through an unbroken line of decisions by this court that the county courts in making those settlements do not act judicially. (Marion Co. v. Phillips, 45 Mo. 75; State to use v. Roberts, 60 Mo. 402; State to use v. Roberts, 62 Mo. 388; Cole v. Dallmeyer, 101 Mo. 57; Sears v. Stone Co., 105 Mo. 236.) In the last case cited, 105 Mo. loc. cit. 242, it is said that 'it has been held by this court through an unbroken line of decisions since the case of Marion Co. v. Phillips, 45 Mo. 75, that the action of the county court in making settlements with county officials is not judicial, but

that, in such cases the judges act merely as the fiscal or administrative agents of the counties.' The principal laid down in the Marion County case, which has since been uniformly followed, is thus stated in the language of Bliss, J., after an exhaustive review of the authorities: 'We hold, then, that the defendant in the case at bar, in making his settlement with the county court of Marion county, settled and adjusted his claims and liabilities with the public agents of the county; that the entry upon the records of the court was not a judgment at law, but the record of the results of that settlement - a statement of his account, as adjusted between him and the county - and that any mistake in that settlement clearly proved is open to correction, and in the same manner as though it were made with an individual.' (45 Mo. 80).

"And in State to use of Carroll Co., v. Roberts et al., which was an action against the collector and the sureties on his official bond, the doctrine was thus applied by this court, speaking through Napton, J.: 'Settlements made with the county court in regard to administrators, guardians, etc., may properly be considered as judicial acts, since they are judgments of a court on proceedings inter partes in which there is notice required, and in which the county and the court are not interested. In settlements with collectors, it is a mere accounting between principal and agent or between a supervising agent

and the subordinate. I refer to the opinion of Judge Bliss, in 45 Mo. 77, where the learned judge has fully discussed this point and established this discrimination, with the sanction of all the court. It is now insisted, however, that no suit could be instituted against the sureties of the collector, until there had been a suit in equity to set aside the settlement. Undoubtedly, if this settlement could be regarded as a judgment, in a suit or proceeding where the sureties were not parties, it might be a protection to them until set aside. Such has been decided to be the law in regard to settlements of administrators, guardians, etc. But in this case it is not perceived how this settlement operates with more efficacy than an ordinary receipt. If a sheriff should receive, on an execution, double the amount he receipts for, would the plaintiff in the execution have to go into a chancery proceeding to set aside the receipt? The sureties on his bond are responsible for breaches of it, and although the receipt in the case supposed and the settlement in the case now under consideration, are certainly prima facie evidence in favor of both the sheriff and his sureties, neither can be pleaded as a bar to the action. They may both be explained or set aside as made through fraud or mistake. Why require two suits to settle what can as well be determined in one?

"That it was the duty of Gideon as clerk to make correct return

quarterly of all fees received by him, and of the salaries by him actually paid to his deputies or assistants, and that in failing to do so, by returning only a part of said fees, and falsely returning the amount paid for salaries to his deputies, as charged in the first two counts of the petition, he committed breaches of his bond, for which the plaintiff has a cause of action, is beyond question. And applying the doctrine of the cases cited, it is quite clear that the plaintiff is not precluded from asserting that cause of action by the approval by the county court of such false statements in ignorance of their falsity."

In the recent case of Sheboygan County v. Frank W. Zimmerman, contained in 103 A. L. R. 1045, the same being a case decided by the Wisconsin Supreme Court, we consider to be in point. The court, in discussing the question, at l. c. 1048, said:

"The defendants attempt to support the judgment on the ground that a committee of the county board audited Zimmermann's books and found them to be correct and in balance. The members of the committee examined only the entries contained in the books and obviously considered only the receipts, and disbursements, listed therein. The balance shown by the books corresponded with the cash in bank and the cash on hand, and to that extent the books were correct and in perfect balance. The members of the auditing committee made

no investigation as to moneys collected or received by Zimmermann which he did not enter in his books. Clearly, that audit in no way binds the county. As was said in Town of Cady v. Bailey, 95 Wis. 370, 70 N.W. 285, 286: 'The law applicable to settlements between private parties does not apply to settlements between a public corporation and its officers, respecting the handling by the latter of public money. Notwithstanding such settlements, if such officers, by a mistake or otherwise, wrongfully retain public money in their hands, they may be proceeded against therefor at any time thereafter, upon discovery of the facts, within the period of the statute of limitations. Throop, Pub. Off. secs. 280-283; Otsego Lake Tp. v. Kirsten, 72 Mich. 1, 40 N. W. 26 (16 Am. St. Rep. 524); Palo Alto Co. v. Burlingame, 71 Iowa, 201, 32 N.W. 259; Boardman Tp. v. Flags, 70 Mich. 372, 38 N. W. 284; Sexton v. Richland County Sup'rs, 27 Wis. 349.' "

The same Volume of A. L. R. reviews all the authorities in Missouri at page 1055 et seq., including the case of Marion County v. Phillips 45 Mo. 75, in which it was determined that:

"* the court, observing that the complaint was based not upon fraud but mistake, rested its allowance of recovery upon the nature of the settlement as one partaking of an adjustment

between principal and agent rather than a judicial proceeding."

In the case of State v. Roberts 62 Mo. 388, it was held:

"A settlement with a county fiscal court, which consisted of a mere synopsis of statements of accounts found in the books of the county clerk, and did not show whether the balance claimed was on account of cash, notes, or railroad bonds given by a sheriff who had been authorized to sell county swamp lands and take payment in one or all of such forms, was held not conclusive in an action against the sureties, especially since the court members were to be considered fiscal agents of the county, and not judicial officers rendering judgments in the premises."

We are impressed with the decision of the court in the early case of Bates County v. Smith 65 Mo. 469, wherein it was held that,

"Where a county tax collector, through fraud or mistake, failed to pay over moneys collected, and such items were omitted entirely in a settlement with the county board, such settlement had no more efficacy than an ordinary receipt, and did not prevent an action on the official bond."

In the decision of Callaway County v. Henderson 139 Mo. 510, it was held as follows:

"Where a county clerk in making up his periodic accounts, required by statute, made only a partial account, and omitted items which should have been charged as fees and for other services rendered, examination and allowance thereof by the county court were held to be no bar to an action by the county to recover that which was received but not included."

In the recent case of United States Fidelity Company v. Huckstep 72 S. W. (2d) 838, it was held that,

"Failure to consider certain items in an official settlement between the county clerk and the county was held to leave the way clear for consideration of such items in an action for an accounting brought by the surety against the clerk's estate."

CONCLUSION

We are of the opinion that irrespective of the finding of the court to the effect that there was no fraud or embezzlement on the part of county officers in Howard County, and that said officers were discharged from further financial liability to the county; that said order is not a judgment which is res adjudicata or estops the county from taking action against the officers and determining any balance due and owing to the county and collecting the same from the officers.

February 3, 1937

II

Assuming that the county court has authority to collect the amounts owing, can they, without suit, withhold the future salaries of the officers?

As stated in the memorandum that you have included with your request, the Legislature has set forth the procedure to be followed in the event clerks fail to report and pay the fees as required by law in Section 11816, R. S. Mo. 1929. Section 11814, passed by the Legislature in 1933, page 372, also deals with the collection of fees by the clerks and reports on the payment of fees.

It is the prime duty of the county court to guard zealously the finances of the county. If money and fees are due the county from any officer, it is the duty of the county court to make every effort to have same collected. Therefore, if in the opinion of the court any officer of the county is indebted to the county, and if the county be indebted to any officer, now or in the future, we think that the county can legally withhold the amount it may owe such officer and the same may be treated as a counter claim or setoff. There are no decisions directly in point in the State of Missouri, but it appears to be a well established rule of law as was said in the case of Price v. Lancaster County, 24 Pa. County Court, 1. c. 235:

"Conceding, therefore, that the plaintiff did receive from the county the above illegal payments, can they be recovered back into the county treasury, or used by way of set-off? The answer to this proposition is fully contained in County of Allegheny v. Grier, 179 Pa. 639. Suit was brought by the county of Allegheny to recover from the controller of that county \$1,290.32, alleged to have been paid to him by mistake in excess of his salary as fixed by law. Among other defenses, it was urged that the payments made to the defendant and sued for were voluntary payments. The court below entered judgment in favor of the

county, and this decision was affirmed by the Supreme Court. The late Chief Justice Sterrett, in delivering the opinion of the court, said: 'The act of 1864 being in force, the amount received by the controller in excess of the salary there fixed was, therefore, illegal. So, on the grounds of public policy, the court was right in holding that the maxim *volenti non fit injuria* has no application to the illegal payment of public funds to a public officer, more especially, where, as here, it is the peculiar function of that officer to guard the public treasury. Public revenues are but trust funds, and officers but trustees for its administration for the people. It is no answer, to a suit brought by a trustee to recover private trust funds, that he had been a party to the devastavit. There could be no retention by color of right: *Abbot v. Reeves*, 49 Pa. 494. With much the stronger reason is this doctrine applicable where the interests of the whole people are involved, and the authorities are, accordingly, numerous to this effect: *New Orleans v. Finnerty*, 27 La. Ann. 681; *Com. V. Field*, 84 Va. 26; *Day Land and Cattle Co. v. State*, 68 Texas, 526; *Am. Steamship Co. v. Young*, 89 Pa. 191; *Taylor v. Board of Health*, 31 Pa. 73; *Smith v. Com.*, 41 Pa. 335. It is obviously immaterial whether the illegal payment be through design or mistake, for, in either event, the result must be not only misuse of trust funds, but, what is of far more importance, demoralization in the service. The only practical difference lies in this, that one makes a criminal and the other a trustee. So it is immaterial by what officer the funds are had and received. Fidelity to the government which he represents and is sworn to support makes restitution a duty. He can plead neither laches nor estoppel in pais to a suit for malversation. Public office is a public trust

the sanctity of public property is essential to its due administration, and necessarily implies a remedy for any diversion from legitimate use."

III

Does the law fix the amount which a person may charge for preparing the financial statement for the County as provided for in Section 12165, Laws of 1935?

You are no doubt confused by the fact that in 1935 the Legislature repealed and re-enacted Section 12165, the same being enacted by the Legislature in 1933. The Legislature made no change in Section 12166, page 356, Laws of Missouri 1933, in which it is stated as follows:

"For the preparation of the copy for the statement the court may allow not to exceed the price per hundred words and figures permitted to the clerk of the court for the writing of the record and no pay shall be allowed for pasting printed copy in the record."

We believe the above properly answers your inquiry under question III.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

CORONERS: Inquest not to be held on Sunday. Fee for
multiple death in one casualty is \$5.00.

October 21, 1937.

10-22



Dr. F. V. DeVinny
Coroner Schuyler County
Downing, Missouri

Dear Sir:

I acknowledge your request for an opinion dated
October 19, 1937, which reads as follows:

"I am writing in regard to a matter which has just been under my jurisdiction. As Coroner of Schuyler County I was called at about 11:00 p. m., Saturday night to come to a place $3\frac{1}{2}$ miles south of Lancaster, Missouri, on highway #63 where an accident had occurred in which two men had been killed. The two men were hit by a car coming from the opposite direction, the men standing beside their car putting oil in the crankcase. Their headlights had been left on bright and the car was still on the pavement. (black-top).

"Being rather new to the Coroner's duties, I made arrangements for an inquest to be held the next morning (Sunday) and when about ready to start the inquest an attorney called and stated that an inquest held on Sunday would not be legal. I am most certainly not a lawyer, but the statute concerning Coroners and Inquests stated that I could call an inquest at 'any time or place' deemed fit. The Prosecuting Attorney ruled that the inquest would not be legal, so I called another one for Monday morning. It seemed rather inhuman to keep the bodies of these two men in an undertaking

October 21, 1937.

establishment when their close relatives wanted them at their homes. However under the ruling of the Prosecuting Attorney I was powerless to release the bodies and they were held.

"I would appreciate your ruling on this matter, so that I may govern myself accordingly in the future.

"Another ruling I would like to have. Am I, as Coroner, entitled to the sum of \$5.00 for viewing each body or just \$5.00 for the two. The inquest was held over both bodies at the same time and naturally the witness, jury and other fees would apply to but the one time, but I thought that perhaps I was allowed the separate fee on each view."

Section 11612 R. S. Mo. 1929 R. S. Mo. 1929, provides:

" Every coroner, so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty, being found within his county, shall make out his warrant, directed to the constable of the township where the dead body is found, requiring him forthwith to summon a jury of six good and lawful men, householders of the same township, to appear before such coroner, at the time and place in his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death."

In the case of Houts v. McCluney 102 Mo. 13, 1. c. 17, 14 S. W. 766, the Supreme Court said:

"The object of the coroner's inquest is to ascertain whether the person died by felony or accident; and, if by felony, to discover the guilty person or persons. The inquest is a proceeding judicial in character, and is one step taken in the enforcement of the criminal laws of the land."

As to holding a coroner's inquest on Sunday, 13 C. J. p. 1248, Section 15, reads as follows:

"Following the established rule that Sunday is dies non juridicus, it has been said that the inquisition must not be conducted on Sunday; but it has been held that an inquest was not void because held on that day."

The fee to coroners having viewed dead bodies is found in Section 11802, R. S. Mo. 1929, which provides in part:

"Coroners shall be allowed fees for their services as follows: Provided, that when persons come to their death at the same time or by the same casualty, fees shall only be paid as for one examination:

"For the view of a dead body. . . \$5.00."

CONCLUSION.

In Missouri a coroner's inquest is a judicial proceeding. The question of the right of a coroner to hold an inquest on Sunday has never been presented to the Appellate Courts of this State. Since our Courts have held the inquest hearing to be a judicial hearing, we are of the opinion that the coroner's legislative power to issue warrants and express on same the time and place of the hearing is not intended as statutory power

October 21, 1937.

to designate the hearing for a Sunday. The coroner's function of holding an inquest over a dead body is to determine the cause of a sudden, violent or unnatural death, which can be determined on a week day as well as on a Sunday. Such was the intent of the Legislature.

Construing Section 11802, supra, we are of the opinion that where persons come to their death by the same casualty, as in the case you describe, the coroner's fee is limited to the fee for one examination, that is \$5.00.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

WOS:H

OFFICERS: Need not be a taxpayer to hold the office of alderman in a city of the fourth class.

March 13, 1937.

3-15

Mr. M. J. Dixon,
City Clerk,
Crystal City, Missouri.



Dear Sir:

This department is in receipt of your request for an opinion under date of March 10, 1937, wherein you state as follows:

"The Mayor and Board of Aldermen have requested me to secure your opinion on the following condition:

"We have a Citizen who is circulating a petition for nomination to the office of Alderman of the City. Said aspirant has always stood on his constitutional right of being exempt from Poll Tax Assessment on account of being a member of the National Guard. Having no Personal Property or Real Estate in his own name he is therefore not a Tax paying citizen and has never been on the City Tax Books. Should he be elected to the office he seeks, could he qualify to said office under existing circumstances?

"I shall greatly appreciate your opinion on the question and it would be of material help to us if we could have your reply in hand on or before March 19th, our closing date for filing petitions."

We assume for the purpose of this opinion that Crystal City, Missouri, is a city of the fourth class.

The following sections of the Revised Statutes of Missouri, 1929, provide the statutory qualifications for the office of alderman:

Section 6964 states in part that:

"No person shall be an alderman unless he be at least twenty-one years of age, a citizen of the United States, and an inhabitant and resident of the city for one year next preceding his election, and a resident of the ward from which he is elected."

Section 6969 states in part that:

"No person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes, or forfeiture or defalcation in office, or who is not a resident of the city."

We find no provision requiring a person seeking the office of alderman or appointed or elected to the office of alderman in a city of the fourth class to be a taxpayer. The only reference to the payment of taxes, as above indicated, is that if he be chargeable with city taxes, he be not in arrears at the time of his election or appointment.

It might be reasoned that if the statute provides that a person appointed or elected to the office of alderman must not at the time be in arrears for any unpaid city taxes, then it must have been the intention of the Legislature that a person appointed or elected to the office of alderman be a taxpayer, at least of city taxes.

We can not so agree. The intention of the Legislature is expressed in clear and unambiguous language, viz., that the person appointed or elected must not at the time be in arrears for any unpaid city taxes, and we have no right to fritter away these plain terms by refined reasoning.

Thus in the case of *Grier v. Kansas City, C. C. & St. J. Ry. Co.*, 228 S. W. 454, 1. c. 458, 286 Mo. 523, the court said:

"It is elementary that in construing a writing, whether it be a statute or a contract, the clear meaning of unequivocal language cannot be controlled or overthrown by a construction in respect to that which is obscure or incomplete. * * * When the words

March 13, 1937.

admit of but one meaning, a court is not at liberty to speculate on the intention of the Legislature, or to construe an act according to its own notions of what ought to have been enacted."

And in the case of Gendron v. Dwight Chapin & Co., 37 S.W. (2d) 486, 1. c. 488, 225 Mo. App. 466, the court said:

"In construing the act, we are bound to ascertain and give effect to the intention of the Legislature as expressed in the statute, and, where the meaning of the language used is plain, it must be given effect by the courts (Betz v. Kansas City Sou. Ry. Co., 314 Mo. 390, 284 S.W. 455, 461; Grier v. Ry. Co., 286 Mo. loc. cit. 534, 228 S. W. loc. cit. 457; Sleyster v. E. Donzelot & Son (Mo. App.) 25 S. W. (2d) loc. cit. 148), and this without regard to the results of the construction or the wisdom of the law as thus construed (State ex rel. v. Wilder, 206 Mo. 541, 105 S. W. 272), and we have no right, by construction, to substitute any ideas concerning legislative intent contrary to those unmistakably expressed in the legislative words (Clark v. Railroad Co., 219 Mo. loc. cit. 534, 118 S. W. loc. cit. 44.)"

From the foregoing, we are of the opinion that a person seeking the office of alderman in a city of the fourth class need not be a taxpayer, and the only restriction with reference to taxes is that if he be appointed or elected to the office, he must not at the time be in arrears for any unpaid city taxes.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

CRIMINAL COSTS: Neither State nor County liable for payment of costs where persons charged with felony have been discharged by Justice of the Peace or any other officers taking their examination.

April 8, 1937.

H-9

Honorable B. G. Dilworth
Prosecuting Attorney
Dent County
Salem, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

"Roy Mackie and Arlie Gibbs were charged, upon complaint by me, as Prosecuting Attorney of Dent County, of burglary in the second degree. No complaining witness signed the complaint, but the case was instituted on my own official oath and information before a Justice of the Peace, W. R. Peck of Dent County, Missouri.

"At the preliminary of these two defendants, they were discharged by the above mentioned Justice, who ruled that there was not sufficient evidence to warrant their being bound over to our Circuit Court.

"The cost bill in this case was made up and presented to me for approval; I consulted Honorable Forrest Smith, State Auditor, and his Criminal Cost Clerk, Marion Spicer, replied that in such a case, under Sections 3831 and 3832, neither the State nor the County would be liable in any costs, but judgment should be rendered against the person on whose oath the complaint was filed, save and except where the Prosecuting Attorney instituted the proceedings, he being relieved from such costs by Section 3510.

"I desire your opinion concerning whether

or not this County or the State is liable for any cost in this case. This situation will undoubtedly arise again and while your opinion is not stare decisis, yet the interested parties have agreed to accept your opinion as final."

We are enclosing a copy of an opinion dated February 27, 1937, written by the Honorable Olliver W. Nolen and approved by the Honorable J. E. Taylor, (Acting) Attorney-General, wherein the Sections 3831 and 3832 of R. S. Mo. 1929, mentioned in your request, are interpreted insofar as relates to the word "prosecutor" as used in these sections. You will also find that Section 3510, R. S. Mo. 1929, is interpreted as relates to the payment of costs by the Prosecuting Attorney.

You will note that the last two clauses of Sections 3831 and 3832, supra, reading,

****; and in no such case shall
the State or county pay such
costs.",

are plain, unambiguous and need no interpretation. In the case of Cummins v. Kansas City Public Service Company, 66 S. W. (2d) 920, 1.c. 931, the Court, in speaking of the fundamental rule where the language of the statute is plain, said:

"It is, of course, fundamental that where the language of a statute is plain, there admits of but one meaning, there is no room for construction."

To the same effect is the ruling in the case of State v. Thatcher, 92 S. W. (2d) 640, 1.c. 643.

CONCLUSION.

In light of the above, it is the opinion of this department that since the parties, mentioned in your request

4/8/37

for an opinion, were discharged by the Justice of the Peace, that neither the State nor the County shall be liable for the payment of costs.

Respectfully submitted,

APPROVED:

RUSSELL C. STONE
Assistant Attorney-General.

J. E. TAYLOR
(Acting) Attorney-General.

RCS/afj
Encl.

MOTOR VEHICLE) C.C.C. enrollees driving government trucks
DRIVER'S LICENSE) do not have to have state driver's licenses.

October 11, 1937

Mr. James N. Diehl, Forest Supervisor
U.S. Department of Agriculture
218½ Walnut Street
Springfield, Missouri



Dear Sir:

This department is in receipt of your request for an opinion which reads as follows:

"Is it necessary for CCC enrollees engaged in driving government-owned trucks and automobiles to procure state driver's licenses?

We have probably one hundred CCC enrollees on this Forest who are engaged in driving such vehicles, who never drive privately owned vehicles.

This matter was taken up with the local Automobile License Office, but we were requested to refer the matter to you.

May we have your early reply?"

In view of Public Act 163, passed by the 75th Congress, First Session, and approved June 28, 1937, which is entitled "An Act to establish a Civilian Conservation Corps and for other purposes" there can be no question but that the Civilian Conservation Corps is an instrumentality of the federal government. The question, therefore, is whether the State of Missouri can require enrollees who drive motor vehicles belonging to the Corps to obtain a state driver's license. A similar situation arose in *Johnson vs. Maryland* 41 Supreme Court 16, 254 U.S. 51, 65 L. Ed. 126, in which the State of Maryland arrested one Johnson, an employee of the Postoffice Department of the United States, while driving a government truck in the transportation of mail, and convicted and fined him

for so driving without having obtained the driver's license. The court reversed the judgment and held that the appellant did not have to obtain a state driver's license. Mr. Justice Holmes, who delivered the opinion said:

"It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed."

CONCLUSION

It is, therefore, the opinion of this department that Civilian Conservation Corps enrollees who drive government motor vehicles are not required to obtain state driver's licenses.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED By:

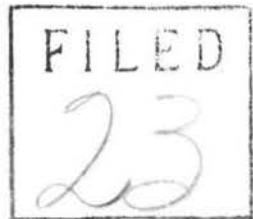
J. E. TAYLOR
(Acting) Attorney-General

AO'K:VAL

COUNTY:) (1) The question of whether property owned by the
TAXATION) county is subject to execution is a question of
AND REVENUE:) (2) fact in view of Section 1161, R. S. 1929.
County Treasurer may make partial payment on
warrant "next in line for payment" provided he
can give proper credit and adjust his own records.

December 16, 1937.

Honorable B. G. Dilworth
Prosecuting Attorney
Dent County
Salem, Missouri



Dear Sir:

This Department acknowledges receipt of your letter of December 11th, wherein you make the following inquiry:

I.

"At the November, 1937, term of Dent County Circuit Court, Security State Bank, plaintiff, a Missouri banking corporation, obtained judgment against Dent County, Missouri, defendant, in the total sum, including interest, of \$6101.73, said judgment being based on 1933 County Warrants of Dent County.

"Judgment provided for execution to issue thereon. Within the past week plaintiff's attorney has made a levy under said execution on a town lot described as 67 feet of the east side of lots one and four of block twelve, original town site of Salem, Missouri. This lot was purchased several years ago by the County Court out of general revenue funds and has since that time stood vacant and unoccupied of any building of any kind or description. It has at present, and before the rendition of this judgment, some very crude hitch-racks, which are composed

of posts and cross-bars. Although the record of the County Court does not show the fact, this lot was originally purchased with the idea in mind of at some future time, erecting a jail building thereon. This was never done nor even started.

"The County Court are very insistent that I, the Prosecuting Attorney, proceed in some manner to quash this execution and levy at the return term, which is the April, 1938 term of our Circuit Court. I have made as thorough a search of the law as my library facilities will permit and am unable to find any statute or case which, under the circumstances as above stated, would prevent levy or sale of this lot. The only statute which I find applicable is Section 1161, R. S. Mo., 1929, which provides only that 'Courthouses, Jails, Clerk's Offices and other buildings owned by any county * * * shall be exempted from taxes and execution.'

"I would appreciate your opinion as to what possible grounds the County would have for quashing the above mentioned execution and levy."

The general rule with respect to county, municipal or public property being subject to execution, and the exceptions thereto, is contained in 23 Corpus Juris, page 355, paragraph 105:

"Where property of a municipal or other public corporation is sought to be subjected to execution to satisfy judgments recovered against such corporation, the question as to whether such property is leviable or not is to be determined by the usage and purposes for which it is held.

The rule is that property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing places, fire engines, hose and hose carriages, engine houses, public markets, hospitals, cemeteries, and generally everything held for governmental purposes, is not subject to levy and sale under execution against such corporation. The rule also applies to funds in the hands of a public officer. Likewise it has been held that taxes due to a municipal corporation or county cannot be seized under execution by a creditor of such corporation. But where a municipal corporation or county owns in its proprietary, as distinguished from its public or governmental capacity, property not useful or used for a public purpose but for quasi private purposes, the general rule is that such property may be seized and sold under execution against the corporation, precisely as similar property of individuals is seized and sold. But property held for public purposes is not subject to execution merely because it is temporarily used for private purposes, although if the public use is wholly abandoned it becomes subject to execution. Whether or not property held as public property is necessary for the public use is a political, rather than a judicial question."

The question as to the liability of the property of a public corporation held for public uses and governmental purposes to levy and sale under an execution, is discussed in the case of *Snow v. Hope Drainage District*, 2 Fed. Sup. 631, 1. c. 933:

"The writ of garnishment which has heretofore been issued cannot be enforced against the deposit in the Pattonsburg Bank. The Hope drainage district is a municipal corporation. State ex rel. v. Drainage District (Supreme Court of Missouri) 49 S. W. (2d) 121, 125. It is elementary in the law that the property of a public corporation held for public uses and governmental purposes is not subject to levy and sale under execution against the corporation. 23 Corpus Juris, 355. Plaintiff makes no question of this general rule, but suggests that the money which has been collected by the drainage district for the payment of bonds issued against the district, and which is now held for the district, is not property held for public uses but is private property of the district and, therefore, is subject to seizure under execution. The suggestion is untenable. Certainly what has been collected by a municipal corporation to pay the principal and interest of bonds issued by it is held for a public use. If the fund which has been collected by the drainage district is private as distinguished from public property, then it is subject to execution in favor of any judgment creditor whatsoever; for if property is private it is not private as to some and public as to others. If one judgment creditor can seize it, so can another. But it would hardly be contended that any creditor of the drainage district having a judgment against it as, for example, some engineer it may have employed and failed to pay, could seize a fund which had been collected by taxation for the specific purpose of paying bonds or the interest thereon. So far then as the motion to quash the writ of garnishment is concerned, that motion should be sustained."

In the decision of *Catron v. Lafayette Co.*, 125 Mo., 1. c. 72, the court held to the effect that a levy and an execution could not be made against the poor-house and farm of a county. In the decision of *Allen v. Trustees of School District*, 23 Mo. 418, the court held that the property held for the use of a school district was not liable to execution. In the year of 1850 certain swamp lands were donated to the State of Missouri and in the year of 1868 the said lands were donated in turn to the several counties of the State and it was held by the court in the case of *State ex rel. v. The County of New Madrid*, 51 Mo. 82, that the said swamp lands were exempt from any ordinary liability for county indebtedness. It was held in the case of *State to the Use of Board of Education v. Tiedemann*, 69 Mo. 306, that a school district, being a public corporation, was not subject to the process of execution as far as the school building or school property was concerned.

The provisions of Section 1161, R. S. Mo. 1929, are as follows:

"All courthouses, jails, clerks', offices and other buildings owned by any county or municipality, and the lots on which they stand, and all burial grounds, shall be exempt from attachment and execution."

By a strict construction of the section and on the bare facts as you present them the lot in question would appear to be subject to execution. The decisions which we have quoted herein bear directly and indirectly on the general rule to the effect that property held for public purposes and generally everything held for governmental purposes is not subject to levy but where the municipality or the county owns property in its proprietary, as distinguished from its public or governmental, capacity that said property is subject to be seized and sold under an execution.

The most exhaustive discussion of the question is contained in 17 Ruling Case Law, paragraph 43, page 145, as follows:

"As a general proposition an execution cannot be levied against the property of a county, state, or municipal organization, in the absence of a statute expressly granting such right in express terms. Even where such a right is granted, however, it is a general rule that an execution cannot be levied on any property held by a municipal or other public corporation for public purposes such as public buildings, schoolhouses, streets, alleys and public squares, parks, promenades, waterworks, wharves and landing places, fire-engines, hose and hose carriages, engine-houses and engineering instruments, the principle being that title to such property is held in trust for the public, and hence can no more be sold to satisfy the debts of a city or other political subdivision than can any other trust property be sold to satisfy the individual debts of any other trustee. Similarly, on the ground of public policy, an ordinary execution cannot be levied on any of the general revenues of a county or city, either before or after they are collected. Moreover, it has been held that liquors held by a town for the purpose of carrying on a dispensary under legislative authority stand in the same position as other property used by the town in the administration of its government, and, accordingly, are exempt from the levy of an execution on a judgment against it. It frequently happens, however, that a city or other municipality is possessed of property, both real and personal, which is not, and never can be, needed for municipal use, the appropriation of which to the payment

of the city's debts could not in any way affect the public. Such property, by the great weight of authority, is treated as the private assets of the municipality, and may be levied on and sold under an ordinary execution. For instance, residence property conveyed to and received by a city from its tax collector as a settlement of taxes collected by him and not paid over, such property not being adapted to or used by the city for any public purpose, is not exempt from levy and sale under execution. However, a public quay in a city, dedicated to public use, does not cease to be *locus publicus*, and become leviable as private property, because it is leased by the public authorities for a purpose subservient to the public use. The question as to whether property is reasonably necessary for public use must ultimately be determined by the court. Presumptively, however, all property of every kind held by a municipality is for the public use, and the onus of overcoming such presumption rests on the plaintiff in execution. In case of doubt, therefore, the question will always be resolved in favor of the city, the interests of the individual being of necessity subservient to the due and proper administration of government, or, in other words, as the revenues of a city must, in a large measure, be raised by taxation, the creditor will be required to wait for payment rather than be permitted to embarrass the corporation by selling property needed for the public welfare."

The manner in which the county now holds the lot in question, or uses the same, is a question of fact which the court will have to determine. As stated in *Corpus Juris*, *supra*, "Whether or not property held as public property is necessary for the public use is a political, rather than a judicial question."

It appears to be a matter which is governed largely by the facts and on which you can only present your own and the views as herein expressed to the court.

II.

Your letter contains an additional paragraph, which is as follows:

"There is also in the hands of the Treasurer of Dent County, some money of 1933 revenue, accruing from payment of back taxes. This sum on hands is not sufficient to pay one warrant which stands registered and next in line for payment. This particular warrant which is next in line is one of the warrants sued on, upon which judgment was returned as above stated. Is it proper, assuming the Security State Bank will accept the sum, for the County Treasurer to pay over such funds as are on hand in partial payment of this one warrant, where credit is made on the back of said warrant and partial satisfaction of the above judgment is made on the Judgment Records of the Circuit Clerk's office?"

The method of paying warrants without referring to the statutes and the authority to apply a surplus to outstanding warrants is contained in the decision of State ex rel. v. Johnson, 162 Mo. 621, as follows:

"A county warrant valid when issued is not rendered invalid because the revenue provided to pay it is not collected during the year in which it was issued, or is misappropriated by the officers of the county for whose act the holder of the warrant is not responsible. On the contrary,

the surplus county revenue remaining after the payment of all current expenses of every kind for the year for which such revenue was levied and collected, may be used in the payment of outstanding valid unpaid county warrants for previous years. Such warrants are to be paid in the order of their presentation and registration, and are not payable pro tanto if there is not a sufficient fund to pay all. Where such surplus is applicable to the payment of the warrants of previous years in the order of their registration, it is the duty of the county treasurer to pay them without waiting for an order of the county court distributing such surplus among the various county funds. No further appropriation or order by the court is necessary. The warrant itself is the voucher the law recognizes as the treasurer's authority for paying it.

In view of the above decision we think it is proper to pay the warrant mentioned in the above paragraph, it being, as you state, "next in line for payment," in the manner as contained in your letter, provided the county treasurer can give to all concerned proper credit and especially can adjust his own records.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

Pool and Billiard) Persons, voluntary associations or incor-
Tables) porated bodies must obtain a license to keep
and operate.

December 17, 1937

12-18



Hon. B.G. Dilworth
Prosecuting Attorney
Dent County
Salem, Missouri

Dear Sir:

This department is in receipt of your letter of December 11, 1937, in which you request an opinion as follows:

"There is being formed now in Salem, Dent County, Missouri, an athletic club, which is taking the form of a voluntary unincorporated association. This club, it is my understanding, intends to operate on a non-profit basis, proceeds merely to be used to pay expenses.

"This club intends to set-up and operate pool and billiard tables in its club-room for the exclusive use of their members. A membership fee is to be charged members, which money will go to payment on the club-room and other operating expenses.

"I would like to have your opinion as to whether or not such a club is required to obtain a pool and billiard table license from the County Court in order to so operate.

"In the event that such an association would incorporate on a non-profit basis, would the requirement as to license be any different."

Section 14272, R.S. Missouri 1929, is in part as follows:

"The county court shall have power to license the keepers of billiard tables, pigeonhole tables, jenny lind tables, and all other tables kept and used for gaming, upon which balls and cues are used."

Section 14280, R.S. Missouri 1929, is as follows:

"This chapter shall not apply to any person having set up in his own private residence any one of such tables mentioned in Section 14272, when used for his own private use and for the use of his family, and upon which no charge is made for playing."

Section 14278, R.S. Missouri 1929, provides that any person who violates the provisions of Section 14272 by operating any of the tables therein mentioned without a license, shall forfeit and pay not less than fifty, nor more than four hundred dollars, to be recovered by indictment or information.

We find two cases in this state which have reached the appellate courts in which persons have been charged with keeping a pool or billiard table without a license.

In *State v. Shotts*, 128 S.W. 245, 143 Mo. App. 346, the defendant was tried (and convicted) upon information with having kept a billiard table without a license. The defendant operated a tobacco store. In conjunction with his tobacco business, defendant set up a billiard table for the use of the public, for which use he made no charge, either directly or indirectly. Also, defendant kept a reading table where he furnished reading matter at no charge to the public. In disposing of this case, the court said at l.c. 346:

"The fact that defendant made no charge to the patrons of his business as a merchant for the use of his table for playing games of billiards thereon was immaterial. It was permitting the playing of such games by defendant as the keeper of the tables without a license therefor that the statute comprehended. Had he been licensed as such keeper he would have been authorized to have charged for the use of his tables or he could have permitted the use free of charge to his patrons although the statute is silent as to that matter. It was the business the Legislature had in view and not whether the licensee realized any profit from it,".

In *State v. Clarkson*, 102 S.W. 2nd 159 (Mo. App.), the *Shotts* case, *supra*, was cited and reaffirmed. In this case, a voluntary association known as a "Recreation Club" was formed. Each member paid the sum of one dollar - out of which was purchased two pool tables. The members of the club then signed an agreement whereby each was to pay one dollar per month to defray the cost of upkeep on the tables, rent, lights, heat, etc. The monthly fee was paid to defendant who rented quarters, set up the tables and paid all expense incident to the operation of the club out of said money. He was not required to account for any surplus, if any, in said fund. No other charge was made for the privilege of using the club's facilities. No one except members of the club and their invited guests used the tables. The defendant was convicted in the trial court of keeping and permitting to be kept and used, pool tables without a license. The appellate court affirmed this conviction.

The statute is directed against the keeping and using of said table at any other place than in the home by a person for his own use or the use of his family. The question of operation for profit is immaterial.

December 17, 1937

The license provided is upon the keeper of the table, whether it be a person, voluntary association, or an incorporated body. We do not think that the fact the keeper of the table is a corporation makes any distinction in the law. The law requires that all the tables, mentioned in Section 14272 must be licensed, except those set up in a private residence by a person for his own use or for his family. The tables kept by voluntary associations or non-profit corporations do not fall within this exception.

CONCLUSION

Therefore, it is the opinion of this department that all the tables, included within the provisions of Section 14272, R.S. Missouri 1929, must be licensed by the county court to operate. The only exceptions are those mentioned in Section 14280, R.S. Missouri, 1929, that is, those set up in a private residence for a person's own use or the use of his family.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED by:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

CHATTEL MORTGAGES: Chattel mortgages that have been filed and not recorded may be subsequently withdrawn and duly recorded, according to law.

March 1, 1937



Mr. Gerald J. Donworth
Recorder of Deeds
St. Louis County
Clayton, Missouri

Dear Mr. Donworth:

This will acknowledge receipt of your request for an opinion, which reads as follows:

"Occasionally, we are requested to withdraw a filed Chattel Mortgage from our files and to record same.

If the original Chattel Mortgage properly acknowledged before a Notary Public was filed, would it be in violation of the Missouri statutes to comply with such requests?"

We direct your attention to Section 3097, R. S. Mo. 1929, relating to when mortgages of personalty may be filed or recorded. It reads as follows:

"No mortgage or deed of trust of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee or cestui que trust, or unless the mortgage or deed of trust be acknowledged or proved

and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are by law directed to be acknowledged or proved and recorded, or unless the mortgage or deed of trust, or a true copy thereof, shall be filed in the office of the recorder of deeds of the county where the mortgagor or grantor executing the same resides, and in the case of the city of St. Louis, with the recorder of deeds for said city, or, where such grantor is a non-resident of the state, then in the office of the recorder of deeds of the county or city where the property mortgaged was situated at the time of executing such mortgage or deed of trust; and such recorder shall indorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for the inspection of all persons; and such mortgage or deed of trust, or copy thereof, may be so filed, although not acknowledged, and shall be as valid as though the instrument were fully spread upon the records of the county, or, in case of the city of St. Louis, upon the records of said city, in the office of the recorder of deeds; and such instrument, when acknowledged and recorded, or when the same, or a copy thereof, shall have been filed, as above provided, shall thenceforth be notice of the contents thereof to all the world."

It is to be noted from the above section that it has for its purpose the imparting of notice to the world of chattels that have been mortgaged, and, that mortgages of personalty not filed, or recorded, would be void except as between the parties. Bank v. Powers, 134 Mo. 432. The obvious purpose

March 1, 1937

of the statute was to protect the mortgagee in any interest that he may have in the mortgaged personalty.

It is to be further noticed that the above section is written in the alternative and when so written we construe the word "or" to mean either. *Dodd vs. Independence Stove & Furnace Co.* 51 S. W. (2nd) 114.

In the case of *Joplin Supply Co. vs. West*, 135 S. W. 156, 1. c. 161, the Springfield Court of Appeals speaking of the construction of a statute said:

"Statutes must be construed in reference to the subject-matter, the object which prompts and induced their enactment and the mischief they are intended to remedy."

Thus, it may be seen that mortgages of personalty may be proved and recorded as conveyances of land, or a true copy of such mortgages may be filed. If the interest of the mortgagee may better be served by the withdrawing of the filed chattel mortgage and subsequent recording, the statutes make no inhibition regarding such procedure. The various reasons that the mortgagee might withdraw the filed mortgage and record the same, need not be discussed.

CONCLUSION

It is the opinion of this department that a chattel mortgage may properly be filed with the recorder of deeds and subsequently be withdrawn and recorded in the manner in which conveyances of land are proved and recorded.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

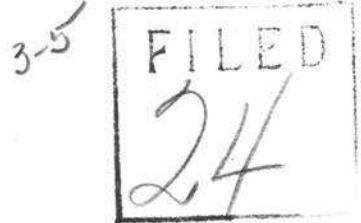
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS:RT

SHERIFF: Entitled to a fee of five cents for "calling any action" only when there is a cause actually pending before a court of record in which there is a party plaintiff and party defendant.

March 4, 1937



Honorable Elvin S. Douglas
Prosecuting Attorney
Polk County
Bolivar, Missouri

Dear Sir:

This Department is in receipt of your letter of February 27, requesting an opinion on the construction of Section 11789, Revised Statutes Missouri 1929. Your letter is as follows:

"Section 11789, R. S. Mo. 1929 provides that the sheriff shall be allowed 'For every action called at each term.....\$.05.'

"I understand that some counties have construed this provision to mean that for every order entered of record in a court of record, including the County Courts and Probate Courts, that the sheriff is entitled to five cents. This office has been asked by the sheriff of this county whether this section is to be so construed. I would appreciate your opinion on this matter."

Section 11789, Revised Statutes Missouri 1929, relates to the fees of the sheriff and relates mainly to his duties and fees in connection with circuit courts. As to the provision "For every action called at each term. . . \$.05" it will be necessary to determine the meaning of the word "action."

Section 2822, Revised Statutes Missouri 1929, being the definition of certain terms as used in the statute, defines "action" to include "counterclaim and

set-off."

It is further defined in the case of Smith v. St. Louis Beef Canning Company 14 Mo. App. 1. c. 526,

"Our present statute on the subject is so plain and unequivocal, that its interpretation needs not the least aid from the ancient distinctions between forms of action, or the origin and development of the trial by jury. 'An issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial be waived or a reference ordered, as hereinafter provided.' Rev. Stats. sect. 3600. The word action does not mean the defence set up, nor the issue developed in a cause. It means, according to the books, 'the legal demand of one's just rights,' in other words, the plaintiff's suit."

The word "action" is defined in 1 Corpus Juris page 924, as follows:

"An assertion in a court of justice of a right given by law; a demand or legal proceeding in a court of justice to secure one's rights; the prosecution of some demand in a court of justice; the means by which men litigate with each other; the means that the law has provided to put the cause of action into effect; the formal means or method of pursuing and recovering one's right in a court of justice; the rightful method of obtaining in court what is due to any one; the prescribed mode of enforcing a

March 4, 1937

right in the proper tribunal; a remedial instrument of justice whereby redress is obtained for any wrong committed or right withheld; a proceeding in court, whether of equity or law; a suit or process by which a demand is made of a right, in a court of justice; a proceeding at law to enforce a private right or to redress a private wrong; a civil proceeding taken in a court of law to enforce a right; a judicial proceeding for the prevention of redress of a wrong; a proceeding by one party against another to try their mutual rights; an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense; a judicial proceeding which will, if prosecuted effectually, result in a judgment."

By statute the sheriff is compelled to perform duties for the county court and probate court, for which he receives a stipulated amount per diem. Construing the word "action" in its use and legal meaning, we are of the opinion that the sheriff is entitled to a fee of five cents in any court only in the event that a case or an action is called wherein there is a cause of action pending in the court in which there is a party plaintiff prosecuting an action against a defendant.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

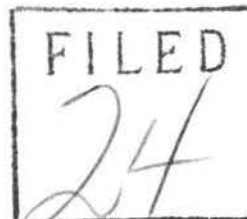
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

INHERITANCE TAX: (1) Missouri Road Bonds subject to inheritance taxation in Missouri, (2) United States Treasury Bonds subject to inheritance taxation in Missouri, (3) War Risk Insurance not subject to inheritance taxation in Missouri.

March 12, 1937.



Mr. H. E. Doerner,
Public Administrator,
Pemiscot County,
Steele, Missouri.

Dear Sir:

This department is in receipt of your letter of March 10, 1937, requesting opinion as follows:

"We have an estate now in course of administration in the Probate Court of our county, practically the entire estate consists of

First Missouri Road Bonds
Second United States Treasury Bonds
Third A United States Veterans Insurance Policy

As the intestate deceased was a single man he only left brothers and their descendants.

The question has arisen as to whether upon an appraisal of this estate whether or not any or all of the above mentioned assets or the value thereof is liable to a tax.

The insurance policy reads that it is to be free from all taxes. But we do not know whether or not this applies to collateral inheritance tax or not.

Would appreciate your advice in the matter."

I.

The exemption of state bonds from all state, county or municipal taxation does not prevent the imposition of a succession tax upon them.

Section 570, Laws of Missouri 1931, page 130, provides, in part, as follows:

Mr. H. E. Doerner

March 12, 1937.

"A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or any interest therein, or income therefrom, in trust, or otherwise, to persons, institutions, associations, or corporations, not hereinafter exempted in the following cases *****"

The Missouri Inheritance Tax is not a property tax, nor is it a tax levied against persons, but rather it is an exaction in the nature of a "death duty" to be paid to the State upon the occasion of a death and consequent transfer of ownership in the property of the decedent. In re Rosing's Estate, 85 S. W. (2nd) 495.

In the rather recent case of Waddell vs. Doughton, 140 S. E. 160, the Supreme Court of North Carolina had the precise problem presented to them that is here before us. Conner, J., in delivering the opinion of the Court said:

"The inheritance tax, however, which plaintiff has been required to pay, and which he has paid, is not a tax upon the bonds, as property owned by him, but upon his right to take and hold said bonds under the will. The bonds are exempt from taxation in the hands of a holder, but this exemption does not extend to the right of succession, or to the right to have said bonds transferred to him.

This necessarily follows, we think, from the nature of an inheritance tax, as defined by this court and as levied and collected under the statute. It is not a tax on property, but on the succession to or transfer of property, occasioned by death. It has been so held consistently in many decisions of this court."

II.

United States Bonds are subject to the Missouri Inheritance Tax.

The power of the State to exact a succession or inheritance tax with respect to United States bonds which are exempt from property taxation is well settled. In the case of

Mr. H. E. Doerner

March 12, 1937.

Plummer v. Coler, 178 U. S. 115, the court, in reaching this conclusion said:

"We think the conclusion fairly to be drawn from the state and Federal cases is that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the state may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and that the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the tax or the law under which it is imposed."

III.

War risk insurance is not subject to the Missouri Inheritance Tax.

We have heretofore had occasion to discuss the above proposition, and we are enclosing copy of an opinion of this Department holding that such insurance is not subject to inheritance taxation in Missouri.

CONCLUSION

In view of the foregoing, it is the opinion of this Department that Missouri Road Bonds and United States Treasury Bonds are subject to the inheritance tax imposed by the laws of the State of Missouri for the reason that the Missouri Inheritance Tax is not a tax on property, but rather a tax upon the right to succeed to property. We are further of the opinion that War Risk Insurance is not subject to inheritance taxation in Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR, Acting
Attorney General

COUNTY COLLECTORS:

Collectors cannot retain twenty-five per cent. increase under Section 9935a, Laws of Mo. 1935, by reason of Section 8, Article XIV, Missouri Constitution.

May 21, 1937.

5-26

FILED
24

Senator Phil M. Donnelly
Missouri Senate
Jefferson City, Missouri

Dear Senator Donnelly:

This is to acknowledge the receipt of your letter of May 19, 1937, in which you request the opinion of this Department as to the commission of the county collectors in the collection of taxes. Your letter is as follows:

"The Fifty-Seventh General Assembly of Missouri passed an Act found in the Session Acts of 1933, at pages 454 to 458 inclusive, fixing the salaries or commission for county collectors.

"At the general election in 1934 county collectors were elected throughout the State. This was over a year after the effective date of the Act.

"The Fifty-Eight General Assembly passed an Act found on page 406 of the Session Acts of Missouri, 1935, approved May 1, 1935, relating to the maximum fees and commissions which may be retained by the collectors for the payment of deputies and clerical hire. There were no additional duties specified in the Act and no additional duties actually performed until possibly in some counties after January 1, 1937, when the collectors took over the duties of the county treasurers and became ex-officio county treasurers by the reason of the consolidation of those two offices.

"In view of the fact that the collectors were elected in the general election in 1934 and at that time they knew what their salaries and duties were to be even to the extent that they would be required

to take over the duties of the office of the county treasurers on January 1, 1937, I would like to know whether or not the county collectors were entitled, or are now entitled, to retain or collect the twenty-five per cent additional fees for deputy and clerical hire as provided for in the Act of 1935 on page 406.

"In other words, would this be construed as an increase in the compensation or fees of the county collectors during their term of office. In this connection I desire to call your attention to Section 8 of Article 14 of the Constitution of Missouri.

"If it is your opinion that the collectors are not entitled to retain the twenty-five per cent increase as provided for in the Act of 1935, at page 406, then would not the collectors be required to pay back to the counties the amount retained in violation of this Constitutional provision.

"I would appreciate an early opinion from you in regard to this matter."

As we understand it, the question is: Whether or not Section 9935a, enacted by the 58th General Assembly, and found in Laws of Missouri, 1935, at page 406, is applicable to the collectors now in office who were elected in November, 1934, for a four-year term, or, in other words, whether said collectors may legally retain the twenty-five per cent. increase in fees and commissions allowed under Section 9935a, supra, in view of Section 8, Article XIV of the Constitution of Missouri. This section provides:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

In approaching this question it might be well to trace briefly the amendments to Section 9935, Revised Statutes of Missouri, 1929. The General Assembly of 1933 by the re-enactment of Section 9935, Laws of Missouri, 1933, pages 454-455, adopted the same general scheme as to the commissions the collectors were allowed to retain, as it existed under Section 9935, supra. This section in part provides as follows:

"The collector, except in counties where the collector is by law paid a salary in lieu of fees and other compensation, shall receive as full compensation for his services in collecting the revenue, except back taxes, the following commissions and no more : * *"

In the re-enactment of Section 9935 it left out the following part of said section in sub-division XV:

"* * that no collector shall be allowed to retain over nine thousand dollars of commissions and fees in any one year except as provided in sub-division fourteen herein."

And in lieu of the omitted portion it adopted the schedules in the first thirteen sub-divisions, but very materially reduced the maximum amounts the collectors in the various sub-divisions were allowed to retain; said portion of said section being as follows:

"Provided, that no collector, except as provided in subdivision fourteen herein, shall be allowed to retain commissions and fees in any one year in excess of the following amounts: In any county coming within the provisions of subdivisions one to seven, inclusive, hereof not more than \$2500.00; in any county coming within the provisions of subdivision eight, not more than \$3000.00; in any county coming within the provisions of subdivision nine, not more than \$3500.00; in any county coming within the provision of subdivision ten, not more than \$4000.00; in any county coming within the provisions of subdivision eleven, not more than \$4500.00;

in any county coming within the provisions of subdivision twelve, not more than \$5000.00; in any county coming within the provisions of subdivision thirteen, not more than \$5500.00; "

And said amendment provided further:

"that the limitations herein contained as to the total compensation of collectors, treasurers and ex-officio collectors shall not apply during the official term of the persons now holding such offices, but the compensation of such persons now holding said offices shall be governed as now provided by law."

The 1933 reenactment of Section 9935, supra, did not change the law in regard to the expenses the collector was required under the laws to pay out of his commissions but left it as it was under the old law. Therefore, in those counties where he paid his deputies out of his commissions and fees of his office, the law remained as it was, notwithstanding the reduction of the maximum amount he was allowed to retain.

Under the law as it existed prior to 1933, he paid his deputies and clerical hire out of his commissions, and under the 1933 law he continued to pay his deputies and clerical hire out of his commissions. Then in 1935, during the term of the collectors who were elected in November 1934, the 58th General Assembly enacted a new law, found at page 406, Laws of Missouri, 1935, and denominated same Section 9935a, which is as follows:

"That the officers referred to in Section 9935, in addition to the maximum amount of fees and commissions permitted to be retained by County Collectors as provided in Section 9935 Revised Statutes of Missouri for 1929, as amended by an act of the General Assembly, approved May 11, 1933, and found in the Session Laws for 1933 at

pages 454 to 458, inclusive, each such officer may retain for the payment of Deputy and/or clerical hire a sum not to exceed twenty-five per cent of the maximum amount of fees and commissions which such officer is permitted to retain by said Section as so amended, but such Deputy and/or clerical hire shall be payable out of fees and commissions earned and collected by such officer only and not from general revenue."

Coming now directly to your question asked in your letter, as to whether or not this twenty-five per cent. increase for deputy and/or clerical hire is applicable to and may be retained by the collectors in office and elected at the November, 1934, Term. It must be borne in mind that his deputy or deputies and clerical hire were paid out of his commissions under Section 9935, R. S. Mo. 1929, and under re-enacted Section 9935, Laws of Missouri, 1933, page 454. And under the 1935 act the collectors may continue to do so but they have a twenty-five per cent. increase for that purpose, if their commissions amount to that much more over the maximum amounts they were permitted to retain under the 1933 act.

Is this twenty-five per cent. increase, therefore, such an increase of compensation or fees as comes within the meaning of Section 8, Article XIV of the Missouri Constitution?

In Ruling Case Law, Vol. 22, page 534, it is said:

"A constitutional provision forbidding the change of the compensation of an official during his term of office is inexorable. It admits of no exceptions and affords no opportunity for evasion by the Legislature or other body."

The law is well-settled in Missouri and numerous cases may be cited that the compensation of a public official, such as County Collector, may not be increased during his term of office, and we cite the following cases:

State ex rel. Stevenson v. Smith, 87 Mo. 158; Givens v. Daviess County, 107 Mo. 603; Callaway County v. Henderson, 119 Mo. 32, l. c. 40; Folk v. St. Louis, 250 Mo. 116, l. c. 134; State ex rel. Truman v. Jost, 269 Mo. 248; State ex rel. Buchanan Co. v. Imel, 280 Mo. l. c. 559.

It is said in 46 Corpus Juris, p. 1026, Section 226, the following:

"Under a constitutional prohibition against increasing the compensation of officers, where the statute allows a lump sum to cover their compensation and expenses, such sum cannot be increased during their term, and the allowance of additional deputies to be paid out of public funds to an officer who is bound to pay all deputies and assistants from his salary is a violation of such a provision."

The general rule is stated as follows in L. R. A., 1918C, in notes at page 561:

"The general rule is that where the compensation of a public officer is, by statute, fixed at a lump sum which is to cover the expense of running the office, it is a violation of a constitutional provision prohibiting an increase of salary during such officer's term to authorize the appointment of a deputy or assistant where there was none before, and to provide that the compensation be met from the public fund."

We are inclined to the view that the collectors now in office and elected at the November, 1934, general election are not entitled to the twenty-five per cent, increase as permitted under the amendment of 1935. For example, a collector under subdivision thirteen of the 1935 Act was allowed to retain \$5500.00 if the fees and commissions amounted to that much and he then paid his deputies and clerical hire \$1200.00 out of said sum. Under the 1935 enactment he would be permitted to pay his deputies and clerical hire out

of the twenty-five per cent increase and would be permitted to retain the \$1200.00 theretofore paid out for deputy hire for himself, and his compensation would thereby be increased that much.

In *Wines v. Garrison*, 214 Pac. 56, 1. c. 58, 26 A. L. R. 1302, quoting from the case of *Dougherty v. Austin*, 94 Cal. 611, 29 Pac. 1095, 16 L. R. A. 161, it was said:

"The sum allowed to any given officer being a lump sum out of which he must pay for the services of all deputies and assistants necessary for the prompt and faithful discharge of all the duties of the office, it is evident that his own compensation consists of the residue remaining after payment of such deputies and assistants; and it is equally evident that just so far as the county assumes the payment of such deputies and assistants, such residue is enlarged and the compensation increased."

And further in said opinion it was said (1. c. 59):

"In *County of Calaveras v. Poe*, 167 Cal. 519, 140 Pac. 23, it was held to be the fixed and settled law of this state that the allowance of a deputy to an officer who had theretofore received a gross sum to cover his compensation and the expenses of his office was a violation of the Constitution if made during his term of office, citing *Dougherty v. Austin*, supra; *Humiston v. Shaffer*, 145 Cal. 195, 78 Pac. 651; *Elder v. Carey*, 19 Cal. App. 776, 127 Pac. 826; *Hanson v. Underhill*, 12 Cal. App. 546, 107 Pac. 1016; *Applestill v. Gary*, 18 Cal. App. 387, 123 Pac. 228."

It is, therefore, our opinion that the twenty-five per cent. increase allowed the collectors under the Laws of Missouri, 1935, page 406, is not available to the county collectors now in office and elected at the November, 1934, general election, by reason of Section 8, Article XIV of the Constitution of Missouri.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

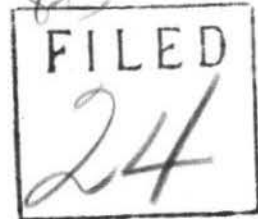
Attorney-General

CRH:EG

DEPUTY AND :
ASSISTANT CIR- :
CUIT CLERKS. :

Their appointment and salaries?
under House Bill No. 177.

August 11th, 1937.



Mr. Elvin S. Douglas,
Prosecuting Attorney,
Bolivar, Missouri.

Dear Mr. Douglas:

This is to acknowledge receipt of your letter of July 2nd, in which your request and opinion of this department relative to House Bill No. 177 passed by the 59th General Assembly pertaining to the appointment and salaries of deputy and assistant circuit court clerks.

Your letter is as follows:

"I am writing you in regard to the recently passed legislation in regard to the Circuit Clerk's offices. We do not have a copy of the law here, but it is the common understanding that the law purports to be effective immediately.

Do the provisions of the law relating to the appointment of the deputies and the fixing of their salaries by the Circuit Judge become effective immediately and apply to the present officers? Is it necessary for the Judge to approve the appointment of deputies and fix their salaries now?

Is it the opinion of your office that this act can validly affect the officers during their present terms?

Judge Skinker of our judicial circuit has planned to be out of the State on a two months vacation after next Thursday, July 10th, and he would like to perform whatever duties he has in accordance with the new legislation before he leaves for the summer."

Under the provision of Section 11812, 1933 Session Act at page 371, deputy and assistant circuit court clerks were appointed by the circuit court clerks with the approval of the county courts, which said courts fixed the compensation of such deputies or assistants, with a limitation, for such time as they desired to designate.

The Clerks could, under said section, discharge such officials at any time and the courts could, at any time, modify or rescind their order permitting such appointment by the clerks and reduce the compensation theretofore fixed.

House Bill No. 177, Section 11812 provides for the approval and fixing of the salaries of the deputy and assistant circuit court clerks by the circuit court, said Section 11812 being as follows:

"Every Clerk of a Circuit Court shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the Judge or Judges of the Circuit Courts, as such Judge or Judges shall deem necessary for the prompt and proper discharge of the duties of his office. The Judge or Judges of the Circuit Court, in its order permitting the Clerk to appoint deputies or assistants, shall fix the compensation of such deputies or assistants which said order shall designate the period of time such deputies or assistants may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the County Clerk. The Clerk of the Circuit Court may at any time, discharge any deputy or assistant, and may regulate the time of his or her employment, and the Circuit Court may, at any time, modify or rescind its order permitting an appointment to be made."

In the case State ex. rel vs Gordon 238 Mo. 168, in passing on the question as to whether appointive officers, with no certain fixed term of office, come within the inhibition of Article 14, Section 8 of the Constitution of Missouri, the court said:

"Attending to the main question, its answer finds itself in the very words and intentment of the Constitution. Those words are common to many Constitutions. They were carefully chosen, have been frequently under judicial scrutiny, and have received a definite judicial construction, as will be seen further on. Observe, the Constitution does not say that the salary of no officer can be increased at any time. It says such salary shall not be increas-

August 11, 1937.

ed during a certain time or while a certain thing lasts. What is that time or thing? It is "his term of office." Therefore the officer in mind is not any officer, but is one of a definite kind, one who has an official term. If any officer has no "term of office" he does not measure up to the constitutional subject-matter and is not within the words or intendment of the Constitution.

In the enclosed opinion written by Mr. Covell R. Hewitt, Assistant Attorney General, the emergency clause of House Bill No. 177 was held to be unconstitutional.

CONCLUSION

It is, therefore, the opinion of this department that House Bill No. 177 does not go into force and effect until September 6th and that thereafter appointments of deputies and assistant circuit court clerks must have the approval of the Judge or Judges of the Circuit Courts and that the compensations of said officials shall be fixed by said Judge or Judges.

Your second question is answered by an opinion written by Mr. Covell R. Hewitt, Assistant Attorney General, on August 6th, a copy of which said opinion I am enclosing herein.

Yours very truly,

S. V. MEDLING
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

SVM:LB

COUNTY COURTS - Shall not, under Section 5, Class 3, estimate expenses to be less than last preceding even year in even years; likewise relates to odd years.

December 20, 1937.

Honorable Elvin S. Douglas
Prosecuting Attorney
Polk County
Bolivar, Missouri



Dear Sir:

This is to acknowledge receipt of your request of December 17, 1937, for an opinion, reading as follows:

"I invite your attention to Section 5, page 244 of the laws of 1933, referring to the County Budget.

"Class three under that section contains the provision in the last sentence thereof that 'This estimate (referring to expense of holding circuit court, pay of petit jurors, etc) shall not be less than last preceding year in even years and last preceding odd year in odd years.'

"In your opinion, does this provision mean the amount such expense ran for the last preceding odd or even year as the case may be, or does it mean the estimate filed shall not be less than the estimates filed in such preceding years?"

We have considered Section 5, Class 3, Laws of Mo. 1933, page 344, and particularly the last sentence of Class 3, reading as follows:

"This estimate shall not be less than last preceding even year in even years and last preceding odd year in odd numbered years."

December 20, 1937

This part of the statute is plain, unambiguous and mandatory in its terms, and needs no interpretation. State ex rel. Jacobsmeyer v. Thatcher, 92 S. W. (2d) 640, and clearly contemplates, without equivocation, that the estimate for expenses made during an even year shall not be less than the estimate for expenses in a preceding even year. Likewise, as relates to an odd year.

To illustrate: 1937 is an odd year, consequently the estimate of expenses for 1937 should not be less than the estimate of expenses for 1935, the last preceding odd year.

CONCLUSION

In view of the above, it is the opinion of this department that the county court, in estimating expenses under Class 3 of Section 5 of the county budget law, supra, shall not estimate the expenses in an even year to be less than the estimate for expenses in the last preceding even year. Likewise, this estimate of expenses in an odd year shall not be less than the estimate of expenses for the last preceding odd year.

Yours very truly,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

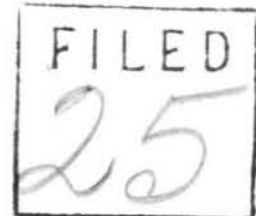
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FOOD AND DRUGS:

The Food and Drug Commissioner cannot collect inspection fee on carbonic gas.

June 17, 1937.

6-19



Honorable Edward L. Drum
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri.

Dear Sir:

This Department is in receipt of your letter of May 27, 1937, requesting an opinion on the following question:

"May the State Food and Drug Commissioner collect an inspection fee on carbonic gas, in tanks, used in the preparation of soft drinks?"

Section 13116, R. S. Missouri, 1929, is as follows:

"The food and drug commissioner of this state shall cause to be inspected by chemical analysis samples of all non-intoxicating liquors or beverages or so-called 'soft drinks' of every kind manufactured or sold in this state, which shall be understood to include those containing less than one-half of one per cent, of or no alcohol, including ginger ale, ginger beer, hop ale, soda water, bevo, unfermented grape juice, cider, carbonated beverages, coca-cola, unfermented cereal or malt beverages, all non-intoxicating

June 17, 1937.

beverages and flavored beverages, seltzer water, mineral water and other waters used and sold for beverage purposes, and also all fountain syrups, flavors and extracts intended for use in the preparation and concoction of so-called 'soft drinks'."

Section 13120, R. S. Missouri, 1929, is as follows:

"The commissioner shall be entitled to receive for inspecting, three-fifths cent for each gallon of non-intoxicating liquid beverage manufactured or sold in this state; five cents per gallon for all fountain syrups; three-fourths of a cent per ounce for all flavors or extracts used in the manufacture or concoction of beverages not otherwise inspected. All fees received by the commissioner shall be paid into the State Treasury."

We must construe the statutes; supra, to see if by implied direction or implication, the Legislature intended to make carbonic gas subject to an inspection fee. It can not be denied, we think, that the Legislature did not expressly make such a provision.

It will be noticed that each of these sections refer to liquid beverages, and that the inspection fee is placed on gallons, or ounces. The article upon which the state food and drug commissioner is attempting to collect an inspection fee in the instant case, is carbonic gas, and although it is probably possible to measure gas in gallons or ounces, we think the usual rule for the measure of gas is in cubic meters.

June 17, 1937.

The Legislature in enacting the above statutes, placed a rather large inspection fee on fountain syrups and flavors or extracts "used in the manufacture or concoction of beverages not otherwise inspected." It is a matter of common knowledge to man, of which the Legislature was no doubt aware, that carbonic gas is an ingredient used in the preparation of nearly all soft drinks. Had the Legislature intended to make carbonic gas subject to an inspection fee, they could have expressly said so and fixed a definite measure on which the fee was to be collected, as they did with reference to syrups, flavors or extracts.

In State ex rel v. Sweany, 195 S. W. (Mo. Sup.) 1.c. 716, the court in construing a statute, said:

"It would be but to do violence to the plain language used to hold that it expressed an intention to apply provisions other than those expressly mentioned. To so hold would be to violate the well-known canon of statutory construction, viz., that the expression of one thing is the exclusion of another."

In State ex rel v. Holtcamp, 181 S. W. (Mo. Sup.) 1007, the court laid down the rule that it could not enlarge and change the scope of the statutes, and in this ruling said at 1.c. 1009:

"If justification there be for this unusual and peculiar course, it must be found in the written law."

CONCLUSION

Therefore, it is the opinion of this Department, that the collection of an inspection fee on carbonic gas is not authorized by statute in this state. That to hold otherwise would be contrary to rule: that those

Honorable Edward L. Drum

-4-

June 17, 1937.

charged with the interpretation of statutes will not enlarge and change their scope. The Legislature in Sections 13116 and 13120, supra, enumerated the items which the commissioner shall cause to be inspected and upon which he is entitled to collect an inspection fee, and by the enumeration excluded all other items not expressly mentioned. Had the Legislature intended to make carbonic gas subject to an inspection fee, it would have been included in the enumerated items.

Respectfully submitted,

AUBREY R. HAMMETT, JR.,
Assistant Attorney-General.

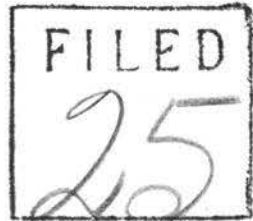
APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

LLB MR

TAXATION: City collector shall sell land for delinquent taxes of cities of the third class at court house door of the county.

October 25, 1937



Mr. Lee M. Duggan
City Clerk
Richmond Heights, Missouri

Dear Sir:

This department is in receipt of your request for an opinion which reads as follows:

"In connection with the provisions of the Jones-Munger Law, we would like to be advised on the following three points:

1. Should the sale of our tax bills for the year 1932 be conducted by the City Collector or the County Collector?
2. Would sales by the City Collector be legal?
3. If the sales by the City Collector are legal, should the same be conducted at the City Hall or at the County Court House?

Richmond Heights is a City of the Third Class, under the Alternative or Commission Form of Government."

Your first two questions are answered in an opinion rendered to the State Tax Commission on August 8, 1933, a copy of which is herein enclosed. The holding of that opinion is as follows:

"It is therefore the opinion of the office that Senate Bill 94 (Jones-Munger Law) is applicable to Cities of the Third and Fourth Classes insofar as it is prescribing the method and manner of the collection and enforcement of the payment of the taxes, but any proceedings had relating thereto are to be conducted by the city collector consistent

with the requirements of
Articles 4 and 5 of Chapter 38,
1929 Revision."

Your third question is whether the sale should
be conducted at the City Hall or at the County Court
House.

Section 6781, R.S. Mo. 1929, which deals with the
collection of delinquent taxes of cities of the third
class, provides in part as follows:

" * * * the city collector * * *
shall proceed to collect the same
in the same manner and under the
same regulations as are or may be
provided by law for the collection
of delinquent lists of real and
personal taxes for state and county
purposes."

Section 9952b, Laws of Missouri, 1935, page 403,
provides in part as follows:

"To such list shall be attached and
in like manner so printed and pub-
lished a notice that so much of said
lands and lots as may be necessary
to discharge the taxes, interest and
charges which may be due thereon at the
time of sale will be sold at public
auction at the courthouse door of such
county, on the first Monday in November
next thereafter, commencing at ten
o'clock of said day and continuing from
day to day thereafter until all are
offered."

It will therefore be seen that the sale of land
for delinquent city taxes must be conducted in the same
manner as the sale of land for state and county taxes.
Since Section 9952b, supra, provides that the sale shall
be made at the courthouse door of the county, such pro-
cedure must be followed.

Mr. Lee M. Duggan

-3-

October 25, 1937

CONCLUSION

It is, therefore, the opinion of this department that the sale of lands for delinquent taxes of cities of the third class shall be conducted by the city collector. It is further the opinion of this department that such sale should be held at the door of the county courthouse.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

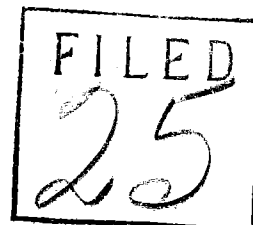
AO'K:VAL

PROBATE COURTS: Right to compel claimant to give security for costs.

December 17, 1937.

Mr. Edward L. Brun,
Prosecuting Attorney,
Cape Girardeau, Missouri.

12-20



Dear Sir:

This department is in receipt of your letter of December 3rd requesting an opinion as to the following:

"I am enclosing a letter received from the Public Administrator of this county. It is my opinion that Section 804 R. S. Mo. 1929, requires or to say the least gives the Probate Judge the right to require the claimant, asking that this small fund a few hundred dollars, administered as the estate of Joe Tillman, be required to give security for costs before such claimant may present the claim and make a large amount of costs, in claiming that the deceased was not Joe Tillman but in fact was Minor McIntire. If it develops that the deceased was Minor McIntire and not Joe Tillman, the claimant would receive the whole of the estate and who would then pay the costs and if it be determined that the deceased was really Joe Tillman, as administered, who is to pay the costs. In this sort of proceeding a very large amount of costs are almost surely to accrue.

The estate was administered as the estate of Joe Tillman and this nonresident comes now and wants to claim all the estate as the widow of Minor McIntire, stating in her claim that the deceased was not Joe Tillman but was Minor McIntire.

It is my opinion before such claim may be permitted to make a large amount of costs, a security for the costs should be required of claimant. If the present administrator wins where is he to recover his costs, if he loses there is the money to pay costs. This small amount will go to the estate if it remains as the estate of Joe Tillman.

Please give me your opinion as to the matters inquired about in the enclosed letter."

Section 204 R. S. Mo. 1899 provides:

"In all suits and other proceedings in said court, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law. In all cases in which costs shall be given against executors and administrators, the estate shall pay the costs: Provided, that parties presenting demands against estates may, for the same causes and in the same manner, be ruled to give security for costs, as is now provided in practice in civil cases."

We assume, from your letter, that the claimant to the fund in question intends to file a claim therefor in the Probate Court. If so, the above statute clearly is controlling and, by its terms, makes Section 1230 R. S. Mo. 1899 applicable; which said section reads as follows:

"If, at any time after the commencement of any suit by a resident of this state, he shall become non-resident, or in any case the court shall be satisfied that any plaintiff is unable to pay the costs of suit, or that he is so unsettled as to endanger the officers of the court with respect to their legal demands, the court shall, on motion of the defendant, or any officer of the court, rule the plaintiff, on or before the day in such rule named, to give security for the payment of the costs in such suit; and if such plaintiff shall fail, on or before the day in such rule named, to file the undertaking of some responsible person, being a resident of this state, whereby he shall bind himself to pay all costs which have accrued or may accrue in such action, or deposit with the clerk of the court in which said suit is pending a sum of money sufficient to pay all costs that have accrued or will probably accrue in the case, subject to be increased at any time whenever the court may deem proper and by its order require, the court may, on motion, dismiss the suit unless such undertaking shall be filed or sum of money deposited before the motion is determined."

In view of the foregoing, it is the opinion of this department that in all proceedings instituted under Chapter 1, Article 7 of the Revised Statutes of Missouri 1899 security for costs may be required of any claimant exhibiting a demand against an estate.

Respectfully submitted,

JWH:SO

Approved:

J. E. Taylor

(Acting) Attorney General

John W. Haffman Jr.

Assistant Attorney General

LEGISLATURE: The Legislature has a right to pass a law which will become effective two years in the future.

1-22
April 21, 1937.



Mr. J. D. Elliff, President,
Board of Curators Lincoln University,
Jefferson City, Missouri.

Dear Sir:

We have received your request for an opinion which reads as follows:

"Please give me at your earliest convenience your opinion on the following:

"Is it legal and constitutional for the General Assembly to pass a law and set the date when it is to become effective two years in advance of its enactment, or beyond the time of meeting of the next General Assembly?"

Art. 4, Sec. 36 of the Constitution of Missouri provides in part as follows:

"No law passed by the General Assembly, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency* * *."

It will be noted that this clause provides that acts shall not go into effect until ninety days after adjournment, however, as was said in *State ex rel Brunjes v. Bockelman*, 240 S. W. 209 "The Missouri Constitution (1875 Sec. 36 of Art. 4) places no inhibition upon the Legislature as to fixing a future date for a law to become effective. It prohibits them from becoming effective upon their passage and approval, except in excepted cases."

In the *Bockelman* case, *supra*, the law was approved May 27, 1919, and was to become effective January 1, 1921, a little more than one year and seven months later. The court en banc said (l.c. 211),

"* * * Where there is no constitutional restrictions, the Legislature may fix a future date upon which a law shall go into effect. 36 Cyc. pp. 1192 and 1200; Ex parte Ah Pah, 34 Nev, 292, 119 Pac. loc. cit. 774. In the latter authority it is said:

"The Legislature, in the absence of constitutional restrictions, is free to fix in each act the time it is to take effect, and an examination of our Constitution reveals no such prohibition. (Citing cases)."

The Legislature has often asserted its right to pass a law to become effective more than ninety days in the future, and the courts have approved them. (State v. Brassfield, 81 Mo. 151, 51 Am. Rep. 234; State v. Orrick, 106 Mo. 111, 17 S.W. 176, 329; State ex rel. v. Edwards, 136 Mo. 360, 38 S.W. 73; Haskell v. Sells, 14 Mo. App. 91; Honeycutt v. St. Louis R.R. 40 Mo. App. 674).

CONCLUSION.

It is therefore the opinion of this department that in view of the authorities cited above the Legislature may pass a law which is to become effective two years in the future.

Respectfully submitted,

OLLIVER NOLEN,
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

AO'K/LD

BOARD OF PHARMACY: May exercise its sound discretion as to whether applicant has passed a "satisfactory examination."

June 21, 1937. 6-24



Mr. W. H. Ellis, President,
Board of Pharmacy,
Vandalia, Missouri.

Dear Mr. Ellis:

We wish to acknowledge your letter of June 17th, wherein you state as follows:

"A situation has developed with the Missouri State Board of Pharmacy in connection with certain examinations that have been held and those that are to be held, which requires advice from your department.

"The Missouri State Board of Pharmacy held an examination in St. Louis, Missouri, on April 25th and 26th. Immediately after that examination, certain charges were filed with Governor Lloyd C. Stark, stating among other things that cheating was prevalent in a large measure.

"Immediately thereafter, Governor Stark appointed a Committee of Inquiry to sift these charges and make a final report to him. That report has been filed with Governor Stark and all hearings have been concluded.

"This hearing developed testimony from many students of the St. Louis College who stated under oath they actually saw numbers of people taking the examination whom were

cheating. Further testimony brought out the fact that Members of the Board of Pharmacy actually found much cheating and these applicants who were caught were finally failed for cheating.

"The grades for this examination have been tabulated and are ready to hand out. There has been some thought among many people who were interested that this examination should be held void. The question presents one involving legal advice.

"A bill has been passed by the legislature, known as CS. for H.B. 265 that has some bearing on this examination. This bill was truly agreed to and finally passed and is now in the hands of the Governor for his approval.

"I wish you would look into this matter for me and give me an opinion as to whether it is within the legal right of the Missouri State Board of Pharmacy to void this examination.

"I was in Jefferson City this week and called in your office to discuss this matter. In conversation with Governor Stark, he expressed the hope that I would talk to you and get your advice on the subject. The Board of Pharmacy is also wondering whether or not to postpone any further examinations until the H.B. 265 is signed by the Governor. As the matter stands, it might involve further difficulties by holding an examination now under the existing law and within three months, the candidates who pass may be eligible for a certificate without an examination.

"The writer plans to leave next Thursday for an extended vacation, and I hope that you can set me right before that time. I will now restate the points I wish cleared up:

1. Shall the Board of Pharmacy void the examination held in St. Louis April 25th and 26th because widespread cheating was charged?
2. Shall the Board of Pharmacy order another examination at once to allow all persons the privilege of taking the examination for Assistants and Registered Pharmacist under the Existing law?"

Section 13142, R. S. Mo. 1929, provides that in order to be licensed as a pharmacist or assistant pharmacist, the applicant must, among other things, "pass a satisfactory examination by or under the direction of the Board of Pharmacy":

"In order to be licensed as a pharmacist within the meaning of this chapter, an applicant shall be not less than twenty-one years of age, and, if his application be filed with the secretary of the board of pharmacy on or after the first day of January, 1912, he shall have been licensed as an assistant pharmacist for not less than two years prior to his application for license as a pharmacist, and he shall present to the board satisfactory evidence that he has had four years' experience in pharmacy under the instruction of a licensed pharmacist, and shall pass a satisfactory examination by or under the direction of the board of pharmacy: Provided, that if the applicant for a license as a pharmacist be a graduate of a school or college of pharmacy, whose requirements for graduation are satisfactory to and approved by the board of pharmacy, it shall not be required that he pass any examination or that he shall have been an assistant pharmacist. In order to be licensed as an assistant pharmacist within the meaning of this chapter, an applicant shall be not less than eighteen years of age, shall have a sufficient preliminary general education, and shall have not less than two years' experience

in pharmacy under the instruction of a licensed pharmacist, and shall pass a satisfactory examination by or under the direction of the board of pharmacy: Provided, however, that in the case of persons who have attended a reputable school or college of pharmacy the actual time of attendance at such school or college of pharmacy may be deducted from the time of experience required of pharmacists and assistant pharmacists."

The status of a board which has the power to examine is well stated in the case of State ex rel. Granville v. Gregory, 83 Mo. 123, 1. c. 136, wherein the Court said:

" * * * the board of health, in the discharge of duties in reference to the issuance of certificates, is engaged in the performance of those things which essentially partake of a judicial nature, requiring the examination of evidence and passing on its probative force and effect, requiring the exercise of judgment and the employment of discretion."

A similar statement of the rule is expressed in the case of State ex rel. Lentine v. State Board of Health, 334 Mo. 220, 65 S. W. (2d) 943, 1. c. 949, thus:

" * * * the question whether the acts or conduct charged are such as to constitute unprofessional and dishonorable conduct or render the licentiate a person of bad moral character within the purview of the statute 'calls for the exercise of judgment and sound discretion' on the part of the board of health."

In the case of State v. Rosenkrans, 30 R. I. 374, 75 Atl. 491, 1. c. 497, the applicant, in order to practice dentistry, was required to "undergo a satisfactory examination".

The Court in pointing out that this was a matter within the sound discretion of the Board of Examiners, said:

"No attempt is made in the statutes to specify what number of questions must be propounded to any candidate for examination upon each or any of the above mentioned subjects, nor is it stated whether the same number of questions must be answered by every candidate; nor are there any provisions declaring what percentage of the questions submitted must be answered correctly by any candidate in order to pass the examination; nor is it provided that the identical questions shall be put to each applicant; nor is there any provision that the percentage required shall always remain the same, that the standard of proficiency and efficiency shall never be advanced. In other words, much must be left to the sound discretion of the board of examiners."

In the case of Tate v. North Pacific College, 140 Pac. 743, 1. c. 745, it is required that before a student receives his diploma and degree, he shall "pass satisfactory examinations." The Court in holding that this meant examinations satisfactory to the faculty, whose duty it was to conduct the examinations, said:

"Among the requirements for a diploma and a degree set forth in the catalogue of the defendant, and set out supra, it is required that the candidate shall "pass satisfactory examinations." This means that his examinations shall be satisfactory to the faculty, whose duty it is to conduct the examinations."

A study of our statutes relating to the examination of applicants desiring to be licensed as pharmacists or assistant pharmacists does not reveal what manner or number of questions that are to be propounded to the applicants,

June 21, 1937.

whether they shall be written or oral, whether personally supervised in case of written examinations, or whether the "honor system" with no supervision be employed. The only requirement of the statute is that the applicant "pass a satisfactory examination by or under the direction of the board."

In passing on your questions it occurs to us that if the Board of Pharmacy can actually determine from the group taking the examination the individuals who conducted themselves in a proper manner and were not guilty of any cheating, and further made a satisfactory grade so as to be eligible for a license, it would be most unfair to void the examination and require them to submit to a new examination. We must necessarily, however, restrict ourselves to applying the law to the facts as presented in your letter.

From the foregoing, we are of the opinion that the question of whether a candidate has passed a "satisfactory examination" is within the sound discretion of the Board of Pharmacy, who may exercise its judgment whether it shall void the examination held in St. Louis, Missouri, on April 25th and 26th because of the charge of widespread cheating, or whether it shall order a new examination to allow all persons the privilege of taking the examination for assistant and registered pharmacist under the existing law.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

MW:HR

ELECTIONS: C. S. For House Bill-234, repeals provisions of Article 17, Chapter 61, R. S. 1929, in so far as it applies to cities of 600,000 or more, and the judges and clerks appointed under said article and chapter are without office.

July 20, 1937

7/22



Board of Election Commissioners
For the City of St. Louis
208 S. Twelfth Boulevard
St. Louis, Missouri

Gentlemen:

This Department is in receipt of your letter of July 6, 1937, requesting an opinion as follows:

"In setting up the new Permanent Registration Act, the Board has considered the matter of Judges and Clerks of Election. Under Section 10571, R. S. Missouri, 1929, the present officials were appointed on September 10, 1936, to serve as Judges or Clerks of Election and Registration for a period of four years.

The Board would like an opinion as to whether, under the new Permanent Registration Act, signed by the Governor on June 30, 1937, and applicable to the City of St. Louis, the Judges and Clerks so appointed will continue to serve until the expiration of their terms under the commissions they now hold, or, does the new law contemplate that election officials be appointed and commissioned."

July 20, 1937

The new Permanent Registration Act mentioned in your request is, what is designated as, Committee Substitute for House Bill No. 234. Section 5 of the act is as follows:

"Said board of election commissioners shall at least sixty days prior to each presidential election thereafter select and choose four electors as judges of election, for each precinct in such city. * * * * Said judges and clerks shall be appointed for a term ending sixty days prior to the next presidential election after the election at which they were appointed to serve, and shall, during said term, serve as judges and clerks at all special, local, municipal, primary and general elections * * * *."

Section 5, supra, deals exclusively with the selection of judges and clerks, their qualifications and term of office. This section makes it the duty of the Board of Election Commissioners, under this new act, to select these judges and clerks. Their selection is provided for in the same manner, and for the same length of time, as it was formerly done in Section 10571, R. S. 1929.

Section 89 of this act is as follows:

"All acts or parts of acts contrary to, in conflict or inconsistent with the provisions of this act are insofar as they effect cities described in the title of the act hereby repealed."

In re: Poindexter v. Pettis County, 295 Missouri 629, 637, the court said:

"A statute revising the whole subject-matter of a former statute and evidently intended as a substitute for it, although it contains no express words to that effect, repeals the former."

Committee Substitute for House Bill No. 234 is a complete revision of, and substitute for Article 17, Chapter 61, R. S. 1929, insofar as that article and chapter applies to cities having a population of six hundred thousand or more. The Legislature by Section 89 of the act expressly repealed all acts inconsistent with this act, and Section 10571, R. S. 1929, is inconsistent with, and is revised by Committee Substitute for House Bill No. 234, and is repealed.

In Gregory v. Kansas City, 244 Mo. 1.c. 548, the court had before it the question of whether the adoption of a new charter by Kansas City, by which all employees of that city were placed under civil service, vacated and ended the term of office for which the present employees had been employed. The then present employees insisted that they held office until the expiration of the term for which they had been appointed. The court in deciding this question said:

"Not only have the respondents failed to cite any law which sustains their * * * contention, but there is an overwhelming array of authorities, both state and federal, which support the doctrine that no one can acquire a vested right in an office or position created by the legislative department of the nation or of a state or municipality thereof. In discussing this very point, Wagner J., speaking for the Missouri Supreme Court in the early case of State ex rel v. Davis, 44 Missouri 129, said: 'The whole doctrine upon which the case is placed for the plaintiff is without support. It

proceeds on the theory that a person in the possession of a public office created by the Legislature has a vested interest, a private right of property in it. This is not true of offices of this description in this country; they are held neither by grant nor contract. A mere legislative office is always subject to be controlled, modified or repealed by the body creating it. In England, offices are considered incorporeal hereditaments, grantable by the crown, and a subject of vested or private interests. Not so in the American states; they are not held by grant or contract, nor has any person a private property or vested interest in them, and they are therefore liable to such modifications and changes as the law-making power may deem it advisable to enact."

Further at l.c. 548 the court quoting from the case of City of Hoboken v. Gear, 27 N.J.L. 265, said:

"An appointment to a public office during a term of years, and the acceptance of such office, is not a contract between the government and an individual that the officer will serve or that the government will pay during that period. The acceptance may not be a matter of choice but of compulsion; and where the acceptance is voluntary, the officer is not bound to serve during the term. He may remove from the state or resign, or otherwise determine his official relation without a violation of contract . . . And on the other hand the government may abolish the office and thereby terminate the service without a violation of contract."

July 20, 1937

The office or position of judge and clerk of the election created by the legislature under Section 10571, R. S. Missouri, 1929, was abolished and the term terminated when the legislature, by enacting Committee Substitute for House Bill No. 234, repealed said section and the whole of Article 17, Chapter 61, R. S. Missouri, 1929, insofar as it applies to cities having a population of six hundred thousand or more.

CONCLUSION

Therefore, it is the opinion of this Department that the new board of election commissioners under the provisions of Committee Substitute for House Bill No. 234, must appoint the judges and clerks in the manner and at the time provided for in Section 5 of this act. That Committee Substitute for House Bill No. 234 repealed the provisions of Article 17, Chapter 61, R. S. Missouri, 1929, insofar as they applied to cities having a population of six hundred thousand or more, and that by this repeal the present judges and clerks of election whose offices were created by Section 10571 of Article 17, Chapter 61, having no private property or vested interest therein, are without office.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR (Acting)
Attorney General

LLB MR

TAXATION: Distribution of proceeds from sale under Senate Bill No. 94, 1933 Session Acts, where the amount received is less than the total amount of tax, penalties, interest and costs.

October 4, 1937. 10/9



Messrs. Eagleton, Waechter, Yost,
Elam & Clark,
Attorneys at Law,
1020 Telephone Building,
1010 Pine Street,
St. Louis, Missouri.

Gentlemen:

We wish to acknowledge your request for an opinion which is as follows:

"I am writing you as attorney for Collector William F. Baumann of the City of St. Louis, Missouri. Under date of August 16th, 1936, your office ruled, in an opinion to the Honorable J. B. Greer, County Collector of Pettis County, that the proceeds of a sale under the Jones-Munger Act which were not sufficient to cover the full amount of the taxes should be distributed after deduction of costs and collector's commissions, to the various taxing authorities or agencies in the same proportion as the amount received bears to the total amount of the tax.

"Inas much as under a ruling of your office dated August 31st, 1937, land is sold under the Jones-Munger Law for as many as seven years' taxes at one time, a question arises as to which tax rate should be used in distributing the proceeds of such a sale where the amount received is insufficient to cover not only the seven years but any one of the seven years. As you undoubtedly know, in St. Louis the tax rate varies from year to year, and in order to keep the records of the collector in good order, it is necessary to show a distribution of all funds received in accordance with some specified rate.

10/4/37.

"In order that there may be no misunderstanding about the question propounded, may I say that, for example, we are advertising property for taxes from 1930 to 1936, inclusive, each year of which amounts to \$100.00 plus penalties, interest and costs. This is the third call of the property, and if a bid of \$5.00 is received, a sale is made. In distributing the \$5.00, or the balance of it, to the various tax units, is the tax rate for 1930 used, or is the money pro rated over the seven years and distributed in accordance with each one of the tax rates during that period?

"Naturally, you understand that if a bid of \$1.00 is received for seven years' taxes, and it must be broken down into seven parts and then distributed among three agencies, and then in turn broken down under each one of these agencies into three to five parts, a mechanical problem presents itself which is well nigh insoluble.

"I will be more than pleased to have your views in regard to this matter, and inasmuch as it will not be necessary to make a distribution of this money until after the remission bill for 1937 goes out of effect on January 1st, 1938, there is no need for immediate action in this regard."

In your letter you quote a part of the first paragraph of Section II. in an opinion rendered by this department to the Honorable J. B. Greer, County Collector Pettis County, Sedalia, Missouri, on October 16, 1936, entitled "Proceeds to be applied to costs and balance distributed to fund.", which said paragraph is as follows:

10/4/37

"It is somewhat difficult to determine the question you had in mind in paragraph two of your letter. However, in general terms, the proceeds of the sale, when such proceeds are insufficient to cover the entire amount of taxes, penalties and costs, should be applied as follows: (a) To the payment of costs, other than collector's commission. (b) Collector's commission, calculated upon the amount received less amount of costs referred to in "a". (c) The balance of the proceeds should be paid to the various taxing authorities or agencies, such as the State, the County, School District, etc., in the same proportion as the amount received bears to the total amount of tax."

When the proceeds of the sale under Senate Bill 94, 1933 Session Acts, are insufficient to cover the entire amount of taxes, penalties, interest and costs for any given number of years for delinquent taxes, such proceeds should be applied as follows:

- (1st) Costs other than collector's commission;
- (2nd) Collector's commission calculated upon the amount received - after deducting costs;
- (3rd) To the various taxing authorities or agencies, such as the State, County, School District, etc., in the same proportion as the amount received bears to the total amount of taxes.

The method of distribution of that part of the proceeds of a sale, under the above subsection III, where the proceeds are insufficient to cover the entire amount of all taxes for all years, interest, penalties and costs, as shown in *Jaicks v. Oppenheimer* by the court en banc in 264 Mo. 693, in the following language:

"With regard to all ordinary liens arising out of private contract and not imposed solely by governmental power, priority in time creates priority in force and effect, the first in order of time being, *prima facie*, superior to

10/4/37

those of a later date. But the priority of the liens of general taxes is in the reverse of this order, the last is first and the first last. (Cooley on Taxation (3 Ed.), 875; Anderson v. Rider, 46 Cal. 134; Sayles v. Davis, 22 Wis. 225; Wass v. Smith, 34 Minn. 304.) This rule is well settled and is not disputed."

This rule was restated and the above decision quoted in Little River v. Sheppard, 320 Mo. 1.c. 346.

CONCLUSION.

Therefore, it is the opinion of this department that the general rule is that the priority of general tax liens is in the reverse order of their accrual, that is - the latest tax lien is paramount to a prior tax lien, and that the above rule, applied to your individual case, would require you to distribute the proceeds (after first deducting items in subsections 1 and 2, supra) for taxes, interest, penalties and costs, first, for the year of 1936, and then to each year prior thereto until the proceeds of such sale may be exhausted.

Respectfully submitted,

S.V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

SVM/LD

JUSTICE OF THE PEACE:

Public officer, who having in his possession public funds for which he has refused to make settlement, may not hold his office under reelection until he shall have made full settlement of such funds.

October 23, 1937.

10-25



Mr. S. B. Ellis
Attorney at Law
Carrollton, Missouri

Dear Mr. Ellis:

We are in receipt of your request for an opinion, which is in part as follows:

"Carroll County is under township organization and as such, Carrollton township, Carroll County, is entitled to four Justices of the Peace under Section 12269 Revised Statutes of Missouri (1929) and on March 26, 1935 Wm. M. Wall was elected as one of the four Justices of the Peace, and was properly qualified and commissioned as such and said commission provided among other things that he shall hold his office as Justice of the Peace for two years and until his successor is elected and qualified; and that at the election for township offices held on March 30, 1937 Wm. M. Wall was not a candidate for the office of Justice of the Peace; but that at said election for township officers on March 30, 1937 four Justices of the Peace were elected; and that at such election Joe Cochran was elected as one of the four Justices of the Peace, for Carrollton township and was notified by the township clerk on April 5 as is provided by Section 12274, Revised Statutes of Missouri, 1929.

* * * * *

"On August 26, 1935 State of Missouri filed its report of State audit for Carroll County

Oct. 23, 1937.

with the County Clerk of Carroll County, Missouri; and among other officers the report shows that Joe Cochran, Justice of the Peace for Carrollton township, Carroll County, Missouri owed to the County and State the sum of \$16.00 for fines collected by him which goes to the school funds of Missouri; and that he was notified by the County Clerk of Carroll County, Missouri that said report showed that Joe Cochran owed to the County the sum of \$16.00 and said amount being not paid suit was filed by the Prosecuting Attorney of Carroll County on March 2, 1936 in the Court of Ora Roberts, Justice of the Peace for Carrollton township for the sum of \$16.00 and that the case was continued from time to time until the 3rd day of July, 1936 when judgment was rendered against the defendant, Joe Cochran by default in the sum of \$16.00 together with cost of suit, and no part of said judgment has been paid.

* * * * *

"

The Constitution of Missouri, Article II, Section 19, is as follows:

"That no person who is now or may hereafter become a collector or receiver of public money, or assistant or deputy of such collector or receiver, shall be eligible to any office of trust or profit in the State of Missouri under the laws thereof, or of any municipality therein, until he shall have accounted for and paid over all the public money for which he may be accountable."

From your letter we understand that judgment has been obtained against a justice of the peace for fines he collected prior to his election, upon his refusal to pay the same, which go to the county school fund as provided in Section 9243, Revised Statutes of Missouri, 1929, which is as follows:

"It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest

that can be obtained, not exceeding eight nor less than four per cent. per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion, require personal security in addition thereto, the proceeds of all moneys, stocks, bonds and other property belonging to the county school fund; also, the net proceeds from the sale of estrays; also, the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of this state, and all moneys which shall be paid by persons, as an equivalent for exemption from military duty, shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools in the several counties of this state."

A collector or receiver of public money must pay over the same to the proper officer and in default of same is denied further political preferment and the door of the same office for another term shall be barred to him until he shall have shown himself eligible and worthy by a full settlement and payment of all public funds in his hands.

The Supreme Court in passing upon this question in *State ex inf. v. Breuer*, 235 Mo. 1. c. 249, said:

"It appears therefore by the above decisions of this court, by legislative enactment and by the general understanding and practice of the people, that persons holding office as collectors or as receivers of public money, have not been regarded as ineligible to election to office for the sole reason that a final accounting of the public money in their hands had not been made at the time of the election.

"It will be noticed that the catch-words of the section of the Constitution are:

'Collectors, receivers etc., in default, ineligible to office.' And the general rule of law upon the subject, as stated in 29 Cyc. 1385, is as follows: 'Statutes frequently disqualify for public office those who, having in their possession public funds, are in default. Such statutes disqualify only those who have been determined by legal authority to be in default, or admit that they are in default, and appear generally to be liberally construed in favor of eligibility to office. Thus "default" is said to mean a will full and corrupt omission to pay over funds.'

"The reasonable and salutary interpretation given to the Constitution and statutory provisions under consideration, by this court, is not that those holding the offices mentioned shall be treated as in default and denied further political preferment while occupying such office, but rather that the door of the same office for another term, or of another office, shall be barred to them until, and only until, they shall have shown themselves eligible and worthy by a full settlement and payment of all public funds in their hands."

A public officer, according to your letter, has made such default and refused to pay the amount of public funds collected by him and for which said funds there has even been a judgment rendered.

Conclusion.

It is, therefore, the conclusion of this Department that a public officer, who having in his possession public funds for which he has refused to make settlement, and for

Mr. S. B. Ellis

-5-

Oct. 23, 1937.

which a judgment has been obtained, may not hold his office under reelection until he shall have made settlement of such funds.

Yours very truly,

S. V. MEDLING
Assistant Attorney-General

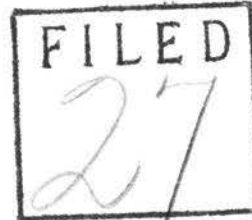
APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

SVM:EG

INSURANCE: Northeast Missouri State Teachers College has authority to buy insurance for its protection and to pay for the same out of the incidental funds which are not appropriated by the Legislature.

January 26, 1937. 128



Hon. Henry L. Enochs,
Business Secretary,
State Teachers College,
Kirksville, Missouri,

Dear Sir:

We have received your inquiry, which is as follows:

"In regard to the question of insurance on state owned property, I should like to be clear as to whether it is possible to carry insurance if such insurance was to be paid from the Funds and Earnings of the institution and not from the General Revenue Funds.

"If the above is not possible, is there any other way possible for us to carry insurance?"

Your question does not involve the authority to expend any moneys appropriated by the State Legislature, but limits itself to the question of whether your Board of Regents has authority to expend a part of the funds collected by the school as incidental funds, and whether insurance may be paid for out of said funds when the insurance is for the protection of and written on properties owned by the Northeast Missouri State Teachers College.

This very question was considered by the Supreme Court of this state in the case of State ex rel. Thompson v. Board of Regents, 305 Mo. 57, decided in 1924. Incidentally, the writer here happened to be a member of the board at that time.

In the above case insurance had been taken out on the properties of the school and the policy written in favor of the Board of Regents. A fire occurred and the question arose as to whether this fund collected from the insurance company should go into the state treasury or could be paid direct to the school and used by the school in repairing and replacing the damaged or destroyed buildings. This case, decided by the court en banc, holds that this fund is not payable to the state treasurer, but may be expended by the Board of Regents of the school in replacing said structures. That opinion also comments on and construes the meaning of this constitutional provision with reference to the Constitution of 1865 and holds that "revenue collected and money received by the State from any source whatsoever", as is referred to in said constitutional provision of 1875, means -

"the current income of the State from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources as our numerous statutes attest, but no matter from what source derived, if required to be paid into the Treasury, it becomes revenue or state money; * * * state money means money the State, in its sovereign capacity, is authorized to receive--the source of its authority being the Legislature."

The opinion also holds that the Board of Regents does not have the attributes of sovereignty "which would entitle them to be designated as the State's alter ego," and that the Legislature, many decades ago, "contented themselves with defining in general terms the powers of such boards as are here under review, leaving the discharge of duties not defined and which may, under changed conditions, arise in the future, to the discretion of the board."

The opinion then sets out the following, l. c. 66:

"When the college was organized fifty-four years ago, it was evidently not within the contemplation of the framers of the law that the board would receive or be charged with the expenditure of other funds than those appropriated by the Legislature and hence no provision was made in reference thereto. In addition, for what reason it is profitless to discuss, no express power was conferred

upon the board to protect the State's property from loss occasioned by fire or other destructive forces. The board, upon the college becoming operative, with the increase in the student body and the extension of its work, deemed it proper to charge students certain fees for junior high school, extension and other work. This custom has continued, not only in this institution but others of like character, during the terms of their respective existences. No criticism has ever been made of same and as proof of its approval no General Assembly during the more than fifty years of this college's operation has sought to either regulate the collection or disposition of the funds thus obtained. The fund arising from such collections has been retained by the board and expended by it for the college."

Speaking of the board, the opinion says, l. c. 66:

"It is charged with no wrong doing or the usurpation of any power which has not at least received tacit legislative and public approval for a half century. These facts are entitled to more than persuasive consideration in determining the question here seeking solution. Absent qualifying incidents they may arise to the dignity of ruling decisions. (State ex rel. v. Gordon, 266 Mo. 412; Folk v. St. Louis, 250 Mo. 141.) The sum of its offending is, that having made a valid contract in the State's interest and for its protection and the fruits of same having been received, that it shall pay this money into the State Treasury instead of using it to partially restore the buildings destroyed, and await legislative action authorizing its use for that purpose. Such a course disregarding the implication which the application for this writ involves as to the integrity and business judgment of the board after its years of experience, is fraught with injury to the college in interfering with its operation and thus lessening its opportunities for the advancement of higher education."

At l. c. 69 the opinion says:

"Without burdening this opinion with their review, it seems sufficient to say that in none of these statutes, either by express enactment or reasonable implication does it appear that it was within the contemplation or intention of the Legislature that moneys received by the managing boards of educational institutions in the nature of incidental fees should, as a condition precedent to their use by the respective boards, be required to be first paid into the State Treasury and appropriated therefrom by the Legislature. In the absence of a mandatory requirement to that effect no duty is devolved upon such boards to thus dispose of these funds. Their duty in the premises in the presence of that discretion with which the law has clothed them is to expend such funds for the college, and account for same in the manner required by the plain provisions of the governing statutes."

CONCLUSION

It is our opinion that the above cited case is authority that the Board of Regents of the Northeast Missouri State Teachers College has the legal right to exercise its discretion as to taking out insurance for the protection of the property of said school, and that if its judgment is that the procuring of insurance is advisable, and if said school has funds on hand which were not appropriated by the Legislature but which were collected as incidental funds, that such funds may be used in payment of the premium on said insurance policies.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

DW:HR

COUNTY BUDGET ACT: (1) Only insane persons in state hospitals can be estimated under Class I, unless the insane person be committed to the state sanatorium at Mt. Vernon. (2) Funds for purchasing right-of-ways and materials on WPA labor and state highways should be estimated in Class 5.

February 9, 1937



Mr. Melvin Englehart
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Mr. Englehart:

This department is in receipt of your letter of February 2nd, wherein you make the following request relative to the County Budget Act:

I.

"Class I, provided, 'the county court shall set aside and apportion a sufficient sum to care for the insane pauper patients in state hospitals'. Does this include persons other than insane people? Should the expense of patients in the tuberculosis hospitals, who are indigent cases, be paid from the class?"

Your first question relates to Class I, page 341, Laws of Missouri, 1933:

"The county court shall set aside and apportion a sufficient sum to care for insane pauper patients in state hospitals. Class I shall be the first obligation against the county and shall have priority of payment over all other classes."

Section 5, page 344, which we deem to be an explanatory statute in referring to Class I, is as follows:

" * * * care of paupers declared by lawful authority to be insane (in state hospitals)".

Conceding that the Missouri State Sanatorium, at Mount Vernon, which may be the tuberculosis hospital which you have in mind, is a state hospital, or a state eleemosynary institution, yet by the terms of Class I, we are of the opinion that only insane pauper patients in state hospitals can be included in Class I, because the statute is not susceptible of any other interpretation.

II.

"In Class 3, it is provided, 'the county court shall next set aside and apportion the amount required, if any, for the upkeep, repair, or replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county. 'Does this include anything other than the building of bridges? Does it include the purchase of right-of-way for county roads other than bridge sites, grading of roads, payment of road-overseers other than to build bridges and purchase of right-of-way for WPA projects which are later taken over and maintained by the State Highway Department, as a State highway?

"Suppose the State Highway Department and the County Court and WPA undertake to build a road. The Highway Department makes the survey and designates the route, the County Court purchases the right-of-way and the WPA furnishes

a part of the materials and the County Court a part of materials, the WPA all of the labor and the State Highway Department supervises the work and then maintains the road as a supplementary highway. Does the money used by the County Court come from Class 3?"

This question relates mainly to Class 3, page 341, of the County Budget Act, which is as follows:

"The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county."

The plain wording of the statute is to the effect that only the repair, upkeep or replacement of the bridges is included in Class 3. Many county courts have by inference and by construing it as the intention of the Legislature, included, in addition to bridges, upkeep, repair and construction of roads not on state highways or any special road districts. Other county courts have created another class of funds for the purpose of repair, upkeep and construction of roads. As stated above, we can not construe the statutes to include the upkeep and repair of roads.

Under Section 5, page 344, the Legislature further interpreted this portion of the statute to only include bridges, as follows:

"Repair and upkeep or replacement of bridges on other than state highways and not in any special road district. List bridges"

Therefore, in answer to your specific question, to-wit,

Mr. Melvin Englehart

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February 9, 1937

"does the money used by the county court come from Class 3?", we are of the opinion that it does not.

Respectfully submitted,

OLIVER W. NOLEN
Assistant Attorney General

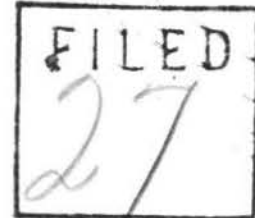
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:RT

MUNICIPAL CORPORATIONS: COUNTIES: When taxes may be levied
for relief purposes and dis-
bursed by relief offices.

June 12, 1937. 614



Mr. Lynn M. Ewing, Mayor,
City of Nevada,
Nevada, Missouri.

Dear Mr. Ewing:

We wish to acknowledge your recent letter wherein
you state as follows:

"A question has arisen here in the City of Nevada as to the power and authority of a city council of a city of the third class, as in Nevada, to make appropriations from month to month for use of the local relief office. The proposition is whether or not the city has power to make such appropriations and turn over the money to the local relief office for relief purposes. Along with this question there has also been raised the question in the council as to the authority of the County Court to make such appropriations. Naturally, the question resolves itself into whether or not the City Council and the County Court have authority to levy taxes for relief purposes.

"I would appreciate it very much if you would advise me as to the following:

1. Does the City Council have authority to levy taxes for relief purposes.
2. In the event no such taxes are levied, does the City have authority to pay out of its general funds money to the relief office.

3. Does the County Court have authority to levy taxes for relief purposes.
4. If the County Court does not have such direct authority, or in the event it does, and does not levy taxes for this purpose, can it make appropriations for use of relief office."

In the case of *Vrooman v. City of St. Louis*, 337 Mo. 933, 88 S. W. (2d) 189, 1. c. 193, the Court in holding that taxes levied by a municipality must be for both a public and a municipal purpose, said:

"A number of cases are cited from this and other jurisdictions asserting the general rule that taxes levied by a municipality must be for both public and municipal purposes. The rule is clearly and concisely stated in *Cooley on Taxation* (4th Ed.) vol. 1, sec. 178, page 388, 389, as follows: 'The "public" that is concerned in a legal sense in any matter of government is the public the particular government has been provided for; and the "public purpose" for which that government may tax is one which concerns its own people, and not some other people having a government of its own, for whose wants taxes are laid. * * * The purpose must in every instance pertain to the sovereignty with which the tax originates; * * * This is the general rule; * * *"

Cooley on Taxation, Vol. 1 (4th Ed.), Sec. 215, page 452, in declaring that the care of the poor is a public purpose, said:

"The support and care of paupers is a public purpose. As to this there is no doubt. The laws not only exempt from taxation the limited means of poor and afflicted persons, but they go further and provide public funds

with which to furnish them retreats where they can be supplied with the necessities and, to a reasonable extent, with the comforts of life."

The case of Jennings v. City of St. Louis, 332 Mo. 173, 58 S. W. (2d) 979, 982, in holding that all cities have an express grant of authority to care for the poor, said:

"As a municipal purpose, poor relief is recognized by our Legislature in the creation of social welfare boards and in express grants of authority to all of our cities to care for the poor.
* * * Poor relief being a municipal purpose, under section 11, article 10, of the Constitution of Missouri, the city of St. Louis has the power to levy taxes so that its poor may be fed, clothed, and sheltered."

Clearly, then, taxes levied by a municipality for the care of its local poor would be both for a public and a municipal purpose.

You speak of the "local relief office", and we assume that you are referring to the local social welfare boards which under Article 5, Chapter 38, of the Revised Statutes of Missouri, 1929, may be created and established at the option of the mayor and common council in cities of the third class, and not a private agency set up for local relief purposes, since as stated by the Court in the case of State ex rel. v. St. Louis, 115 S. W. 534, 216 Mo. 47, l. c. 91, no municipality is authorized to exact taxes and turn them over to a private individual or to a board of any private corporation to disburse at their discretion:

" * * * taxes should only be levied for public purposes and when collected should be administered and disbursed only by public officers elected or appointed according to law and that their accounts should from time to time be investigated by the lawful authorities, and that municipal

corporations were only authorized to levy and collect taxes for municipal purposes, and municipal enterprises should be conducted and controlled in fact by such municipalities by and through their proper officers, and were not authorized to exact taxes and turn them over to any private individual or board of any private corporation to disburse at their discretion."

Section 6899, R. S. Mo. 1929, authorizes the creation and establishment of a social welfare board in a city of the third class:

"In all cities of the second and third class in this state there is hereby created and established, at the option of the mayor and common council of any such city, a board which shall be styled 'the social welfare board of the city of _____.' All powers and duties connected with and incident to the relief and prevention of dependency, relief and care of the indigent, and the care of sick dependents, with the exception of the insane and those suffering with contagious, infectious and transmissible diseases, and excepting those persons who may be admitted to the county poorhouses of the counties in which such cities are located, shall be exclusively invested in and exercised by said board. Said board shall have power to receive and expend donations for social welfare purposes, and shall have exclusive control of the distribution and expenditure of any public funds set aside and appropriated by such cities for relief of the temporary dependent. Said board shall have power to sue and be sued, complain and defend in all courts, to assume the care of or take by gift, grant, devise, bequest or otherwise, any money, real estate, personal property, right of property or other valuable things, and may use, enjoy, control, sell or convey the same for charitable purposes, to have and to use a common seal and alter

the same at pleasure. Said board may make by-laws for its own guidance, rules and regulations for the government of its agents, servants and employes, and for the distribution of the funds under its control."

The above section expressly confers upon the board the exclusive control of the distribution and expenditure of any public funds set aside and appropriated by the city for relief purposes.

Section 6786, R. S. Mo. 1929, provides that the city council may by ordinance provide for the levy and collection of all taxes, in part, as follows:

"The city council shall, from time to time, provide by ordinance for the levy and collection of all taxes, * * *."

From the foregoing, we are of the opinion that the city council has the authority to levy taxes for relief purposes.

II.

McQuillin on Municipal Corporations, Vol. 5, Sec. 972, page 2337, declares that:

" * * * ordinarily general funds may be appropriated by the council to any municipal object."

44 C. J., Sec. 4116, page 1160, provides that:

"General municipal funds may be used, applied or expended for any lawful municipal purpose."

Funds for relief being for a lawful municipal purpose, we are of the opinion that in the event no taxes are levied for relief purposes, the city has the authority to

pay out of its general funds money to the local social welfare board, if said agency is created and established under Section 6899, supra.

III.

Section 1, Article X, of the Missouri Constitution provides how the taxing power is to be exercised, as follows:

"The taxing power may be exercised by the General Assembly for State purposes, and by counties and other municipal corporations, under authority granted to them by the General Assembly, for county and other corporate purposes."

Section 3, Article X, of the Missouri Constitution provides that taxes may be levied and collected for public purposes only:

"Taxes may be levied and collected for public purposes only. * * *"

Section 11, Article X, of the Missouri Constitution fixes the rate of taxation for county purposes:

"Taxes for county * * * purposes may be levied on all subjects and objects of taxation; * * *. For county purposes the annual rate on property, in counties having _____ million dollars or less, shall not, in the aggregate, exceed _____ cents on the one hundred dollars valuation * * *."

Section 12950, R. S. Mo. 1929, provides as follows:

"Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Section 12961, R. S. Mo. 1929, makes it the duty of the county court to set apart funds. It provides:

"The several county courts shall set apart from the revenues of the counties such sums for the annual support of the poor as shall seem reasonable, which sums the county treasurers shall keep separate from other funds, and pay the same out on the warrants of their county courts."

We have already pointed out that taxes for the care of the poor would be for a public purpose, but if levied by a county would also have to be for a county purpose.

In the case of Board of Commissioners v. Peter, 161 S. W. 155, 253 Mo. 520, 1. c. 534, the Court in holding that the care of the poor by counties was for county purposes, said:

"We will not go into that field, because roads, bridges, the care of paupers, of the insane, of prisoners, official salaries, the care of public buildings, etc., have usually been considered county purposes within the purview of revenue laws and the administrative details of county business."

In the above case the court had before its consideration whether the Act of 1913 authorizing a levy of twenty-five cents on the one hundred dollars valuation of all property in the county for the maintenance of a tuberculosis hospital was violative of the above constitutional provisions. The Court in holding that the Act standing alone was not violative of Section 1, Article X, of the Missouri Constitution, *supra*, but that said constitutional provision must be read in connection with Section 11 of Article X of the Missouri Constitution, said, 1. c. 535:

"As at present advised, we see no insuperable obstacles to the law in section 1, article 10, of the Constitution, standing alone; but that section, as well as section 3, *supra*, must be read in connection with section 11 of article 10 of the Constitution, for they pertain to the same subject-matter and are strictly in pari materia. (Brooks v. Schultz, 178 Mo. 1. c. 228.)"

And the Court in pointing out further that the provisions of the Constitution were insurmountable barriers for an increase in taxation for county purposes beyond the constitutional limitation, said, l. c. 536:

"The case, then, must stand or fall on the proposition that the proposed levy is in addition to the thirty-five cents allowed by the Constitution for 'county purposes.' Evidently that was the theory of the lawmaker. Otherwise, if the constitutional levy of thirty-five cents for roads, bridges, the care of the insane, paupers, criminals, and the current expenses of the county for salaries, jury service, care of public buildings and what not, is to be depleted by a deduction of a twenty-five cent levy on the hundred dollars for the tuberculosis hospital district, then, all the usual and needful activities of the county would be crippled by starvation into a state of suspended animation akin to death. Self-evidently so benevolent an act as the one under review could not have contemplated so unbenevolent and injurious a result. The itching idea in the lawmaker's mind was to progress, i. e., to keep what we have and get more, not to go backward in governmental purpose and action. The lawmaker, then, must be held to have intended his act to permit a levy in addition to the thirty-five cents permitted by the Constitution, and appellant so argues in a brief most commendable in tone and uncommonly ingenious in reasoning. But we shall not follow the lead of learned counsel. That provision of the Constitution may neither be struck down by the General Assembly nor ignored, nor evaded by deft indirection. It stands there as an insurmountable barrier to an increase in taxation for county purposes beyond the maximum rate of thirty-five cents on the hundred dollars. It goes further. It interprets itself. It declares that the restriction shall apply to taxes of every kind and description whether general or special,

June 12, 1937

except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness."

From the foregoing, we are of the opinion that the county court has the authority to levy taxes for relief purposes, but that same must not be in excess of the constitutional limitation prescribed by Section 11, Article X, of the Missouri Constitution, supra, after having made provision for all the other usual and needful activities of the county.

IV.

In reply to your fourth question whether in the event the county court does not have such authority, or in the event it does have the authority to levy taxes for poor relief, it can make appropriations for the use of the relief office, we enclose herein copies of two opinions rendered by this department under date of November 12, 1934, to Hon. John D. Brooks, Judge of the Grundy County Court, and December 23, 1935, to Hon. John J. Wolff, Associate Prosecuting Attorney of St. Louis County, respectively, wherein it was held that it was the duty of the county court to care for the poor, and that they could not turn the money over for relief purposes to a board, commission or agency to dispense it for them.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

TAXATION & REVENUE: Procedure of collector at second and third offering for sale. Collector of City of St. Louis may not subdivide state, city and school tax and enforce them independently

August 31, 1937.



State Tax Commission,
Jefferson City, Missouri.

Attention: Mr. Evans, Chairman.

Dear Sir:

We acknowledge receipt of your letter of August 5th to General McKittrick requesting an opinion of this office relative to the sale of real estate under the Jones-Munger Law, known as Senate Bill #94. We are answering all of these inquiries in this opinion.

The inquiries are set out in a letter addressed to you from Mr. John G. Burkhardt, Tax Attorney of the City of St. Louis, which letter is as follows:

"Upon behalf of the City of St. Louis and Mr. Wm. F. Baumann, Collector of the City of St. Louis, and pursuant to Section 9960 d, Revised Statutes of Missouri, 1929, as adopted by the laws of Missouri 1933, page 443, we are requesting a ruling of the State Tax Commission and the Attorney General upon the following questions:

1. At the third offering of lands for delinquent taxes under the Jones-Munger law, does the bid of a purchaser in an amount insufficient to pay the taxes extinguish the balance of said taxes? As an example, if a purchaser at a tax sale this November should bid \$5.00 for 1930 taxes which amount to \$100.00 and which are being offered for sale for the third time, does this bid constitute satisfactory payment in full of said taxes? In other words, does the owner or the interested party redeeming said land have to pay merely the \$5.00 to the purchaser to redeem or must he (the interested party) likewise pay the balance of the \$95.00 to the Tax Collector before he is entitled to redeem his lands?

2. What is meant by the use of the words "then delinquent taxes," in Sec. 9953 of the laws of Missouri for 1933, p. 432? Must the Collector accept any bid, when the property is being offered for the third time, and consider said bid as being in full for all the taxes advertised at that sale? Or must the bid be considered in full for all taxes then delinquent on the property, whether advertised or not? Or does the bid only foreclose the lien for the one year's taxes which are being called for the third time? In either of the first two contingencies above stated, must the bid be sufficient to cover in full the taxes for the year or years other than those which are being advertised for the third time?

3. The Collector of the City of St. Louis collects State, City and Board of Education taxes. Can the Collector or other proper authority of the City of St. Louis sub-divide the tax bills into three separate bills, one for each said unit respectively and then offer the lands for sale for the taxes due the City of St. Louis alone?"

I.

BID AT THIRD SALE EXTINGUISHES TAX LIEN IF NO REDEMPTION EXERCISED.

Section 9953a, page 432, Session Acts of Mo. for 1933 provides:

"Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell the same to the highest bidder, and the purchaser thereof shall acquire thereby the same interest therein as is acquired by purchasers of other lands at such delinquent tax sales."

The last phrase of this section states that the purchaser at the third offering of a tract or lot for delinquent tax acquires the same rights as any other purchaser, which means that in the event no redemption is effected within two years of the sale, the purchaser is entitled to a deed from the Collector vesting in the Grantee:

"an absolute estate in fee simple, subject, however, to all claims thereon for unpaid taxes except such unpaid taxes existing at the time of the purchase of said lands and the lien for which taxes were inferior to the lien for taxes for which said tract or lot of land was sold." (Section 9957, page 438, Session Acts of Missouri 1933). *See*

The purchaser at the third sale thereupon obtains the right to a fee simple title, discharged of the lien for delinquent taxes existing at the time of sale, conditional, upon the failure of the owner or an interested person to redeem. However, such right is a conditional one and is eliminated by the purchaser or any other person having a right to redeem, exercising that privilege and redeeming the tract from the sale.

CONCLUSION

It is, therefore, the opinion of this office that at the third sale, the bid of the purchaser, even though insufficient to pay the taxes, penalties, interests and costs gives the purchaser the conditional right to a deed which, when obtained, extinguishes the balance of said taxes.

II.

THE PERSON REDEEMING IS ONLY REQUIRED TO
PAY AMOUNT OF BID WITH INTERESTS PLUS SUB-
SEQUENT TAXES PAID PLUS COSTS.

Section 9953a herein before set out plainly states, that lands sold at the third offering for what they may bring are subject to redemption under the same terms as though sold at the first or second offering.

Section 9956a, page 437, Session Acts of Mo. for 1933, provides, that lands may be redeemed:

"By paying the County Collector for the use of the purchaser * * * the full sum of the purchase money named in the certificate of purchase and all the costs of sale together with interests at the rate specified in such certificate not to exceed 10 per centum annually with all subsequent taxes which have been paid thereon by the purchaser * * * with interest * * * of eight per centum per annum and such taxes subsequently paid, and in addition thereto the person redeeming shall pay the costs incident to entry of recital of such redemption."

Therefore, any person entitled to redeem, need only to pay the amount of the certificate of redemption, plus the items above referred to. No further nor additional payments may be required. However, we direct your attention to the provisions of Section 9953b, supra, which authorizes and directs, that:

"In the event of the redemption of any land from any sale made under the provisions of this act, the land so redeemed shall be liable to resale by such county collector at the next or any subsequent tax sale of lands for all delinquent taxes, penalties, interest and costs not paid by such sale."

In the event of a redemption for less than the full amount of taxes, penalties, interest and costs existing against a given tract or lot of land, the collector is charged with the duties of advertising and selling the tract or lot for the balance of the taxes, penalties, interest and costs which were not paid by the prior sale.

CONCLUSION

It is, therefore, the opinion of this office that the person redeeming tracts or lots of land pays merely the amount of the bid made by the purchaser as shown on the certificate of purchase, together with the costs of sale, with interest on the whole at the rate specified in the certificate plus any subsequent taxes paid by the purchaser with interest at the rate of 8% per annum thereon and the costs incidental to such redemption, but that, if such bid did not pay the taxes, penalties, interest and costs existing at the time of

sale, the collector is required to resell the tract at the next sale for the balance of such taxes, etc. as were not paid at the prior sale.

III.

CONSTRUCTION OF PHRASE "THEN DELINQUENT TAXES."

Your inquiry refers to the phrase "then delinquent taxes" as used in Section 9953, page 432, Session Acts of Mo. 1933. This section requires that in the event no bid is received at the first sale of a given tract to pay the taxes, penalties, interests and costs thereon, the tract shall be again advertised or offered for sale at the next subsequent sale for "the then delinquent taxes, penalties, interests and costs." When lands are reoffered for sale under Senate Bill No. 94, it is in a subsequent year to a former offering and therefore additional penalties, interests and costs have accrued on the former years taxes and, an additional year's taxes has become delinquent and penalties, interests and costs have accrued thereon. The term "then delinquent taxes" refers to the total taxes delinquent at the time of the reoffering and the term "then delinquent taxes thereon with interests, penalties and costs" as used in Section 9953, supra, means the total of all delinquent taxes, penalties, interests and costs due at the time of the reoffering.

CONCLUSION

It is, therefore, the opinion of this office that on a reoffering of a tract or lot of land under Section 9953 or 9953a, page 432, Session Acts of Mo. for 1933, such reoffering should be for all delinquent taxes, penalties, interests and costs which exists at the time of the reoffering.

IV.

THE COLLECTOR MUST ACCEPT THE BEST BID AT THE THIRD OFFERING IN PAYMENT OF ALL TAXES, ETC. THEN DELINQUENT AND ADVERTISED.

Under provisions of Section 9953a, supra, the collector is directed, in the event he has failed to receive ~~for~~ two successive prior years a bid "equal to the delinquent taxes thereon, interests, penalties and costs", he shall sell at the next regular sale "to the highest bidder".

The best bid is the one that must be obtained and that bid, although not equal "to the delinquent taxes thereon, interests, penalties and costs", when paid, is warrant for the issuance of the Certificate of Purchase.

You inquire if that bid is in full for all taxes "then delinquent" whether advertised or not.

Compliance with said Senate Bill No. 94, eliminates this issue. This law contemplates and requires that all taxes then delinquent on a given tract be included in the advertisement. Section 9952, page 429 of the 1933 Session Acts of Mo. requires the county collector to compile the lists of delinquent lands and lots describing them and,

"charging them with the amount of delinquent tax and name the years delinquent, separately states * * *."

Section 9952b, page 403, 1935 Session Acts of Mo. provides for the publication of the list of delinquent lands and lots and states:

"And it shall only be necessary in the printed and published lists to state in the aggregate the amount of taxes, penalties, interests and costs due thereon, each year separately stated" * * *

and further that a notice shall be attached to such lists stating:

"That so much of said lands and lots as may be necessary to discharge the taxes, interests and charges which may be due thereon at the time of sale will be sold at public auction * * *."

Section 9952c, page 431 of the 1933 Session Acts of Mo. provides that the collector shall at the time and place mentioned proceed to hold the sale as published until so much of each tract "shall be sold as will pay the taxes, interests and charges thereon * * *."

These Sections and many others which are a part of Senate Bill No. 94 clearly show that the advertisement and the sale contemplated and required is and must be for all the taxes, penalties, interests and costs existing and delinquent against the tract. If further proof is required we call attention to Section 9953 and 9953a, supra, as quoted under part one of this opinion.

Under Section 9953, supra, the county collector is forbidden to make any sale of any tract or lot at the first offering unless he shall receive a bid heretofore "equal to the delinquent taxes thereon with interests, penalties and costs * * *."

August ³¹~~25~~, 19³~~27~~.

Nor may the collector sell at the second offering, unless a person,

"shall bid, therefor, a sum equal to the then delinquent tax thereon with interest, penalty and cost * * *."

Under Section 9953a, provision is made for a third offering for what the property will bring provided that at the two prior sales,

"no person shall have bid therefor, a sum equal to the delinquent taxes thereon, interests, penalties and costs * * *."

Under these sections, no sale may be had at the first or second offering, unless a bid is received equal to the taxes, penalties, interests and costs existing at the time of the sale. The collector is without authority to issue a certificate for any bid less than the amount of the taxes, interests, penalties and costs at the first or second offering.

Therefore, he could not offer a given tract for less than the amount of the taxes, penalties, interests and costs existing at the time of the sale.

The answer to your inquiry is that the bid made at the third offering is to be considered in full for all taxes then delinquent which must be included in the publication of the list of delinquent lands and lots.

Accordingly the bid made does not foreclose the lien for the first years taxes which are being called for the third time for, as heretofore stated, the bid is for all taxes, penalties, interests and costs existing against the tract at the time of sale.

Accordingly the bid need not be sufficient to cover any given years taxes in full, as the tract, when offered the third time is offered for all taxes, penalties, interests and costs existing and delinquent at the time of the third offering.

CONCLUSION

It is, therefore, the opinion of this department that when the given tract is included in the publication of a notice of sale that the same shall describe the tract and state the amount of all the taxes, penalties, interest and costs due and delinquent at the time of sale each year separately stated and that in the event no bid is received equaling the sum of such items, no sale may be had at the first offer, but at the next sale the tract shall

be again advertised stating the amount of taxes, penalties, interests and costs due and delinquent thereon at the time of the second offering each year separately stated and if no bid is received at such second offering equal to the delinquent taxes with penalties, interests and costs then due and delinquent thereon, that the same land may not be sold at the second offering, but that the next publication and sale, the given tract shall be advertised stating all the taxes, penalties, interests and costs due and delinquent at the time of the third offering each year separately stated and at which sale the highest bidder will be entitled to a certificate of purchase irrespective of the sum due and delinquent against the tract.

V.

THE ENFORCEMENT OF CITY AND SCHOOL TAXES OF THE CITY OF ST. LOUIS - MAY BE ENFORCED IN LIKE MANNER AS MAY BE PROVIDED BY LAW IN ENFORCING THE PAYMENT OF STATE TAXES AND MAY NOT BE SUBDIVIDED INTO THREE SEPARATE BILLS.

Under Article one, Section one, of the Charter of the City of St. Louis, it is provided that said City shall have power to "assess, levy and collect taxes for all general special purposes on all subjects or objects of taxation."

It is provided in the assessment division of said City in Article 15, Section 4, that "the assessment division shall consist of the assessor and such deputy assessors and employees as may be provided by ordinance." It is their duty, under Section 8 of said Article "to commence their assessment on the first day of June of each year and complete the same, and the deputies to make their final reports thereof to the assessor on or before the first day of January next following".

The assessor shall make up the assessment books and complete them on or before the third Monday of March each year. Section 9 of Article 15:

"There shall be a board of equalization consisting of the assessor who shall be its president and four tax-paying * * *citizens* * *and, each member shall take an oath similar to that required by law of the members of the county boards of equalization." Section 10 of Article 15.

Under Section 11, Article 15, of said Charter, the powers of said board are set out, which said powers are similar to that of county courts.

When the assessment books are completed, the assessor is required to give notice that said books are open for inspection and stating therein when the board will meet, and thereupon the board meets, proceeds with its duties and, after the assessment books have been corrected, the assessor must make an abstract thereof as provided in Section 15, Article 15, Charter of St. Louis at page 1316 which is as follows:

"After the assessment books have been corrected, the assessor shall make an abstract thereof showing the amount of the several kinds of property assessed and specifying the amount of value of all taxable property within the city, and certify thereon that the same is a true and correct abstract of all such property in the city so far as he has been able to ascertain. One copy of the abstract, verified by his oath, shall be delivered on or before the fourth Monday in May to the mayor, and another to the state auditor. The assessor shall extend in said assessment books the state, school, and city taxes and include in said books such matter as the law shall provide or the comptroller require. The assessor shall then cause tax bills to be made out for such taxes in such forms as the law shall provide or the comptroller prescribe, and deliver them with a duplicate schedule thereof to the comptroller, who shall compare said bills with said books and schedule and test the footings, and then officially stamp said bills and deliver them with one schedule to the collector, and take his separate receipts; one for the aggregate of said bills, and another for the state taxes, which last receipt the comptroller shall transmit to the state auditor."

The collection division shall consist of the collector and such deputies and employees as may be provided by ordinance.

The duties of the collector are set out in Section 20, Article 15 of said Charter which is as follows:

"The collector shall have the qualifications provided with regard to the mayor and be the head of the collection division. He shall receive such compensation as may be provided by law or ordinance. He shall collect all state, city, and school taxes, wharfage, water rates, and dramshop licenses, and may collect special assessments, and, unless otherwise provided by ordinance, all indebtedness and claims due the city, and daily pay the same to the city treasurer, except the state taxes, which shall be paid by him as provided by law, and except the school taxes, which shall be paid by him to the board of education of the city monthly, or oftener when required in writing by the treasurer of said board. He shall collect license taxes as permitted by law. He shall appoint the deputies and employes in his division. Each deputy shall have all the powers of the collector, subject to his control."

Said collector, before entering upon the duties of this office, "shall give bond to the State as required by law and to the City as may be required by ordinance". Section 21 of Article 15.

Section 22, Article 15, provides for the enforcement of tax payment and is as follows:

"The payment of all city and school taxes may be enforced in like manner as may be provided by law for enforcing the payment of state taxes."

In considering the above questions the Supreme Court in the case of State ex. rel v. Gardner, 234, S. W. 53, stated:

"Section one, Article 9, of the Constitution of Mo. provides that 'the several counties of this state, as they now exist, are recognized as legal subdivision of the State'. St. Louis City is a legal subdivision of Missouri and as such has been and should be treated for all governmental purposes as a county, Gracey v. St. Louis, 213 Mo. 384, State ex. rel v. Finn, 4 Mo. App. 347.

In the last cited case, the court said regarding the City of St. Louis:

"it may be a county so far as to keep up the relation as such to the rights of the State".

In the case of State ex. rel Halpin v. Powers, 68 Mo. 1. c. 323, the court, in commenting on the same subject, said:

"The 20th section of article 9 of the constitution, which provided for the separation of the city from the county, authorized the people of the city to adopt a charter for their government which should be in harmony with and subject to the constitution and laws of Missouri, and should take the place of and supersede the charter of St. Louis and all amendments thereof. The 23rd section of the same article provides that the city of St. Louis shall collect the State revenue in the same manner as if it were a county. As the city government, authorized by the constitution for the city of St. Louis, is entirely different in its organization from that of the counties, and as the duty of collecting the State revenue which devolved upon the county of St. Louis under the general law, was thereafter to be performed by the city of St. Louis, it became necessary to provide in the charter the requisite municipal agencies for the performance of that duty. Proper officers were to be designated, the mode of their selection prescribed, and the duties which were previously performed by the officials designated in the general law were, by express enactment, to be imposed upon them. The 1st section in the city charter on this subject declares that the city of St. Louis shall be assessed in accordance with the general law. Subsequent provisions require the annual assessment of real property within the city, and create a city board of equalization, which is required to meet annually, and is authorized to adjust, correct and equalize the valuation of real property so assessed, and to determine, as far as possible whether such property has been assessed

at its true cash value, and in just proportion to the assessed value of other property in the city similarly situated, and to increase or diminish the assessment accordingly. These requirements are substantially the same as those of the general revenue law relating to St. Louis county, in force at the time of the adoption of the scheme and charter,"

The question of a levy and collection of the school taxes within the City of St. Louis was passed on by the court in State ex. rel v. Casey, 94 Mo. l. c. 221, wherein it said:

"it is also to be remembered that the relator (School Corp. within the City of St. Louis) received a due portion of the general state revenue, set apart for the support of schools. It has, like the school districts throughout the counties, power to levy a local tax for the same purpose. In short, thought created by a special act of the legislature, it is designed to assist in carrying out the general common-school system, adopted by the state.*** This corporation is not subject to the control of the city government, but independent of it; save that it is the duty of the city officers to extend, collect, and turn over all school taxes levied by the board * * *."

The City of St. Louis having adopted its present scheme and charter, the constitution, (Section 23, Article 9), declares that the city shall collect the State Revenue and perform all other function in relation to the State, in the same manner as if it were a county. The suits for State, County and School Tax under Chapter 59 of 1929 Statutes were to be brought in the name of the State of Missouri for the use of the collector of the City of St. Louis. Such suits were based on tax bills, each bill including the taxes due for State, City and School. Under Senate Bill No. 94 said taxes are to be collected, by the collector, without suit, and no provision is made therein to divide or split the cause of action by bringing independent actions for State, City or School taxes.

St. Louis as a public corporation and agency of the State has authority to raise and collect money by taxes under the delegated authority of the legislature, and the money thus raised, under the control of

the State, is to be disposed of as the legislature may direct. State ex. rel St. Louis Police Commissioners v. St. Louis County Court, 34 Mo. 1. c. 552.

The school district or districts in St. Louis have not been given the power by the legislature to collect school taxes by suit, neither has the City of St. Louis been given the power, by the legislature, to bring separate suits for the taxes of City, School and State.

The legislature in Senate Bill No. 94 has determined the manner of the collection of all such taxes and the same cannot be collected except in the manner prescribed by law. Morton v. Reeds, 6 Mo. 64; Loring v. Groomer, 142 Mo. 1; Holly v. Rowling, 87 S. W. 1. c. 655.

CONCLUSION

It is, therefore, the opinion of this department that the City of St. Louis, as to the enforcement of state, city and school taxes, must act through its collector, and as such collector he is an official for the State, the City and the School District. He is an official in whom the interlinked interest of State, City and School District repose and on whom they collectively depend to obtain their independent revenue under the procedure of Senate Bill No. 94; and in view of the above statutes and decisions, the collector of the City of St. Louis, "may not subdivide the tax bills into three separate bills for each said unit and then offer the lands for sale for the taxes due the city alone".

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

SVM:LB

SCHOOLS:

Members of school board employing themselves to render service or labor for a school district and receive compensation for same, violate the public policy of the State

September 24, 1937

FILED
27

Honorable Edward T. Eversole
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri



Dear Sir:

This department is in receipt of your letter of September 16, in which you submit the following facts and desire an opinion thereon:

"One of the directors of a rural school, that is, a common school district, having a board consisting of three members, at the request of the board did some work on the school building in the district of which he was a member. There is no complaint about the price charged for the labor done and no complaint was made about the director doing the work until after it was completed, when certain residents objected to the director being paid for his work and have insinuated that if he is paid out of the district funds, action will be commenced against him to remove him from office.

"I have been unable to find any prohibition in the school laws against the director entering into a contract with the school board or doing any work for the district other than the prohibition contained in Section 9360, R. S. Mo. 1929. It occurs that provisions of said section to not apply in this case as the district

September 24, 1937

in question is not a city,
town or consolidated one.

"This question has arisen frequently and there seems to be a variety of opinions on the subject and for that reason, I would appreciate very much receiving your opinion as to whether or not a director of a common or rural school district has the right to do work for the school district of which he is a director and receive compensation for his labor.

"Thanking you for an early reply, I am."

Irrespective of the provisions of Section 9360 mentioned in your letter, we think that a member of a school board should not be employed to perform labor or services for the reason that it violates the public policy of the State.

A leading authority which bears on this question is that of State ex rel. v. Bowman, 184 Mo. App. 1. c. 559:

"We are not without abundant authority for this ruling. The case of Meglemery v. Weissinger, (Ky.), 131 S.W. 40, 31 L. R. A. (N.S.) 575, is a leading case on this subject. The editorial note to that case says: 'The adjudged cases upon

the validity of appointment to office made from the membership of the appointing body hold uniformly that such appointments are illegal and to be generally discountenanced.' In that case it was held that the fiscal court of a county, empowered to appoint a bridge commissioner, a salaried officer, could not appoint one of their own number. No specific statute or constitutional provision is cited as prohibiting such action. The court held the appointment void as against public policy, and said: 'Nor does the fact that his term expired within a few days after his appointment, or the fact that his duties would be prescribed and his compensation allowed by a body of which he was not a member, or the fact that he was not present with the court when his appointment was made, have the effect of changing this salutary rule. The fact that the power to fix and regulate the duties and compensation of the appointee is lodged in the body of which he is a member is one, but not the only, reason why it is against public policy to permit such a body charged with the performance of public duties to appoint one of its members to

an office or place of trust and responsibility. It is of the highest importance that municipal and other bodies of public servants should be free from every kind of personal influence in making appointments that carry with them services to which the public are entitled and compensation that the public must pay. And this freedom cannot in its full and fair sense be secured when the appointee is a member of the body and has the close opportunity his association and relations afford to place the other members under obligations that they may feel obliged to reply.' Other cases to the same effect will be found, giving the same and other reasons for so holding. (Smith v. City of Albany, 61 N. Y. 444; Gaw, et al. v. Ashley, et al., (Mass.) 80 N. E. 790; The People v. Thomas, 33 Barbour's Repts. 287; Ohio ex rel. v. Taylor, 12 Ohio St. 130; Kinyon v. Duchene, 21 Mich. 497.)"

We are of the opinion that members of a school board of any district who employ themselves, or a member thereof, to render labor and services for the school district and receive compensation for the same, violate the public policy of the State.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN LC

SALES TAX

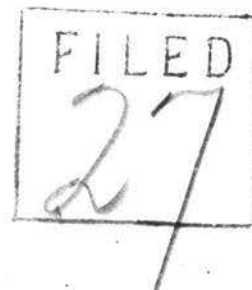
Charitable Institutions
Educational "
Exemption

(profit plan, in which deficits, if any, are
(paid by gifts from benevolent persons, and
(which receives all students applying, whether
(able to pay for such instruction or not, comes
(within class of public charitable institution
(and is exempt from provisions of 2% Sales
(Tax Act.
(

November 10, 1937

11-12

Ewing, Ewing & Ewing
Attorneys-at-Law
Nevada, Missouri



Dear Sirs:

We have received your request dated October 29th, 1937, for an official opinion as to whether Cottey College, of Nevada, Missouri, is within the class of institutions exempted from the provisions of the two per cent sales tax by Section 46 thereof, which request is as follows:

"Knowing the policy of your Department in not giving opinions to any except public officials, nevertheless I write you in regard to the following question because of the nature of the college involved, which might be quasi-public. Cottey College in Nevada, Missouri, is a junior college maintained by the P.E.O. Sisterhood. Tuition is charged to part of the students and the funds for running the college arise approximately one-half from the tuition charged and the other half by direct gifts from the P.E.O. Sisterhood. This institution is not run for profit.

"The question has come up as to whether this college should pay sales tax on commodities purchased for use by the school.

"In the Laws of Missouri, 1937, page 555 there appears the new 2% Sales Tax Act, and on page 568, Laws of 1937, Section 46, there appear the exemptions from the tax, which section reads as follows:

'In addition to the exemptions under

Section 3 of this Act there shall also be exempted from the provisions of this Act all sales made by or to religious, charitable, eleemosynary institutions, penal institutions and industries operated by the Department of Penal Institutions, or educational institutions supported by public funds or by religious organizations in the conduct of regular religious, charitable, eleemosynary, penal or educational functions and activities, and all sales made by or to a state relief agency in the exercise of relief functions and activities.'

"Cottey College is not strictly an institution supported by public funds, nor is it supported by a religious organization inasmuch as the P.E.O. is not primarily a religious organization. But according to our views, we do not believe this tax should apply. Because of the circumstances and the nature of the college we would very much appreciate your giving to us your opinion on this matter."

If the institution is exempt from the provisions of this Act, it is by virtue of the provisions of the Act as set out in Section 46 thereof, which is as follows:

"In addition to the exemptions under Section 3 of this Act there shall also be exempted from the provisions of this Act all sales made by or to religious, charitable, eleemosynary institutions, penal institutions and industries operated by the Department of Penal Institutions or educational institutions supported by public funds or by religious organizations, in the conduct of the regular religious, charitable, eleemosynary, penal or educational functions and activities, and all sales made by or to a State Relief Agency in the exercise of relief functions and activities."

November 10, 1937

In your letter of request, you state that Cottey College is not strictly an institution supported by public funds, nor is it an educational institution supported by a religious organization, but you do state that this institutions receives about one half of the amount required to operate on from tuition from pays tudents and the remainder is made up by gifts direct from the P.E.O. Sisterhood which is a non profit organization incorporated under the laws of Iowa, with its purpose announced as charitable and educational.

You further state in your letter of November 4th, 1937, pertaining to this request, that Cottey College is not an endowed institution in the usual sense, although the alumnae are working to establish an endowment fund.

Upon an examination of the charter and articles of incorporation of this institution in the Secretary of State's office, dated February 25, 1925 I find,

" * * * that the purposes of this corporation are to maintain an institution for instruction to females in every branch of knowledge and to promote the cause of christian education and learning and to fit those who come within the range of its influence for a better physical and spiritual life; and to that end shall have and enjoy all the privileges and rights and powers of all colleges of the highest grade in the United States."

By said charter, said college is also authorized to hold property, real and personal and to accept endowments. We further find from the aforesaid articles of incorporation that Virginia Stockard, the founder of Cottey College, conveyed the real estate upon which the college is located to this institution and provided that the college corporation had no power to mortgage same and authorized the institution to consolidate with any other institution of learning under supervision of the M.E. Church, South.

83 A. L. R., People Ex Rel Nelson vs. Rockford Masonic Temple Building Association, at page 770, reads:

"As a general rule, the purpose for which a corporation is formed is shown by its charter."

The college was incorporated by authority of the provisions of Article II, Chapter 90, R. S. Mo. 1919 for the purposes aforesaid. While there is some evidence in the articles of incorporation and charter that this institution is supported by a religious corporation, we do not think there is enough to find that it is within that class of educational institutions supported by religious institutions to be exempted on that account.

Then, there is only one other class this institution could be placed if it is exempted by Section 46; and that is in the class of a charitable institution.

An alleged constitutional or statutory grant of exemption from taxation will be strictly construed. 61 C. J., page 392, para. 396; State ex rel. Y.M.C.A. vs. Gehner, 11 S. W. (2d) 30; School of Domestic Arts vs. Carr, 322 Ill. 563.

A claim for exemption can not be sustained unless it is thoroughly found to be within the letter and spirit of the law. Readlyn Hospital vs. Hath, 272 N. W., 1.c. 92.

5 R. C. L. page 331, Section 56, reads as follows:

"A university which is organized as a private corporation without power to declare dividends and is dependent upon the income from its property and upon endowments and gifts for the funds to carry out the purpose for which it was created, the benefits of the institution being secured to all persons of good moral character who have sufficient preliminary education, is a charitable institution, and gifts thereto are valid charitable gifts. And the fact that a school requires its students to pay tuition does not change its character as a charitable institution."

Upon the question of what is a charitable institution

we find in the case of *School of Domestic Arts vs. Carr*, 322 Illinois, l.c. 568:

"A charity, in a legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burthens of government."

Upon the definition of charity which benefits to the public, Judge Bond in the case of *Catron vs. Scarritt Collegiate Institute* in 264 Mo. at 723, l.c. 725 and 726, cites the following statement:

"Probably the most comprehensive and carefully drawn definition of a charity that has ever been formulated is that it is a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature. Another definition capable of being easily understood and applied is that given by Lord Camden as follows: 'A gift to a general public use, which extends to the poor as

well as the rich.' The theory of this is that the immediate persons benefited may be of a particular class, and yet if the use is public in the sense that it promotes the general welfare in some way, it has the essentials of a charity.'"

And citing as authority on such statement (5 R.C.L. pp. 291-292), Judge Bond in this case further quotes the following from 5 R. C. L. pp. 322 and 323 in 264 Mo. at page 727:

"Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

From the foregoing facts and authorities cited, we find that even though Cottey College does make charges for tuition to the students who are able to pay, it does not receive enough money to operate upon and that the deficit is made up by the charitable organization; that by virtue of the authorities cited above, charges for tuition do not prevent the college from being within the classification of a charitable institution. The college realizes no profit from its operation, but in fact has to depend upon the benevolence of the P.E.O. Sisterhood for its existence and is organized for charitable and benevolent purposes.

From the articles of incorporation of Cottey College, we find that its doors are open to all females who desire instruction in every branch of knowledge and who desire a christian education to fit themselves for a better physical and spiritual life. It can not be questioned that such teaching in all its several branches is a benefit to the student, makes it possible for some of them to earn a living and does benefit the public.

CONCLUSION

We are, therefore, of the opinion that Cottey College is a charitable institution and that the sales of tangible personal property made by or to said college, being exempted by Section 46 of the Act, are not taxable under the provisions of the two per cent Sales Tax Act of Missouri, found at page 552, Session Acts of Missouri, 1937.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:RT

NEWSPAPERS:

When county is liable for the costs
of printing election notices

November 13, 1937

Honorable John A. Eversole
Prosecuting Attorney
Washington County
Potosi, Missouri

FILED
27

Dear Sir:

This Department herewith renders you an official opinion on the following question, as contained in your letter of some time ago:

"I have a question which the County Court of this county have asked me to present for your opinion.

"There are at the present time two newspapers published in Washington County, Missouri. One has been here for many years, the other issued its first publication on November the 15th, 1935. The papers are of opposite political faith.

"Preceding the general election of 1936 said election was published in both papers at the request of the county Clerk of this county.

"The question has arisen as to whether the paper which lacked two or three publications of being a legal newspaper at the time of the first publication should be paid or not.

"The county court will appreciate your opinion on this matter at your earliest convenience as the matter has been dragging for some time."

Section 13775, Laws of Missouri 1931, page 303, is as follows:

"All public advertisements and orders of publication required by law to be made, and all legal publications affecting the title to real estate, shall be published in some daily, tri-weekly, semi-weekly, or weekly newspaper of general circulation in the county where located and which shall have been admitted to the post office as second class matter in the city of publication; shall have been published regularly and consecutively for a period of one year; shall have a list of bona fide subscribers voluntarily engaged as such who have paid or agreed to pay a stated price for a subscription for a definite period of time. Provided that when a public notice required by law to be published once a week for a given number of weeks, shall be published in a daily, tri-weekly, semi-weekly or weekly newspaper, the notice shall appear once a week on the same day of each week, and further provided, that every affidavit to proof of publication shall state that the newspaper in which such notice was published has complied with the provisions of this Act. All laws or parts

of laws in conflict with this section, except sections 13777, 13778, 13779, 7631, 7632 and 7633, Revised Statutes of Missouri, 1929, are hereby repealed."

The above section was amended in 1931 and has again been amended at the last session of the General Assembly. However, as the matter under consideration relates to the law as contained in the session acts of 1931 we shall ignore the recent amendment.

The statutes, in enumerating the qualifications of a newspaper, uses throughout the section the verb "shall," which, when used, usually denotes that the terms of a statute are mandatory in nature, that is, the terms must be strictly complied with.

Relative to the question as to whether or not a newspaper must be published in a continuous and unbroken period for a one year period, we are inclosing an opinion rendered by this Department on October 8, 1936, to Honorable Sam V. Cochran, Judge of the Probate Court, Boonville, Missouri.

Your question is to the effect: Whether or not the paper, which, in truth and in fact, lacked two or three publications of being published in a continuous and unbroken period of time for one year, should receive the publication fee for printing the notice of the General Election of 1936.

We call your attention to Section 13776, as amended in 1935, Laws of Missouri 1935, page 320:

"When any notice or other advertisement shall be required, by law or order of any court, to be published in any newspaper or made in conformity with any deed of trust or power of attorney, the affidavit of the printer, editor, or publisher, with a copy of such

advertisement annexed, stating the number and date of the papers in which the same was published, shall be sufficient evidence of the publication."

We think it a reasonable construction, the statutes being in numerical order and following each other, that the affidavit of the publisher must also contain, as stated in Section 13775, that the newspaper publishing said notices has complied with the provisions of said section. Whether or not the newspaper in question has complied with said section is a question of fact. We assume that your statement of the facts is correct and that we must treat the question wholly from a legal standpoint.

Your question has never been directly passed upon by any court in the State of Missouri, at least we are unable to find any decision after having made an exhaustive research. Interpretation of a similar section under the Act of 1933 relating to the qualifications of a newspaper is discussed in Sekyra v. Schmoll, 313 Mo. 1. c. 703:

"Relator's first position is that the Act of 1923 is vague, uncertain and meaningless. It is said that Section 10405, part of which is quoted above, requires the order of publication to be published for at least one year. The section is awkwardly worded, but there is no doubt about the meaning of the language used. It is the daily newspaper and not the order of publication which must have been published for one year. In construing language of that kind it is proper to give it a meaning which is in accord with common sense when it is susceptible of such meaning.

"It is further said that there is no reasonable basis upon which the circuit judges are authorized to qualify newspapers. The paper shall be one of general circulation and shall have been published in the city for one year. Those are the sufficient qualifications required of papers in filing their statement of qualifications verified by affidavit with the board.

"It is further said there is a conflict between Sections 10406 and 10407, because the former section provides that under certain circumstances the legal notices may be published in some other paper than those qualifying at a higher rate than that designated, while Section 10407 provides that no notice required by law to be published shall be valid unless it be published in a paper qualified by the act. It will be noticed that these last two objections are not based on the theory that they render this act unconstitutional and therefore if sustained would be of no effect on the point that the provision in the old law relating to the duty of the clerk is repealed. But a reasonable construction of Sections 10406 and 10407 of the new act shows no such conflict. The requirement under Section 10407, that the notice must be published in a paper qualified, refers, of course, to all that is said in the previous section which provides generally

for the qualifications of the newspapers and allow exceptions in certain instances. The papers coming under the exceptions are qualified under the requirement of Section 10407."

The question as to whether or not a newspaper was legally entitled to bid on a publication and the question of a newspaper being printed in the German language when the statute stated it should be printed in the English language, is discussed in State ex rel. Goebel v. Chamberlain, 99 Wis. 1. c. 509:

"The present case is clearly distinguishable from the cases cited, in that in this case the county treasurer had no power or discretion to receive relator's bid, or award him a contract under it. No authority had been given to him by the county board for that purpose under sec. 675, R. S. 1878. The English language is the language of the country, to be used in all legal and official notifications or proceedings, in the absence of any statute authority to the contrary. It does not appear that the county board had considered or acted upon the subject. We hold that this section is decisive against the validity of the relator's claim, under his bid, to the contract. The publication of said list in the English language in a German paper would not, for the reasons stated, in the absence of such authority, be a legal publication; and the county treasurer rightfully refused to award to the relator a contract for that purpose, upon his bid."

Under Section 10249, R. S. Mo., 1929, it is the duty of the clerk to publish the names of the nominees. Said section reads as follows:

"At least seven days before an election to fill any public office, the clerk of the county court of each county shall cause to be published in two newspapers representing each of the two major political parties, if such there be, and if not, then in two newspapers, or if there be only one newspaper published within the county then in such newspaper, the nominations to office certified to him by the secretary of state, and also those filed in his office. He shall make two such publications in each of such newspapers before the election, one of which publications in each newspaper shall be upon the last day upon which such newspaper is issued before the election. Provided that no higher rates shall be paid per inch, than is provided by section 13773, chapter 114, R. S. 1929, as amended."

The terms of Section 10251, R. S. Mo., 1929, are also to be taken into consideration by the clerk.

Conclusion.

We are of the opinion that it being the duty of the clerk to select the newspapers in which publications shall be made, and by the terms of Section 13375, quoted supra, it is his duty to select a newspaper or newspapers


Nov. 13, 1937

which contain the requisite qualifications. The facts in the instant case show that the county clerk did not select a newspaper which possessed the requisite qualifications and was without authority to designate and select such newspaper. Hence, the county is not legally liable for the cost of printing the election notice.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:



J. E. TAYLOR
(Acting) Attorney-General

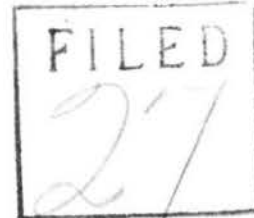
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COUNTY COURT: County Court has power and authority to redistrict county into two districts for County Court Judicial Districts.

November 23, 1937.

11-26

Honorable Edw. T. Eversole
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of November 19th requesting the opinion of this Department, which letter is as follows:

"Your opinion is respectfully requested concerning the power and legality of a proposed plan to re-divide Jefferson County into County Court Districts. The re-dividing is to be done by Order of the County Court of Jefferson County, for the purpose of making more nearly equal, the population of the two Districts, than they are at present.

"Section 2072, R. S. Mo. 1929, provides for the County Court dividing the County into two Districts as nearly equal in population as possible, without dividing municipal townships. The original division of the County into the two present districts undoubtedly was as fair division as could be made at the time, however, since the original division, some parts of the County have increased in population materially while others have stood still or increased very little.

"The vote in the County the last election indicates beyond any question that the population of the Southern District which includes Desoto, Festus, Crystal City and Herculaneum has approximately twice

the population, as that of the Northern District. It would be impossible to re-divide the County so that the population in each district would be exactly the same, without dividing the Municipal Townships, however, a division could be made as proposed which would make the two districts much more nearly equal than they are at present, in population."

Your question is whether the county court after a county has established its two (judicial) districts, as provided in Section 2072, R. S. Mo. 1929, may change or alter said districts?

Article VI, Section 36, Missouri Constitution, provides:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

Section 2072, R. S. Mo., 1929, provides:

"The county court shall be composed of three members, to be styled judges of the county court, of whom the probate judge may be one, and each county shall be districted by the county court thereof into two districts, of contiguous territory, as near equal in population as practicable, without dividing municipal townships."

The power to establish the county court districts has been delegated by the legislative branch of the State to the county courts of the various counties.

Section 2073, R. S. Mo. 1929, provides for the election of a county judge from each district of the county

for two years and a presiding judge from the county at large to serve four years. Each district thereby has a judge on the county court. Does this Section (2072, supra) mean that if a county has been districted once by the county court that it cannot thereafter be altered or changed? We do not think so.

We are unable to find in the appellate courts of Missouri a case where this question has been decided. In 15 Corpus Juris, page 415, Section 42, it is said:

"The Legislature has power, when not limited or restricted by constitutional provisions, to alter, to abolish or to change such precincts at will, and this power may be, and sometimes is, delegated to county boards. * * * * Where the power and duty to create or to change precincts or districts are delegated to county authorities, they must make the change or division in a reasonably fair and just manner, with due regard to the convenience of the people, and must comply with statutory requirements; but a substantial compliance is sufficient."

In State ex rel. Connelly v. Haverly, 87 N. W. 959 (Neb.), it is held that under the statute the county commissioners had the right to alter the boundary lines of the different commissioners' districts of a county for the purpose of adjusting such districts to changing population.

Also, in Hayes v. Rogers, 24 Kans. 145, it was said:

"Full power of rearranging the county in commissioners' districts is given, with the limitations that they shall be compact districts, and as equal in population as possible. In the very nature of things, the changes of population in some of our new and growing counties would require very radical changes of territory in order to make the districts equal in population."

Nov. 23, 1937.

Can it be said that once a county has been districted by a county court, it is fixed and settled for all time to come? The pertinent part of Section 2072, supra, says:

"* * * and each county shall be districted by the county court thereof into two districts, of contiguous territory, as near equal in population as practicable, without dividing municipal townships."

We can imagine a situation where at the time a county was established the county court exercised its prerogative and divided the county into two districts, in accordance with the above section, "of contiguous territory, as near equal in population as practicable, without dividing municipal townships." The districts at the time of their creation may be equal in population but as time goes on one district by the rapid changes in population may have three or four times as many inhabitants as the other district. The very purpose of this section is that the two districts be as near equal in population as practicable so that the people of one district shall have the same representation, according to population, on the county court as the other district. The section does not say that the county shall be divided equally territorially, but equally according to population.

It is, therefore, our opinion that the county court of your county, exercising the discretion which has been lodged in it, has the power and authority to redistrict the county for the purpose of more equitably adjusting the districts, so as to conform to changes in population of the county since the formation of the two districts now existing.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

SCHOOLS:
SCHOOL BOARDS:
SPECIAL ELECTIONS:

School Board may not call meeting for special election without petition being presented signed by a majority of qualified voters of the District

December 15, 1937

12-16



Mr. Edw. T. Eversole
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

This office acknowledges your request dated December 8, 1937, which is as follows:

"I would appreciate your opinion of the law on the following statement of facts:

"In April 1937, one of our local School Districts held its Annual Meeting and conducted its regular business. There was a total vote of 75 votes cast at the meeting.

"At the meeting, it was decided that the School House could be used for meetings of various kinds, including the meeting of the Parent Teachers Association of the District.

"In November of this year, a special election and meeting was called by the Board for the purpose of voting on the question of the use of the School House for meetings of the Parent Teachers Association.

"The Board claims to have called the meeting in compliance with a petition handed them under the authority of Section 9228, R. S. Mo. 1929. The Petition was signed by 40 persons.

"Complaining Parents maintain and undoubtedly correctly so, that there is 102 qualified voters in the School District.

"QUERY: Can the Board call a meeting without a petition being presented to them signed by a majority of the qualified voters of the District?

"Can the Board take the total number of votes cast at the last School election as the number of qualified voters in the District or must the Board ascertain the exact number of qualified voters in the District by a census to determine what constitutes a majority.

"If the meeting in November prohibiting the use of the School House to the Parent Teachers Association is not legal, because of failure to have a petition signed by a majority of the qualified voters. What is the proper steps for them to take to obtain the use of the School House for their meetings? "

In answer to the first paragraph of your query will say that school boards are created by the Legislature and their powers are limited by statute. Consolidated School Dist. No. 6 v. Shawhan, 273 S. W. 182, 184:

"Under our state law the government of a school district, as well as the handling of the finances thereof, is vested in a board of directors duly elected

by vote. Their powers and duties are prescribed by statute."

Section 9228, Revised Statutes Missouri 1929, authorizes a school board to call a special meeting when a petition is signed by a majority of the qualified voters of the District and is presented to them. This is the only authority the school board has to call a special meeting and if the petition is not signed by a majority of the legal voters of the district the Board does not acquire jurisdiction to call the meeting, and the election is null and void. School District, etc., v. Pace, et al. 113 Mo. App. 134, 140:

"There can be no election where there is no warrant for holding it. The authority to issue the warrant for the election (notices posted in the district) is conferred on the clerk of the district. They are not to be issued at his discretion or on his whim; but only on the presentation of a proper petition, signed by at least ten legally qualified voters of a district to be affected and containing a certain definite proposition to be submitted to the voters of the district to be voted upon by them."

CONCLUSION

It is, therefore, the opinion of this Department that the school board cannot call a special meeting of the electors of the district without a petition being presented to them which is signed by a

majority of the qualified voters of the district.

The second paragraph of your query goes to the question of how shall the board determine whether or not the petition for the special election is signed by a majority of the qualified voters of the district.

Section 9228, Revised Statutes Missouri 1929, does not provide how the board of directors shall determine as to whether the petitions are signed by the required number of qualified voters, and we find no Missouri case just in point upon this question. We find somewhat of a similar situation in the case of State ex rel. v. Carter, 257 Mo. 52, 85, where the Court was discussing how the city council would get the information as to how many voters were in the district at the time of presenting a petition for a local option election. In discussing Section 7239, Revised Statutes Missouri 1909, which pertained to local option elections, the Court, in the Carter case, supra, at l. c. 85, said:

"The latter section does not prescribe from what source the city council shall obtain official information as to the number of qualified voters in such city and therefore as to the requisite number of petitioners required to sign the petition for an election. In the absence of a statutory prescription as to the source of this information, it would seem either that they guess at it (city council) and thus act at

their peril, in guessing a sufficient number when the matter is tested in the courts, or that they use in their discretion the best and latest official data obtainable. * * * * *

The record shows that they used the very last official vote obtainable by them, * * * * *

In the Absence of a statute in this behalf all that can be required of the city council is that in determining the number of votes as a basis of computation of the requisite number of petitioners they should use the latest official sources of information * * * * *."

The board of directors of the school districts have no authority to take a census to determine how many qualified voters there are in the district, and the statute has made no provision for the board to obtain this information. It would seem that the school board, in its discretion, may use the number of votes cast at the last school district election prior to the time of the presenting of the petition as a basis for its determination of whether or not fifty per cent of the voters have signed the petition.

CONCLUSION

In the absence of a showing by a proper proceeding that the board erred in its determination that the petition had sufficient signers or that the board had no jurisdiction to call a special election, it is

Mr. Edw. T. Eversole

-6-

December 15, 1937

the opinion of this Department that the special election referred to in your letter, which was called by the board upon a petition presented to them containing the signatures of fifty per cent of the legal voters who voted at the last election prior to the presentation of such petition, is a valid election.

The third paragraph of your query assumes that the election was invalid. In as much as the answer to the second paragraph of your inquiry holds that the election was valid the necessity of going into the third paragraph is obviated and this office does not deem it necessary to pass upon that subject.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED

J. E. TAYLOR
(Acting) Attorney General

TWB LC

FEES: Receipts derived from an insurance policy by State Teachers College may be used to restore or build a building, and it is not necessary that the same be deposited with the State Treasurer.

April 9, 1937

4-12

Honorable Eugene Fair
President
Northeast Missouri State Teachers College
Kirksville, Missouri



Dear Sir:

This Department is in receipt of your letter of March 30, 1937, wherein you make the following inquiry and request an opinion thereon:

"I was in Jefferson City a few days ago and conversed with your Mr. Nolen.

"We had a small building on our campus which recently burned. It was adjudged a total loss on the part of the insurance adjuster and we have collected nearly all of the money from the insurance companies.

"Some of us here would like very much to restore the building as soon as possible. Are we within our rights, should we go ahead and expend the insurance money on the restoration without depositing it in the state treasurer's office?

"I will appreciate an answer from you or Mr. Nolen at your earliest convenience."

A number of years ago it appears that this same situation arose at the Northeast Missouri State Teachers College with reference to insurance collected as the result of a building having burned. At that time the

question arose as to whether or not the money derived from the insurance policies should be deposited in the State Treasury, or by retained by the college for the purpose of erecting another building. The decision is found in the case of State ex rel. Thompson v. Board of Regents, 305 Mo. 57.

Since the decision in the Thompson case the Legislature, Laws of Missouri, page 415, 1933 session, enacted the following section:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision hereof, shall be

deemed guilty of a misdemeanor; provided, that in the case of state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; appropriations, gifts or grants from the Federal Government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the Governor and biennially to the General Assembly."

In deciding the question as to whether or not money derived from the insurance policy in the former fire at the Northeast Missouri Teachers College should be paid into the treasury, the court, in the Thompson decision, at l. c. 66, 67, said:

"Among other expenditures which have been made by the board in the exercise of its discretion is that for insurance upon the buildings and equipment of the college. Lacking express statutory authority for its action the beneficiary named in the policies thus obtained, was the board. When the loss occurred the amounts due under the contract was paid, as it should have been, to the board. In furtherance of its discretion it proceeded at once to expend a portion of the money thus received in repairs necessary for the protection of certain damaged buildings and to partially replace the library. When this writ was served the board was taking steps to replace the destroyed buildings. It is charged with no wrong doing or the usurpation of any power which has not at least received

tacit legislative and public approval for a half century. These facts are entitled to more than persuasive consideration in determining the question here seeking solution. Absent qualifying incidents they may arise to the dignity of ruling decisions. (State ex rel. v. Gordon, 266 Mo. 412; Folk v. St. Louis, 250 Mo. 141.) The sum of its offending is, that having made a valid contract in the State's interest and for its protection and the fruits of same having been received, that it shall pay this money into the State Treasury instead of using it to partially restore the buildings destroyed, and await legislative action authorizing its use for that purpose. Such a course disregarding the implication which the application for this writ involves as to the integrity and business judgment of the board after its years of experience, is fraught with injury to the college in interfering with its operation and thus lessening its opportunities for the advancement of higher education. The result of the granting of this writ will be to take money out of one of the State's hands and put it in another, which other must remain tightly closed until opened by a legislative sesame. Such a procedure can serve no beneficial purpose and savors of folly. Mandamus was never intended to subserve such an end as is here sought to be accomplished. A drastic writ at best, it is properly invoked to remedy 'rights that lack assistance or wrongs that need resistance.' It was never intended to be invoked simply to demonstrate the existence of the

April 9, 1937

State's power, which, when thus exercised, cannot be denominated as other than tyranny."

Referring to the section of the law enacted by the Legislature and by analyzing the wording therein, the effect of the expression,

"All fees, funds and moneys from whatsoever source received by any department, etc.,"

it would appear that the section is broad enough to include the receipts of an insurance policy received by the college, but, we think, the words

"fees, funds and moneys from whatsoever source received,"

are restricted by the expression

"by virtue of any law or rule or regulation made in accordance with any law," .

It appears that the receipts from the insurance policy are not the result of any law or rule or regulation.

We are, therefore, of the opinion that the decision in the Thompson case is still controlling and it is not necessary for the funds derived from the insurance policy to be deposited in the State Treasurer's office.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

SHERIFF:) May file complaints on Sunday.
) May not hold a prisoner more than twenty hours
OFFICERS:) without complaint being filed and warrant issued.

December 4, 1937.

12-8



Honorable Chas. Farrell
Sheriff
Oregon County
Alton, Missouri

Dear Sir:

This is to acknowledge your letter of November 26th in which you request the opinion of this Department on what procedure you should take under the facts as set forth in your letter.

You wish to know what action you should take where arrests are made at night or on Saturday nights for offenses committed in the presence of the officer where no warrant is required, and whether the prisoner may be held until the following Monday morning without complaint being filed.

We presume that you have reference to disturbances of the peace, affrays and offenses of like character committed in the presence of the officers and those cases where the officers have a right to make arrests for those offenses. If an officer makes such arrests without a warrant he should take the prisoner before a proper magistrate to be dealt with according to law. The proper procedure in the cases in which you describe is for the officer to as soon as practicable take the prisoner before a magistrate so that he may be permitted to give bail if desired. The officer or some interested person should file a complaint before a magistrate within a reasonable time.

Under Section 3952, R. S. Mo. 1929, "All persons arrested and confined in jail, calaboose or other place of confinement by any peace officer, without warrant or other process, or any alleged breach of the peace or other criminal offense, or on suspicion thereof, shall be discharged from

Dec. 4, 1937.

said custody within twenty hours from the time of such arrest, unless they shall be charged with a criminal offense by the oath of some credible person, and be held by warrant to answer to such offense;" This statute was enacted for the purpose of protecting the individual citizen in his rights so that one arrested and placed in jail could not be held for an unreasonable time without some person coming forward and upon oath charging the incarcerated person with the violation of a criminal statute, and the Legislature has said by the above statute that a person cannot be held in custody longer than twenty hours from the time of his arrest without being charged with a criminal offense upon the oath of some credible person.

The above section of the statute was cited in the case of State v. Miller, 289 S. W., 1. c. 903, 316 Mo. 372.

Section 1863, R. S. Mo. 1929, provides that a magistrate may exercise his jurisdiction "when it shall be necessary in criminal cases to preserve the peace or arrest the offender." on Sunday.

Section 755, R. S. Mo. 1929, provides:

"No person, on Sunday or any other day declared and established as public holiday by any statute of this State, shall serve or execute any writ, process, warrant, order or judgment, except in criminal cases, or for a breach of the peace, etc."

It is, therefore, our opinion, under the above circumstances, for the officer or some other competent person to file a complaint against the person arrested, within the statutory period so that the person arrested will not be held beyond the statutory twenty-hour period, and there is nothing in the statute to prevent this action being taken on Sunday.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

APPROPRIATION:

CANCER COMMISSION: Term "operation," as used in the appropriation act, authorizes expenditures of preliminary expenses.

September 2, 1937.

Dr. Ellis Fischel,
Chairman, State Cancer Commission,
Metropolitan Bldg.,
St. Louis, Missouri.

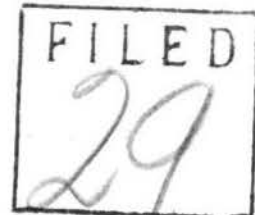
Dear Dr. Fischel:

We wish to acknowledge your request for an opinion wherein you inquire whether, under the act creating the State Cancer Hospital and the appropriation made for its maintenance, funds may be expended for such preliminary expense as clerical help, postage, etc., and if they may be expended, out of what part of the appropriation act are they to be paid.

The 59th General Assembly created a State Cancer Commission to establish a State Cancer Hospital. Sections 1 and 2 of the Act, to be found in the Laws of Missouri, 1937, page 496, provide as follows:

"Section 1. APPOINTMENT OF COMMISSION AND ADMINISTRATOR, BY WHOM. - The Governor of the State of Missouri is empowered to appoint with the advice and consent of the State Senate a Cancer Commission for the State of Missouri, consisting of four (4) qualified voters of the State. The Cancer Commission shall appoint by and with the consent and advice of the Governor an Administrator to have charge of the operation and conduct of said Cancer Hospital.

"Section 2. COMMISSION EMPOWERED TO ESTABLISH HOSPITAL. - The Cancer Commission of the State of Missouri is hereby empowered and directed to establish a hospital to be known as the State Cancer Hospital".



Section 15 of said Act, Page 500, provides that the General Assembly shall appropriate such sums necessary to establish and maintain the hospital, thus:

"SECTION 15. GENERAL ASSEMBLY SHALL APPROPRIATE SUMS NECESSARY TO ESTABLISH AND MAINTAIN HOSPITAL. - The General Assembly shall appropriate out of the State Treasury such sums of money as is deemed necessary to establish and maintain an Institution to be known as the Missouri State Cancer Hospital".

The General Assembly made the following appropriation for the establishment and maintenance of the hospital (Laws Missouri, 1937, Sec. 145-J, Page 166):

"Section 145-J. CANCER HOSPITAL. - There is hereby appropriated out of the State Treasury, chargeable to the general revenue fund, the sum of Six Hundred Thousand Dollars (\$600,000.00) for the building, equipment, and operation for one year of the Cancer Hospital for the State of Missouri in compliance with the provisions of committee substitute for Senate Bill No. 3, as follows:

For construction of Cancer Hospital,	\$400,000.00
For equipment of Cancer Hospital,	100,000.00
For operation of Cancer Hospital for one year,	100,000.00
Total,.....	\$600,000.00".

One of the meanings of the word "operation", according to the Century Dictionary, is:

"The course of action or series of acts by which some result is accomplished".

By the Standard Dictionary "operation" is defined as:

"A course or series of acts to effect a certain purpose".

Dr. Ellis Fischel,

-3-

9/2/37.

The series of acts by which the Cancer Hospital may be established and maintained entails the expenditure of such preliminary expenses as postage, clerical help, etc.

We are, therefore, of the opinion that funds may be expended by the State Cancer Commission for such preliminary expenses as clerical help, postage, etc., and that such expenses are to be paid out of that part of the appropriation act designated "operation".

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

MW/LD

DEPOSITORIES:) Banks may pledge their assets to secure public
BANKS & BANKING:) funds where authorized by statute.
Depositories of county, cities of 3d Class,
township, school districts & levee and drainage
district discussed.

January 30, 1937.

2-3



Honorable Elbert L. Ford
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date in which you enclose a letter received from Mr. J. C. Welman, Cashier, Bank of Kennett, Kennett, Missouri, in which he requests you to secure the opinion of this Department on the questions submitted in his letter. We set forth in full his letter:

"As you are aware, we have been executing personal bonds signed by some of our directors for the past several years for the purpose of securing funds of the County, Township, City, various School Districts and various Levee and Drainage Districts.

"We are desirous of discontinuing this practice and pledging securities belonging to the bank in lieu thereof. The question has been raised as to the legal authority of the County, Township, City, School District and Levee and Drainage Districts to handle in this manner. We are quite sure, however, that the statutes provide for the pledge of such securities to secure County funds but are uncertain on the other funds. We do not know, however, whether it is necessary to pledge securities in any margin above the amount of the deposit we are attempting to secure. We further understand that by reason of a recent statute the amount of F. D. I. C. insurance, namely \$5000.00, can be deducted from the amount of funds which must be secured.

"We would like to know whether a definite opinion could be obtained by you from the Attorney General as to the legality of the various municipalities above mentioned accepting the security in the manner described above, whether any margin above the amount to be secured would be required, and what type of securities would be eligible for us to pledge. We have in mind using obligations of U. S. Government, direct and/or fully guaranteed, State of Missouri direct obligations, direct obligations of Dunklin County, Missouri, and possibly direct obligations of the City of St. Louis, Missouri.

"Inasmuch as it is necessary to make a decision in this connection in the very near future, we will appreciate very much any assistance you may be able to give us in obtaining an authoritative ruling which could be relied upon by the municipalities affected."

As we interpret the letter, you desire to have our opinion as to the legal authority of the county, township, city, school district, and levee and drainage district, respectively, to accept pledges of banks' assets and securities to secure them against loss of the public funds deposited in the respective banks.

Various statutes have been enacted in Missouri authorizing the pledging of assets to secure public funds deposited in selected depositories.

Section 11469, R. S. Mo. 1929, as amended by Laws of Missouri, 1931, page 378, authorizes the pledging of certain bonds and other securities of banks to secure state funds deposited by the state treasurer. This statute was enacted by the General Assembly in 1879, pertaining to the safeguarding of the public funds to carry out the provisions of Section 15, Article X, of the Constitution of Missouri of 1875.

I.

Under the provisions of Section 12187, R. S. Mo. 1929, as amended by Laws of Missouri, 1935, page 316, it is provided that,

"* * * the (county) court may accept in lieu of real estate as security, bonds of such county, or of the State of Missouri, or of the United States, or bonds fully guaranteed by the United States, which such bonds shall be deposited as the court may direct, with a Trustee, Trust Company or other fiduciary designated or approved by it; * * *"

In the case of Huntsville Trust Co. v. Noel, 12 S. W. (2d) 751, 754, the Supreme Court recognized the right of a trust company to pledge its government bonds to secure the county in lieu of real estate as security (personal bond) in the following language:

"It is in lieu of that security that the statute authorizes the taking of bonds of the United States. It would follow, therefore, that the proviso authorizes the court to take government bonds in lieu of the security afforded by a bond signed by sureties who own real estate."

II.

Under the county depository law, Article 8, Chapter 85, Section 12184, R. S. Mo. 1929, it is provided as follows:

"* * * Provided, that in counties operating under the township organization law of this state, township boards shall exercise the same powers and privileges with reference to township funds as are herein conferred upon county courts with reference to county funds at the same time and manner, except that township funds shall not be divided, but let as an entirety: * * *"

Since township depositories are governed by the same laws in essential respects as county depositories, banks are authorized to pledge the same securities as in county depositories and township boards may accept the same securities as county courts may and in the same manner.

III.

Sections 6793 and 6794, R. S. Mo. 1929, cities of the Third Class (Kennett, we understand, is of that class) provide for the selection of a depository of the funds of the city in said section more particularly described and that the designated bank to execute a bond payable to the city, to be approved by the mayor and filed with the city clerk, with not less than three solvent sureties, who shall own unencumbered real estate in the state of as great value as the amount of said bond--the penalty of said bond to be at least double the revenues of the city for any one year and conditioned for the faithful performance of all the duties and obligations devolving by law or ordinance upon said depository, etc.

These sections providing for the selection of depositories for cities of the third class, do not provide for pledging of assets.

IV.

With reference to the selection of depositories of school moneys, Section 9362, R. S. Mo. 1929, provides in part as follows:

"The board of education of city, town and consolidated school districts in this state shall select depositories for the funds of such school district in the same manner as is provided by law for the selection of county depositories; * * *"

The above section provides the statutory method of selecting the depositories of school funds as stated in School District of Cameron v. Cameron Trust Company et al., 51 S. W. (2d) 1025, 1. c. 1026:

"Article 9 of chapter 85, R. S. 1929 (Mo. St. Ann. c. 85, art. 9, Secs. 12184-12198), which governs the selection of depositories of school funds by virtue of section 9362, R. S. 1929 (Mo. St. Ann. Sec. 9362), requires school boards to select a depository every two years. The provisions of the statute are mandatory and must be complied with in all respects."

The Springfield Court of Appeals in the case of French v. School Dist. No. 20, 7 S. W. (2d) 415, 1. c. 416, said the following:

"Section 9582, R. S. 1919, provides how a county depository shall be selected. Section 11268, R. S. 1919, provides that the board of education of a city, town, or consolidated school shall select depositories in the same manner county depositories are selected. Section 9585, R. S. 1919, provides how county funds are to be secured by the county depository, and included in the security permitted are bonds of the United States or bonds of the state of Missouri. But there is no statute defining what security shall be given by the depository of a city, town, or consolidated school district. Section 13379, R. S. 1919, specifically authorizes a bank which has been selected as a depository for state funds to pledge its real estate notes to secure such funds."

And the same court, in the case of Consolidated School Dist. No. 4 v. Citizens' Savings Bank of Cabool, 21 S. W. (2d) 781, 1. c. 787, said:

"Section 11268, Rev. St. Mo. 1919, provides that depositories for school funds shall be selected in the same manner as provided by law for the selection of county depositories; section 9582, Rev. St. Mo. 1919, provides how county depositories shall be selected; and section 9585, Rev. St. Mo. 1919, provides for the giving of security. There is no section of the statute defining what security shall be given to a school district."

These cases would indicate that banks are not specifically authorized to pledge their assets to secure public funds belonging to school districts the same as depositories are for county funds, going on the theory that Section 9362, supra, provides only for the selection of depositories and not as to the security given.

V.

Section 10767, R. S. Mo. 1929, provides that the treasurer of drainage districts organized by circuit courts shall keep all funds received by him from any source whatever deposited at all times in some bank, banks or trust company to be designated by the board of supervisors.

We do not find that a depository is required under this section or that assets of the depository are required to be put up as security for said funds. However, we refer you to the case of Cantley, State Commissioner of Finance, v. Little River Drainage District, 2 S. W. (2d) 607, in which the court discussed this question extensively and held that a bank which deposited with the drainage district its bills receivable as collateral to secure a loan made to the bank by the drainage district, that it could not be recovered from the district and that the bank could not plead ultra vires in view of the fact that they had received the benefit of the loan.

From the above and foregoing it is our opinion that in the statutes where it specifically authorizes the bank to pledge certain designated securities or bonds owned by the bank to secure the state and municipalities and political sub-divisions against loss, such as the state, the county and the township, that the banks are so authorized and have full authority so to do. In other words, the selected depository is authorized to secure the public funds in the manner prescribed by the statute, and in those political sub-divisions where only a personal bond or other kind of bond is required that they are not so authorized to pledge assets. Where the statutes particularly outline a plan for the safeguarding of public funds, political sub-divisions should follow the statutory method, and if they follow some other plan than the statutory method they are proceeding at their own peril.

It is our further opinion that the amount of security required to be given by a bank to secure public funds is reduced \$5000.00 under the provisions of Laws of Missouri, 1935, page 372, if such bank is insured with the Federal Deposit Insurance Corporation.

Hon. Elbert L. Ford

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Jan. 30, 1937.

The questions asked by you are broad, and a different state of facts on a concrete case presented to us might alter our opinion.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

CRH:EG

County court cannot, by order, voluntarily apply salaries and fees due county officials to the payment of delinquent taxes, on personal or real estate, which they may owe.

August 27, 1937.



Hon. Elbert L. Ford,
Prosecuting Attorney,
Dunklin County, Mo.,
Kennett, Missouri.

Dear Sir:

This office is in receipt of your request for an opinion which is as follows:

"The County Court has asked me to write to you for an opinion in regards to certain County officials who owe delinquent personal and real estate taxes. They are desirous of knowing whether the County can refuse payment of salary or fees due such officials and apply the same against the amounts owing on said delinquent taxes.

"I have endeavored to find some statute to cover this situation but have been unable to do so. I find the statute prohibits the payment of jury and witness fees when they owe taxes, fines, bond forfeiture, etc., to the State and County.

"Please get me this opinion at your earliest convenience."

The Supreme Court in the case of Corondolet v. Picot, 38 Mo. l. c. 130, with reference to the question of delinquent tax says:

"The levying of taxes is a matter solely of statutory creation, and no means can be resorted to, to coerce their payment other than those pointed out in the statute."

Also the same rule is stated in State ex. rel v. Snyder, 139 Mo. l. c. 556.

August 25, 1937.

The salary of a public officer is a right created by law:

"The right of a public officer to the salary of his office, is a right created by law, is incident to the office, and not the creature of contract nor dependent upon the fact or value of the services actually rendered". State ex. rel v. Walbridge, 153 Mo. l. c. 203, State ex. rel v. Brown, 146 Mo. 401, Gammon v. Lafayette Co. v. 76 Mo. 675.

We find no constitutional act nor statute giving the county court the right to voluntarily apply salaries and fees of county officials to the payment of personal and real delinquent taxes which they might owe.

CONCLUSION

It is, therefore, the opinion of this Department that in the absence of a constitutional act or statute, giving the county court the right, by order, to voluntarily apply the salaries and fees, of county officials, to the payment of delinquent taxes, personal or real estate, which they may owe, such court has no right to so apply said salaries and fees.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

SVM:LB

CHIROPRACTIC: Qualifications for license.

October 7, 1937. 10/9



Dr. Jerome F. Fontana, Secretary
State Board of Chiropractic Examiners
2605 Chippewa Street
St. Louis, Missouri

Dear Sir:

We acknowledge your request for an opinion dated September 14, 1937, which reads as follows:

"About two years ago the 'COLLEGE OF CHIROPRACTIC' (International Chiropractic Research Foundation) was founded here in St. Louis and began teaching Chiropractic under the above name until this year when it was incorporated under a pro forma decree of the Circuit Court of St. Louis and filed with the Secretary of State on January 16, 1937 as the 'LOGAN CHIROPRACTIC COLLEGE INC.' and continued under this name until September of this year when the College was dissolved, leaving the students to complete their Chiropractic Education elsewhere.

"Of the students who attend the above mentioned College approximately twenty (20) now wish to enroll in the Missouri Chiropractic College here in St. Louis to complete their course. Due to the fact that the Logan College was not recognized by this Board we request your opinion as to whether or not these students can receive credit for the period of time they attended the Logan College and if the Missouri Board can accept them for examination after completing their course at the Missouri Chiropractic College.

Section 13549 R. S. Mo. 1929, provides:

"No person shall engage in the practice of chiropractic without having first secured from the board of chiropractic examiners a license as provided in this chapter. Any person desiring to procure a license authorizing him or her to practice chiropractic in this state shall make application therefor to the board on a form prescribed thereby, giving his or her name, sex, age, which shall not be less than 21 years, name of school or college of which he or she is a graduate, and shall furnish the board satisfactory evidence of preliminary education as required in this chapter, and of good moral character, and that he or she is a graduate of a chiropractic school or college teaching chiropractic in accordance with the requirements of this chapter, which shall be determined by the board, together with such other information as the board may require, and which application shall be sworn to before some officer authorized to administer oaths. Any applicant who applies for examination to procure a license to practice chiropractic, and who has matriculated in a chiropractic school or college after the passage of this chapter, furnish satisfactory evidence of their preliminary educational qualifications, to-wit: a certificate of graduation from an accredited high school or its equivalent. Their chiropractic course shall cover a period of not less than three years of nine months each, and requiring actual attendance of not less than 2045 hours and which shall

be construed as the maximum requirements for qualifications to practice chiropractic under this chapter. There shall be paid to said board, by each applicant, a fee of \$25.00, \$15.00 of which shall accompany the application, and the balance of \$10.00 shall be paid upon the issuance of a license. Any person failing to pass such examination may be re-examined within one year from the time of such failure without additional fee. The board shall subject all applicants to an examination in the following subjects: anatomy, physiology, symptomatology, hygiene and sanitation, chiropractic orthopedy, pathology, principles of chiropractic, chiropractic analysis, and practical application of their knowledge and skill in chiropractic adjusting and nerve tracing. The board shall issue to such applicant, who shall correctly answer 75 per cent. of all questions propounded in such examination, and who shall not fall below 60 per cent. in any one subject, a license to practice chiropractic. Provided, that persons who have been engaged in the practice of chiropractic for a period of two years continuously prior to the passage of this chapter may be granted a license by the board upon the payment of the required fee, and upon satisfying the board that he or she is a person of good moral character, and upon meeting such other requirements as the board may prescribe: Provided further, that any such person, who has practiced chiropractic for such period of two years shall apply for such license within thirty days after organization of the

first board of chiropractic examiners: Provided further, that the board shall not recognize any correspondence work in any chiropractic school or college as credit for meeting the requirements of this chapter: Provided further, that students who are matriculated in a properly recognized chiropractic school or college on October 1, 1926, and who have had two years high school or its equivalent at that time, shall be admitted to examination upon qualifying with three years of six months each actual attendance in such school or college: Provided further, that the board may issue a license without examination to persons who have been regularly licensed to practice chiropractic in any other state, territory, or the District of Columbia, wherein the regulations for securing such license are equivalent to those required in the state of Missouri, provided such applicant shall furnish satisfactory evidence that he or she has continuously practiced chiropractic in such state, territory, or the District of Columbia, at least one year after the securing of such license, and that he or she is of good moral character, and upon the payment of the required fee to the treasurer of the board. All licenses shall be in effect until September 1st of the even-numbered years succeeding the date of issue."

As to the statutory construction of legislative acts, the Legislature has provided in Section 655, R. S. Mo. the following:

"The construction of all statutes of this state shall be by the following additional rules, unless

such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import; * * * *."

Your request states that the Missouri Chiropractic college at this time has the approval of the Board as being a reputable college teaching chiropractic in accordance with Missouri statutes.

CONCLUSION.

The words and phrases used in Section 13549, supra, should be given their ordinary and usual meaning. In said section the Legislature laid down the process in which a person can legally obtain a license and become a practicing chiropractic.

Applicants for the chiropractic license, before taking the examination, must furnish the Board the name of the school or college of which he or she is a graduate, and that he or she is a graduate of a chiropractic school or college teaching chiropractic in accordance with the requirements of the Missouri Code.

The accrediting of any school or college, teaching chiropractic, is left entirely to the determination of the Board, and once the Board accredits a college in its minutes, it remains accredited until the Board rescinds its prior order.

In addition to prescribed preliminary educational qualifications, to wit: a certificate of graduation from an accredited high school, or its equivalent, any applicant for a license must show that he or she has completed a chiropractic course of study of not less than three years of nine months each, and must have been in actual class attendance not less than 2045 hours, this being the maximum requirements for qualifications to practice chiropractic in Missouri.

Dr. J. F. Fontana

-6-

October 7, 1937.

This department is of the opinion that the only plausible construction of Section 13549, supra, is as follows: Since the Missouri chiropractic college is admittedly an accredited college of chiropractic in Missouri, the former students of the Logan Chiropractic College who matriculate complete their course of study in the accredited school to the end that in all they attend three years of nine months each, and attend classes for at least 2045 hours of study of chiropractic and receive a diploma from the accredited school, and at the same time have the necessary preliminary educational qualifications, the said applicants are legally qualified to take the examination for a chiropractic license in Missouri.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

WOS:H

OFFICERS: COMPENSATION: Express provision for allowance of
pay for words and figures does not permit
the counting of punctuation marks and
ditto marks.

June 3, 1937

OPINION No. 31



Hon. W. E. Freeland,
Jefferson City, Missouri.

Dear Senator:

We wish to acknowledge your letter of May 14th wherein
you state as follows:

"The following is a copy of the letter
referred to in our conversation:

"Thank you very much for copy of the
opinion relative to the counting of words
and figures in cases where the same is
provided for pay for official services.

"I evidently did not make my intention
clear in my first letter. There is another
opinion that I had in mind when I wrote
you, which has to do with the method of
counting. Your opinion, which you sent me,
refers to the fact that certain statutes
had no provision for the count of figures.
The opinion which you sent me relates to
these statutes which have no such pro-
visions.

"What I would like to have is the opinion
which deals with the method of counting
figures, punctuation marks and ditto marks
where the statute has express provision
allowing pay for words and figures. It is
possible that this opinion may have been
delivered before you became Attorney-
General, but I believe, if my memory of the
press report is correct, this also was
written by you. The news report said that

June 3, 1937.

the ruling was that each figure and each punctuation mark should count as a word, which seems to be the correct interpretation, since the Arabic symbol really is an abbreviation for a word, and the same is also true of each punctuation mark. If not too much trouble, would appreciate it if you could give me a copy of this opinion."

The precise question is "the method of counting figures, punctuation marks and ditto marks where the statute has express provision allowing pay for words and figures."

We have searched our records and fail to find an opinion upon the specific question raised.

In an opinion rendered by this department under date of October 21, 1933, to Mr. Homer Rinehart, Prosecuting Attorney, a copy of which is enclosed, the question was raised whether a County Clerk could charge for ditto marks used in making up the tax books at the rate prescribed in the statute of "10¢ per 100 words and figures" (Section 9877, Laws of Missouri, 1933, page 422.).

Section 9978, R. S. Mo. 1929, provides that the use of ditto marks is to be given the same effect as though the matter was written out in full, and since the statute prescribing the above rate of pay was part of the same article and chapter, it was held that ditto marks could be charged for at the statutory rate.

However, where a statute provides pay for words and figures and has no relation to the above statute providing that the use of ditto marks be given the same effect as though the matter was written out, a different conclusion is reached.

25 C. J. 1122, defines the word "figure" as

"The numerical character by which a number is expressed or written. The term has been held not to include punctuation marks."

In the case of *In re Murtaugh*, 71 Misc. 513, 128 N. Y. Supp. 850, l. c. 851, the Court in defining the term "figure" in determining the compensation of a stenographer, said:

"The word 'figure' does not include punctuation marks, and is not so intended in this section. If that had been the intention of the Legislature, it would have used the words 'each figure and character.' Bouvier's Law Dictionary defines the word 'figures' as 'numerals,' and numerals are letters or characters representing number. In 'Words and Phrases,' the title 'Figures' contains no reference to punctuation marks, which are treated under another title. Punctuation, in writing and printing, is a pointing off or separation of one part from another by arbitrary marks; a division of a composition into sentences. So says the Century Dictionary."

In the case of *Walsh v. Jackson*, 81 Pac. 258, 33 Colo. 454, l. c. 457, the Court in construing a statute providing that the stenographer transcribing the shorthand notes of the testimony should be allowed not exceeding 20 cents per folio of 100 words, said:

"It is so clear that the compensation of the stenographer is to be determined by the number of words transcribed, and not by the number of punctuation marks * * *, that it is not necessary to enter upon a dissertation on the subject."

From the foregoing, we are of the opinion that where the statute has an express provision allowing pay for words and figures, the same does not permit the counting of

Hon. W. E. Freeland

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June 3, 1937.

punctuation marks and ditto marks, but would, of course, include the counting of figures because expressly included.

Yours very truly,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

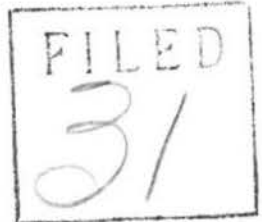
MW:HR

GAMBLING: Section 4287 R. S. Mo. 1929 and other gambling laws apply to private clubs.

PRIVATE
CLUBS : Applicable to criminal law.

December 29, 1937

12-31



Mr. J. Overton Fry
City Attorney
Mercantile Bank Building
Louisiana, Missouri

Dear Sir:

We have your request of December 23, 1937, for an opinion, as follows:

"In Re: Application of Sec. 4287 of
Rev. Stat. 1929.

I am writing your office relative to the application of the above statute in a situation where slot machines and similar devices are operated in a private club.

Would you kindly advise me whether or not it is the opinion of your office that the operation of these devices are unlawful, where such a club is composed of private members paying dues. Such a club is not open to the public, but members are selected. The operation of these machines is for the purpose of enhancing the treasury of the organization, and are only played by club members."

Section 4287 R. S. Missouri 1929, makes it a felony for every person found guilty of keeping gaming devices, including slot machines. To begin with, I assume that your "private club" is a corporation. Does this "the cloak of a soulless person", exempt the corporation, its officers, or members from the operation of the criminal law? An officer of the corporation is liable criminally

for any criminal act of the corporation of which he has knowledge of its commission prior to the commission thereof. 14a C.J. 244; State vs. Viviano, 206 S.W. 235, 1. c. 236. The proper method to get service on the corporation charged with the violation of some criminal act is to serve a copy of the information or indictment on the proper officer of the corporation. 14a C.J. 878; State vs. White, 96 Mo. App. 34, 7 R.C.L. 771, 778.

Officers of a private club which assist in the sale of intoxicating liquors in violation of state law are liable to prosecution. State vs. Zehnder, 168 S.W. 661, 182 Mo. App. 161.

The charter of every corporation in this state is a contract with the State to the effect that the corporation will not engage in any act which is either unlawful or immoral. State ex rel. vs. Jackey Club, 200 Mo. 51; State ex inf. vs. Standard Oil Company, 218 Mo. 350. There are many cases which have condemned the attempt of private clubs to circumvent the application of the criminal law to its members, and the criminal law has been applied to the acts committed in private clubs in violation of public law. Some of these cases are: County vs. Commercial Club, 20 Idaho 421; Conococheaque Club vs. Maryland, 116 Maryland 317; Beauvoir Club vs. State, 148 Ala. 643; Army and Navy Club vs. District of Columbia, 8 D.C. App. 544; Ky. Club vs. Louisville, 92 Ky. 309; State vs. Boston Club, 45 L.R.A. 485; United States vs. Alexis Club, 98 Fed. 725.

In most of the above cases private social clubs attempted to engage in the sale of intoxicating liquor in violation of law, and based their defense upon the feeble link that such sales were limited to members. Neither the corporation itself, nor its members, obtain any advantage of the criminal law by the process of organizing and joining. Membership in the club does not clothe the individual with any authority to commit murder, rape or arson, and it certainly does not extend to him any right to operate a slot machine in violation of the felony statute. Slot machines are gambling devices per se; they were adapted, devised and designed for the exclusive purpose of gambling and could not be used for any other purpose.

CONCLUSION

It is therefore the opinion of this office that Section 4287 R. S. Missouri 1929 is applicable to any person or corporation, and membership in a private club does not carry with it any license to violate the criminal law. The above statute prohibiting the operation of slot machines applies to slot machines whenever and wherever found.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

BOARD OF PHARMACY: Board of Pharmacy may make rules and regulations not inconsistent with the provisions of the law, so as to determine one's qualifications for a license as a pharmacist or assistant pharmacist.

4-19
April 16, 1937.



Mr. Newt Gardner, Secretary,
Missouri Board of Pharmacy,
1700 West 39th Street.,
Kansas City, Missouri.

Dear Mr. Gardner:

This will acknowledge receipt of your request for an opinion, which reads as follows:

"The Board of Pharmacy would like to have your opinion of the prerequisite ruling in regard to the qualifications to become a registered pharmacist in the State of Missouri.

"The former Attorney-General rendered an opinion that the Board of Pharmacy had the right to make rules and regulations inconsistent of law to keep the standard of Missouri on a par with those of other states.

"We have enforced our present ruling so that the pharmacists of Missouri will be on equal basis and believe this to be right. We would greatly appreciate your opinion as to whether or not we have this privilege."

Appended to your request for an opinion are the following proposed requirements of the Missouri Board of Pharmacy, which we have numbered from 1 to 8, inclusive, for the purpose of reference. They read as follows:

"QUALIFICATIONS FOR ASSISTANT PHARMACIST.

1. Applicant for examination as Assistant Pharmacist shall have had two years' practical experience in a retail drug store under the supervision of a Registered Pharmacist. Shall be not less than eighteen years of age, and in addition shall have attended High School for four years, or its equivalent. (THE HIGH SCHOOL REQUIREMENTS MUST BE OBSERVED.) If applicant has not had the advantage of

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attending High School for four years, he shall take an examination given by the Superintendent of Schools of his county or someone whom he may designate, and file this statement with the application for examination. All applications shall be in the hands of the Secretary, together with fee of \$5.00 at least fifteen days previous to date of examination.

2. After the examination given by the Board of Pharmacy in June, 1934, candidates for assistant pharmacist examination will be required to show that they have satisfactorily completed one year of attendance at an accredited college of pharmacy.

3. After June, 1935, two years of attendance will be required; after June, 1936, three years of attendance will be required; after June, 1937, graduation from an accredited college of pharmacy will be required, and such graduates will be eligible for the registered pharmacist examination.

4. It will further be required that all assistant registered pharmacists pass the registered pharmacists' examination prior to the September, 1937, examination or graduate from an accredited college of pharmacy.

QUALIFICATIONS FOR REGISTERED PHARMACIST.

5. Applicant for examination for Registered Pharmacist shall have had four years' practical experience in a retail drug store under the supervision of a Registered Pharmacist, and shall have been an Assistant Pharmacist for two years, or hold a Ph. G. degree. Applicant shall be not less than twenty-one years of age. Applications shall be in the hands of the Secretary at least fifteen days previous to date of examination, together, with required fee of \$10.00.

RECIPROCITY REQUIREMENTS.

6. Applicants for reciprocity shall have obtained their registration by examination, having made an average grade of 75 per cent and a minimum of 75 per cent in Practical Work, (60 pccent in Practical

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Work is required to those registered prior to June, 1936) and not less than 60 per cent in any one other branch of such examination, and, in addition, their certificates shall have been in effect one year before being allowed the benefits of reciprocity. Application blanks may be obtained from H.C. Christensen, 130 North Wells Street, Chicago, Illinois, Secretary, National Association Boards of Pharmacy, which request for blank shall be accompanied with fee of \$25.00, said sum going to the National Association to be used to extend the benefits of reciprocity.

7. After applicant has filled out blank and all places indicated for him and character witnesses, he may then send to the Secretary, together, with fee of \$15.00, and registration will be issued to him if found correct.

8. It is absolutely necessary to furnish affidavit that he has resided for twelve months in the state where he registered, and was actively engaged in the practice of pharmacy during that period."

We have considered the ruling made by the former attorney general, in which you state the opinion held that the board of pharmacy had the right to make rules and regulations inconsistent with the law, in order to keep the standard of Missouri on a par with those of other states, and have reached a conclusion, after such consideration, that the opinion did not rule the board of pharmacy had the right to make rules and regulations inconsistent with the law in order to keep the standard of Missouri on a par with those of other states.

It has long been universally recognized that it is the right of any person to pursue any lawful trade or business, subject to certain restrictions. Rules respecting the various callings have been many, depending upon the nature of the business. Some occupations have been necessarily regulated because of the dangerous character of the articles used, manufactured and sold. (See Sec. 13152 R.S.Mo. 1929); also strict and severe qualifications have necessarily been imposed upon the parties using, manufacturing and selling such dangerous article. Crowley v. Christman, 137 U.S. 86. So it has been with persons desirous of pursuing the calling of a pharmacist or an assistant pharmacist.

Our Legislature has seen fit to provide a complete scheme for the regulation of druggists (Chap. 94, R.S. Mo. 1929) and created a State Board of Pharmacy. The Legislature has, by Sec. 13148, R. S. Mo. 1929, given the board power to make rules and regulations not inconsistent with law, as may be necessary. It reads in part as follows:

"The board of pharmacy shall have a common seal, and shall have power to adopt such rules and by-laws not inconsistent with law as may be necessary for the regulation of its proceedings and for the discharge of the duties imposed under this chapter, and shall have power to employ an attorney to conduct prosecutions or to assist in the conduct of prosecutions under this chapter."

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In the case of State v Smith, 49 S.W. (2d) 74, l.c. 76, the court discussed the right of the Legislature to enact a law, complete in itself, to authorize certain designated officials to make rules and regulations for the complete operation and enforcement of the law. The court said:

"The Legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose."

In the case of Ex Parte Cavanaugh, 313 Mo. 375, l.c. 380, the court discussed the right of the Legislature to empower certain officers, boards and commissions to carry out the detail of any legislative enactment, and said:

"It may empower certain officers, boards and commissions to carry out in detail the legislative purposes and promulgate rules by which to put in force legislative regulations. It may provide a regulation in general terms and may define certain areas within which certain regulations may be imposed, and it may empower a board or a counsel to ascertain the facts as to whether an individual or property affected come within the general regulation or within the designated area."

In the case of Sawyer v. United States, 10 Fed. (2d) 416, l.c. 420, the United States Circuit Court of Appeals laid down a general proposition of law as follows:

"Authority to make rules and regulations necessary for carrying out the purposes of a legislative act can confer no authority to change the provisions of the act itself, and thereby deprive one of a right by the act."

The Legislature, having given to the Board of Pharmacy the right to make rules and regulations consistent with the law and for the purpose of meeting the complexities which may arise under the law, we now turn in our consideration to Section 13142 R. S. Mo. 1929, relating to the qualifications of pharmacists and assistant pharmacists. it reads as follows:

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"In order to be licensed as a pharmacist within the meaning of this chapter, an applicant shall be not less than twenty-one years of age, and, if his application be filed with the secretary of the board of pharmacy on or after the first day of January, 1912, he shall have been licensed as an assistant pharmacist for not less than two years prior to his application for license as a pharmacist, and he shall present to the board satisfactory evidence that he has had four years' experience in pharmacy under the instruction of a licensed pharmacist, and shall pass a satisfactory examination by or under the direction of the board of pharmacy; Provided, that if the applicant for a license as a pharmacist be a graduate of a school or college of pharmacy, whose requirements for graduation are satisfactory to and approved by the board of pharmacy, it shall not be required that he pass any examination or that he shall have been an assistant pharmacist. In order to be licensed as an assistant pharmacist within the meaning of this chapter, an applicant shall be not less than eighteen years of age, shall have a sufficient preliminary general education, and shall have not less than two years' experience in pharmacy under the instruction of a licensed pharmacist, and shall pass a satisfactory examination by or under the direction of the board of pharmacy; Provided, however, that in the case of persons who have attended a reputable school or college of pharmacy the actual time of attendance at such school or college of pharmacy may be deducted from the time of experience required of pharmacists and assistant pharmacists."

In construing the above statute, we imply (State v. Riedel, 46 S.W. (2d) 131), that the Board of Pharmacy has a right to determine what shall be considered satisfactory evidence an applicant may present, to the end that the applicant has had at least four years' experience in pharmacy, under the instruction of a licensed pharmacist. Likewise, the board has the right to determine what shall be deemed a satisfactory examination.

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You will observe from the first proviso of the statute that if an applicant for a license as a pharmacist be a graduate of a school or college of pharmacy, whose requirements for graduation are satisfactory to and have been approved by the board, such applicant shall not be required to pass any examination, or that such applicant shall have first been an assistant pharmacist. Here again, the statute, by clear implication, leaves the question of the reputableness of the school or college to the determination of the board. In this connection your attention is respectfully directed to the case of *Abbott v. Adcock*, 225 Mo. 335, the court had before it for consideration rules that had been promulgated by the State Board of Health, and particularly a rule which provided in substance and effect that all medical colleges, wherever located, on or before October 1, 1907, should conform to the standard specified in the schedule of minimum requirements adopted by the board on July 11, 1907. The rule further provided that students, upon being graduated from such schools, as in the opinion of the board were deemed accredited and reputable, should be admitted to examination by the State Board of Health, so as to determine their fitness to practice medicine and surgery in the State of Missouri. In passing upon such rule, at page 360, the court said:

"* * * since the act left it to the board to pass upon the reputableness of all medical colleges, whose graduates applied to it for examination, and to determine the character of the evidence by which said fact was to be established, said rules were not only reasonable and just but were also wise and proper.* * *"

In the case of *Ex Parte Whitley*, 144 Cal. 167, 1.c. 180, 181, the Supreme Court of California, in considering an act relating to the practice of dentistry, together with rules promulgated, aptly sets forth the reasons as to why details, with reference to qualifications of applicants, and reputableness of schools or colleges, should be left to the determination of the board. The court said:

"But it must be remembered that the act regulating the practice of dentistry and similar acts are not passed to promote the personal ends of individuals, but as salutary enactments in the exercise of the police power of the state to legislate for the safety, health, and welfare of the people.* * * 'What is reputable in a dental college must necessarily be determined from a standpoint of men of scientific attainments in the line of work it represents, not from that of mere laymen,' and committed the determination of that matter to the state agency it created, consisting of dentists, presumably learned, trained, and eminent in the profession, and obligated, under the law, to deal fairly and justly with all ap-

4/16/37.

plicants and the colleges from which they presented their diplomas. We do not perceive that in so doing any provision of the organic law was violated. The power to determine whether a college was reputable had to be lodged somewhere, and it was properly committed to the only body which could fairly and intelligently determine, not only as to the qualifications of the applicant, but upon the reputation of the college whose diploma he claimed to possess. This is a power which seems to be usually given by the Legislature to boards of examiners, and its commission is sustained by the courts."

In further considering the first proviso of the statute, you will notice the language of the statute; "In order to be licensed as an assistant pharmacist within the meaning of this chapter, an applicant shall be not less than 18 years of age, shall have sufficient preliminary general education, and shall have not less than two years' experience in pharmacy under the instruction of a licensed pharmacist, and shall pass a satisfactory examination by or under the direction of the board of pharmacy."

The words used in the above part of the statute are plain, clear and without ambiguity. The only "detail" the board of pharmacy may determine from this part of the proviso is what shall be deemed to be a "sufficient preliminary general education" and a "satisfactory examination".

In this respect the board has attempted to supply the "detail" by their Rule No. 1, supra, relating to the High School requirements, or the taking of an examination by the Superintendent of Schools of the county wherein the applicant resides, or by someone whom the applicant may designate, so as to be licensed as an assistant pharmacist.

Rules numbered 2, 3 and 4, supra, relating to the qualifications for assistant pharmacists, plainly contravene the letter and spirit of Section 13142, supra, for the statute requires that, in order for a person to be licensed as an assistant pharmacist, such person shall not be less than eighteen years of age, have a sufficient preliminary general education, shall have not less than two years' experience in pharmacy, under the direction of a licensed pharmacist, and shall pass a satisfactory examination by or under the direction of the board of pharmacy.

Rules promulgated as here (2, 3 and 4) express an attempt upon the part of the board of pharmacy to make a law, and blatantly show on their face to be arbitrary and capricious, thus denying to persons qualified under the statute of their lawful right to pursue the calling of pharmacy. Your attention is respectfully directed to Section 13143, which reads in part as follows:

Mr. Newt Gardner, 8.

4/16/37.

"If the applicant for license as a pharmacist or assistant pharmacist has complied with all the requirements of the two preceding sections, the board of pharmacy shall enroll his name upon the register of pharmacists or assistant pharmacists and issue to him a license which shall entitle him to practice as pharmacist or assistant pharmacist for a period of one year from the date of said license."

We have considered Rule No. 5, promulgated by the board of pharmacy, relating to the qualifications for a registered pharmacist, and conclude that such rule only reflects the statute itself in different verbiage, and is within the authority of the board to promulgate under Section 13148, supra.

Rules designated 6, 7 and 8 are reasonable and intend to supply the detail respecting reciprocity requirements of persons desiring to be licensed within this state, and are within the authority of the board to promulgate.

CONCLUSION

In light of the above, it is the opinion of this Department that the board of pharmacy may make rules or regulations not inconsistent with the provisions of the law, so as to determine one's qualifications for a license as a pharmacist or assistant pharmacist. We further conclude that Rules designated 2, 3 and 4, promulgated by the board of pharmacy, contravene the spirit and letter of the statute; that such rules have for their immediate effect the denying to one qualified under the statute of his or her lawful right to pursue the calling of pharmacy, consequently, such rules are void and should be abrogated.

Very truly yours,

RUSSELL C. STONE,
Assistant Attorney General

APPROVED:

J. E. Taylor
(Acting) Attorney-General.

JET/LD.

COUNTY TREASURER:) Premium on surety bond may be paid
) by county if officer elects to
BONDS:) give same, and county court approves.
Surety Premium paid)
out of Classes 5 and)
6 under Budget Act.)

October 7, 1937.

10-8



Honorable M. Stanley Ginn
Prosecuting Attorney
Lawrence County
Aurora, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of September 30th, in which you request the opinion of this Department on three questions therein submitted. Your letter is as follows:

"At page 190, The laws of Missouri 1937, Section one provides that public officers may enter into surety bond, and the costs to be paid by whom. I have three questions under this section, on which I would like to have your opinion.

- 1) If the County Court requires a surety bond, are they compelled to pay for the same?
- 2) Does the County Court have the right to refuse to pay for a surety bond, and thus compel the officer to either pay for the same or furnish a personal bond?
- 3) If the County Court does pay for the bond, out of what fund in the budget is the money taken?"

Replying to questions (1) and (2) in your letter, we are enclosing a copy of an opinion written to Honorable

Oct. 7, 1937

Alvin H. Juergensmeyer, Prosecuting Attorney of Warren County, which we think answers same.

In answer to your third question, we refer you to the County Budget Act, Laws of Missouri, 1933, page 341, et seq., and especially to Class 5 which relates to the "contingent and emergency expense of the county." We assume that you have funds in this Class, which, if available, could be used for the payment of the premium on the bond. Likewise, Class 6, which permits funds to be used for any lawful purpose providing there are no outstanding warrants.

The recent 59th General Assembly amended the Budget Act, Laws of Missouri, 1937, page 423, so that Class 5 now reads as follows:

"The county court shall next set aside a fund for the contingent and emergency expense of the county, the county court may transfer any surplus funds from classes 1, 2, 3, 4 to class 5 to be used as contingent and emergency expenses. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

Therefore, the premium on the bond may be paid by the transfer of any surplus in Classes 1, 2, 3 and 4, or, as suggested above, may be paid from funds remaining in Class 5 or 6.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

CRH:EG

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

BOARD OF HEALTH

PHYSICIANS AND SURGEONS: Persons licensed in foreign states are not permitted to come within this state and conduct examinations without first having applied for and received license to practice medicine and surgery within this state.

January 14, 1937

Opinion No. 34

Dr. H. S. Gove
State Health Commissioner
Medical Licensure Department
Jefferson City, Missouri



Dear Dr. Gove:

This will acknowledge receipt of your request for an opinion, which reads as follows:

"Will you kindly give me an opinion as to whether or not a physician who is licensed in another state can come into the State of Missouri and examine a group of men for the purposes of Occupational Diseases Insurance coverage without a medical license of the State of Missouri."

The statute governing your request for an opinion is Section 9113 of R. S. Mo. 1929. It provides in part as follows:

"All persons desiring to practice medicine or surgery in this state * * * shall appear before the State Board of Health, at such time and place as the Board may direct and there shall be examined as to their fitness to engage in such practice."

The question naturally arises as to whether a physician licensed in another state can come into the State of Missouri and examine a group of men and escape the necessity of appear-

Dr. H. S. Gove

ing before the Board of Health and there be examined as to his fitness to examine this group of men. It would seem that no licensed physician of another state could do so without the necessity of appearing before the Board to show his particular qualifications to make such examination, as was said in the case of State vs. Davis, 194 Mo. L. C. 497. The court in discussing the provisions relating to medicine and surgery said:

"The practice of medicine as contemplated by the provisions of the statute covering that subject, may consist only of the examination of a patient, * * *".

It is further provided in Section 9113 that all persons, before appearing before the Board, shall make an application in writing showing their necessary qualifications. In the same section, it is further provided:

"And it is further provided that the said board of health may under the regulations established by the board admit without examination legally qualified practitioners of medicine who hold certificates to practice medicine in any state or territory of the United States or the District of Columbia with equal educational requirements to the state of Missouri and that extend like privileges to legally qualified practitioners from this state upon the applicant paying a fee of fifty dollars (\$50.00)".

In the case of State ex rel Walker vs. State Board of Health, 61 S. W. (2d) 1. c. 927, the court had the above quoted part of the section before it for consideration and in discussing the proviso said:

" * * * the state board of health 'may under the regulations established by the board admit without examination' qualified practitioners

Dr. H. S. Gove

holding certificates to practice medicine in other states 'that extend like privileges to legally qualified practitioners from this state. * * * . The second proviso of section 9113, Mo. St. Ann. 1929, is a legislative declaration of comity between Missouri and sister states. To this state of comity there is applicable the comment of this court on another statute (Newlin v. St. Louis & San Francisco Ry. Co., 222 Mo. 275, 121 S. W. 125, loc. cit. 130): 'In this connection we observe: Our statutes * * * opening the doors of our courts to causes of action accruing under laws of our sister states, are legislative declarations of comity. Comity, in a legal sense, is complaisance, courtesy, the granting of a privilege not of right, but of good will. Black's L. Dict. tit. 'Comity'. Now, in reason, courtesy in that behalf has its useful limitations. It may not run riot; it goes circumspectly. It must be courtesy in fact as well as name.' The command of our statute (section 9113, Mo. St. Ann. 1929) is that all persons desiring to practice medicine in this state shall be examined as to their fitness by the state board of health. By way of exception to this command the provisos quoted permit the board to admit certain classes of applicants without examination. Persons so admitted are granted a privilege, not of right but of good will, and in the exercise of the board's sound discretion."

Your attention is directed to Section 9111, R. S. Mo. 1929, relating to practitioners being duly registered:

"It shall be unlawful for any person not now a registered physician within the meaning of the law to practice

Dr. H. S. Gove

medicine or surgery in any of its
departments * * *, in the State of
Missouri, * * *".

Your attention is further directed to Section 9118 of R. S.
Mo. 1929, relating to the practice of medicine without a
license. Said section reads in part as follows:

"Any person practicing medicine or
surgery in this state * * * without
a license from the State Board of
Health * * * shall be deemed guilty
of a misdemeanor."

In reaching our conclusion, we are not unmindful of Section
9122, R. S. Mo. 1929, relating to when a licensed practitioner
of medicine or surgery in a border state may attend the sick
within this state when the practitioner does not maintain an
office within this state. The pertinent part of said section
reads as follows:

" * * * any licensed practitioner of
medicine and surgery in a border state
attending the sick in this state provi-
ded he does not maintain an office
or appointed place to meet patients
or receive calls within the limits
of this state, and provided, that such
practitioner comply with the statutes
of Missouri and the rules and regula-
tions of the Missouri state board of
health relating to the reports of
births, deaths and contagious diseases,
* * *".

You will note that the above quoted section of the statute
uses the words "attending the sick in this state" and in light
of the cases herein cited, this necessarily contemplates that
a person is ill and might require the administration of drugs
or surgery, whereas from your request for an opinion, the physician
therein mentioned, only makes an examination for the purpose of
determining ones physical fitness as an insurable risk.

It can not be said that a physician licensed in a foreign
state can come into this state and make an examination of persons
to ascertain whether or not occupational diseases exist by virtue

Dr. H. S. Gove

to ascertain whether or not occupational diseases exist by virtue of Section 9122, supra.

It is evident that the Legislature intended to throw the cloak of guardianship around the citizens of this state when enacting the above sections of the statutes to prevent persons not sufficiently skilled in the practice of medicine to attend unto the afflicted. In the case of State vs. Davis, supra, at page 499, the court said:

"The prime object of this law upon the subject of the practice of medicine is the protection of the people from the impositions * * * by persons who are not sufficiently skilled in the profession * * *".

In the case of State vs. Smith, 233 Mo. 1. c. 267, the court said:

"Laws enacted for the purpose of regulating or throwing restrictions around a trade, calling or occupation, in the interests of the public health and morals are everywhere upheld and sustained. Such laws are within the police power of the State, and are universally sustained where enacted in the interests of the public welfare. The question presented in cases where the validity of such laws is called in question is no longer the power or authority of the Legislature to enact them, but whether the occupation, calling or business sought to be regulated is one involving the public health and interests. A person engaged in such an occupation is not alone interested therein. The public served by him is also interested. He is interested to the extent that it provides and furnishes him with employment and a means of livelihood. The public is interested in his competency and qualifications, and it is eminently proper that there be thrown around the calling protection from intrusion by incompetents and others inimical to the public good".

Dr. H. S. Gove

CONCLUSION

It is the opinion of this department that a physician, who is a licensed practitioner in another state, cannot come into the State of Missouri and examine a group of men for the purpose of determining whether or not they have occupational diseases, without making application for a license and becoming registered.

We further rule that a physician licensed in a foreign state coming into this state for the purpose of examining men for occupational diseases only determines their physical fitness for insurance. And, in so doing must comply with the provisions of the Missouri law relating to the practice of medicine and surgery.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

STATE BOARD OF HEALTH:

Board has authority to employ and fix compensation of employees and if a person renders service by virtue of such employment such person is entitled to back pay.

1/16
January 15, 1937.



Honorable Herman S. Gove, M. D.,
State Health Commissioner,
State Board of Health,
Jefferson City, Missouri.

Dear Dr. Gove:

This is to acknowledge your letter dated January 14, 1937, as follows:

"Please give me your opinion on the following question that was discussed at the recent meeting of the Board members of the State Board of Health.

"The question in discussion was in regard to paying back salary to the amount claimed by Mr. James Fern, former Director of the Division of Licensure. Dr. Elam, a member of the Board moved that the question be referred to the Auditor and Attorney General as to the liability of the Board, and as to its right to pay the same."

On November 20, 1934, this Department rendered an opinion to Emmett P. North, M. D., President of the State Board of Health, which in part reads as follows:

"It is therefore inescapable that the State Board would have authority to employ a director of medical licensure and to establish the amount of compensation he is to receive as well as to prescribe the other rules and conditions under which he is to be employed.

Jan. 15, 1937.

* * * * *

"It is therefore the opinion of this Department that the State Board of Health was acting within the powers granted it in determining the compensation of the Director of Medical Licensure to be paid to the Director of Medical Licensure."

We are enclosing herewith copy of above opinion.

You desire our opinion as to the liability of the Board for back salary. The paying of a state salary depends upon three things: (1) An office or employment; (2) an appropriation; (3) the rendering of service by the person appointed or employed.

In the opinion heretofore quoted from, it is seen that the State Board has the authority to employ a director of licensure and fix the compensation. Whether or not the State Board did employ Mr. James Fern is a question of fact. If said person was employed and rendered service, that, likewise, is a question of fact. The State Board knows the facts. We do not know the facts. Consequently, we cannot render an opinion as to whether said person should receive back salary. Suffice it to say that if said person was appointed and rendered service for which he received no salary, then it would be only fair, just and equitable for him to be compensated.

It is our opinion that if Mr. James Fern was employed and accepted the employment and rendered service to the State, and did not receive compensation for his services, then the Board would be within its rights to pay him for his services, providing there is an appropriation.

It is well settled that public moneys may not be given to individuals unless services are rendered. Section 46, Article IV, of the Constitution of Missouri; Kavanaugh v. Gordon, 244 Mo. 695.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

Re: BOARD OF HEALTH - Right to disclose results of
examinations.

June 21, 1937.

Herman S. Cove, M. D.,
Director - Medical Licensure,
Jefferson City, Missouri.

Dear Sir:

This Department is in receipt of your request for
an opinion as to the following:

"Will you kindly give us an opinion as to
whether or not it would be permissible to give
out grades to applicants who have passed the
State Board of Health medical examination if
they should request them.

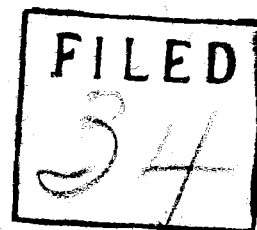
Kindly give us this information at your
earliest convenience."

Section 9113 R. S. Mo. 1929 provides for the examination
of applicants to practice medicine or surgery in Missouri. In
this section it is expressly provided that "The medical examina-
tion except that part which is practical to be in writing and
the questions and answers shall be kept on file by the State
Board of Health, subject to public inspection *****".

In the recent case of King v. Wolfe, et al, decided by
the Super. Ct. of California May 11, 1937 (not yet officially
published) it was held that a rule of the Civil Service Commission
under which the inspection of examination papers was discretionary
with the Commission was reasonable and not void on the theory that
it conflicted with a statute of California giving to citizens the
right to inspect public records. The Court held that the
Commission in denying inspection of papers acted in the exercise
of its discretion and that its exercise of such discretion could
not be controlled by the Court.

While this case is not precisely in point, it is
indicative of the attitude of the Courts with respect to regula-
tions prescribed by a Board invested with discretionary powers.
In the case of State ex rel v. Goodier, 195 Mo. 551, the Court said:

"The duties of the Board are of an administrative
or ministerial character, and therefore as long as
its acts are within the scope of the exercise of a
reasonable discretion it is free to act."



June 21, 1937.

In view of the provisions of Section 9113, supra, requiring the Board of Health to keep the questions and the answers made thereto by applicants on file subject to public inspection, it is the opinion of this department that it is permissible to disclose the grades achieved by applicants on examinations and that such act of the Board would be within the scope of a reasonable discretion.

Respectfully submitted,

JOHN W. HOFFMAN, JR., Assistant
Attorney General.

APPROVED:

(Acting) Attorney General

PHYSICIANS: Board of Health may not admit applicant for registration by reciprocity who does not comply with statute and rules of board, as long as said rule remains in force.

September 3, 1937
9-4

Dr. Herman S. Grove, Director
Medical Licensure
State Board of Health
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your letter of August 27, 1937, in which you request an opinion, as follows:

"Will you kindly give me an opinion in regard to issuing license by reciprocity to graduates of grade "A" schools who are legally licensed to practice medicine in another state, have had one year's internship in a recognized hospital in the State of Missouri or another state, but have not had one year's practice in the state in which they were licensed."

Section 9113, R. S. Missouri, 1929, provides the manner and general procedure to be followed by the applicant and the State Board of Health in granting to the applicant a license to practice medicine. In part, this section is as follows:

"And it is further provided that the said board of health may under the regulations established by the board admit without examination legally qualified practitioners of medicine who hold certificates to practice medicine in any state or territory of the United States or the District

of Columbia with equal educational requirements to the State of Missouri and that extend like privileges to legally qualified practitioners from this state upon the applicant paying a fee of fifty dollars (\$50.00)."

It will be noticed that the legislature at no place in this section required that those applicants desiring admission by reciprocity have anything other than a license to practice medicine in another state and that the state from which the applicant received his license have equal standards of admission and is a state which reciprocates with the State of Missouri.

The requirement of one years' practice, by the applicant for reciprocal medical registration, in addition to the requirements made in Section 9113, R. S. Missouri, 1929, seems to be found in a rule promulgated by the State Board of Health in accord with Section 9113, supra, wherein it is provided that the "said Board of Health may under the regulations established by the board, admit without examination" an applicant for reciprocal medical registration. This rule is in part, as follows:

"A certificate of registration or license issued by the proper board of any state may be accepted as evidence of qualification for reciprocal registration in any other state; provided, that the holder of such certificate or license has been engaged in the reputable practice of medicine in such state at least one year."

This rule appears as qualification No. II under the heading, "Basis for Reciprocal Medical Registration" in the application for certificate required to be executed by the applicant. No similar provision appears in the pamphlet entitled "Instruction to Physicians" under the heading on page 6, "By Reciprocity". We, therefore, assume that the above quoted rule is the only rule on this particular phase of reciprocal registration that the State Board of Health has made.

The statute does not make the requirement of one years' practice in the state in which the applicant desiring reciprocal registration is licensed to practice, but this is done solely by the rule promulgated by the board.

The authority to make such a rule certainly carries with it the authority to change, revoke or promulgate a new rule covering the same subject at such times as the board may deem it necessary or advisable.

In State ex rel Crites v. Clark, 230 S. W. 609, where a rule promulgated by the State Board of Health was before the court, it is said:

"Dr. Crites, the relator here, filed his application for examination some 10 days before the date fixed for such examination. The statute (Section 7332, R. S. 1919) provides that his application shall be made to the State Board of Health 30 days prior to the examination. The rules of the board allowed such application to be made 10 days before the time of the examination. The rules conflicted with the statute, but the board is not in a position to urge this question. The applicant complied with their rules."

This case was a mandamus action by the applicant to compel the board to grant him an examination to which the board, along with other defenses, had set up the applicant's failure to comply with the statute in filing his application for examination.

The import of this decision seems to be that once the board makes a rule they will be bound by the same as long as said rule is in force and cannot make exceptions to their rules and disregard the same in one case, yet adhere to them on other cases. To do this would be highly discriminatory.

In this opinion, we are not undertaking to determine the reasonableness or unreasonableness of said rule, we are merely pointing out that the board has the right and authority to make reasonable rules concerning reciprocal registration and we might say that authority to make such rules confers no authority to change, alter or amend the provisions of the act itself and thereby deprive one of a right given by the act. U. S. v. Sawyers, 10 Fed. (2d) 416.

It is, therefore, the opinion of this department that the state board of health may amend, revoke or promulgate new rules; concerning reciprocal registration to practice medicine, at any time they deem it necessary or advisable, but that as long as the present rule is in force, it is binding upon said board as well as the applicant and that said board may not disregard the same in special instances when they may be inclined to do so.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB MR

TAXATION

SALES TAX

RELIGIOUS INSTITUTIONS

Missouri Baptist General Association
exempted from provisions of the two
per cent sales tax act.

November 17, 1937



Mr. E. Godbold
General Superintendent
Missouri Baptist General Ass'n
Kansas City, Missouri

Dear Mr. Godbold:

This office acknowledges receipt of your request
dated November 12, 1937, which is as follows:

"I wish you would please give me your opinion as to whether we are subject to the state sales tax in our purchases for the work carried on by the Missouri Baptist General Association. For instance, we have an automobile that belongs to Missouri Baptists that is used in our missionary work. We have several telephones here in our offices and we do considerable business with the Western Union Telegraph Company. We also in our promotion work have some pictures of our missionary work which we show, the material for which we buy for the most part from the Eastman Kodak Company. Should we be subject to sales tax on such purchases? We have a book store in connection with our offices and sell nothing but our own denominational books and every cent that comes to us from these sales goes into our missionary work. Mr. Forrest Smith, the State Auditor, about a year ago, exempted us from charging sales tax on the sales made

in our Book Store. Should we be exempt from paying the tax to others from whom we make purchases?"

Section 46 of the Sales Tax Act, which is as follows:

"In addition to the exemptions under Section 3 of this Act there shall also be exempted from the provisions of this Act all sales made by or to religious, charitable, eleemosynary institutions, penal institutions and industries operated by the Department of Penal Institutions or educational institutions supported by public funds or by religious organizations, in the conduct of the regular religious, charitable, eleemosynary, penal or educational functions and activities, and all sales made by or to a State Relief Agency in the exercise of relief functions and activities."

exempts from the provisions of the Act all sales made by or to religious * * * institutions * * * of tangible personal property or services subject to the provisions of the Act in the conduct of the regular religious functions and activities.

It appears from your request that you are particularly anxious for this opinion to cover the question of whether or not your institution should pay the two per cent tax to those from whom you make purchases of tangible personal property or receive services which are subject to the provisions of the Act. That part of the business which you carry on with the Western Union Telegraph Company and with the Eastman Kodak Company, which is outstate, is interstate business and is not taxable, nor are the purchases of gasoline you make taxable. All such purchases are exempt by provisions of Section 3 of the Act, which reads in part as follows:

" * * * and any retail sale which the State of Missouri is prohibited from

November 17, 1937

taxing under the Constitution or laws of the United States of America, and such retail sales of tangible personal property which the General Assembly of the State of Missouri is prohibited from taxing or further taxing by the Constitution of this state. In order to avoid double taxation under the provisions of this Act, no tax shall be paid or collected under this Act upon the sale at retail of any motor fuel, subject to an excise or sales tax under another law of this state;
* * *

Your request also indicates that you operate a book store in connection with your office, but sell nothing but your denominational books and all receipts from such sales goes into your missionary work.

It is the opinion of this office that so long as you sell only your denominational books in your book store, you are not entering into a commercial enterprise outside the scope of your religious activities. However, if you sell books other than your denominational books, such transactions would not be classed as religious activities, but would be commercial. Judge Gentry of the Supreme Court of Missouri, in the case of State vs. Gaynor, 11 S. W. (2nd) 30, l.c. 35, cited the case of American Sunday School Union vs. City of Philadelphia, 161 Pa. 307 in which that court held as follows:

"The Pennsylvania court held that an institution of purely public charity is not, as such, exempt from taxation on property used by it in carrying on a book store in which are sold, in addition to all its own publications, other standard works, in order to aid it in making its business self-supporting, although the whole profit therefrom was devoted to charity purposes of the institution. Amer. Sunday School Union

v. City of Philadelphia, 161 Pa.
307, 29 A. 26."

Judge Gentry followed the rule of the Pennsylvania court in arriving at his findings in the case of State vs. Gaynor, supra. The court in the same case quoted the following rule, which is the general rule with respect to construction of exemption statutes, at page 34:

"In the construction of laws
exempting property from taxation
it is a cardinal principle that
they must be strictly construed."

Even though the rule of strict construction is applicable in this case, we do not think the association would lose its right to exemption on account of the sales it makes at the book store and hold that such sales are made by religious organizations in the conduct of their regular religious functions and activities. As said Act exempts sales made by or to such organizations, then the purchases of personal property or the receipt of services taxable under the Act used by said Association in the conduct of its regular religious functions or activities would be exempted.

CONCLUSION

It is, therefore, the opinion of this department that sales and purchases by the Missouri Baptist General Association in the conduct of its regular religious functions and activities of tangible personal property and services subject to tax under the two per cent Act are exempt by Section 46 of said Act and that the two per cent tax should not be collected on such transactions.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

STATE BOARD OF HEALTH - Certificates to practice cosmetology and hairdressing may be signed by any of the well-known methods of impressing a name on paper by another at the direction of the persons required to sign such certificates.

November 24, 1937

Honorable Herman S. Gove, M. D.
Director - Medical Licensure
State Board of Health
Jefferson City, Missouri



Dear Dr. Grove:

This will acknowledge receipt of your request for an opinion reading as follows:

"Please advise us as to whether or not Section 9098 of the Revised Statutes of Missouri 1929, relating to the issuance of a certificate to practice cosmetology and hairdressing, requires the signature of the President and Secretary of the State Board of Health of Missouri."

Your attention is directed to Section 9098, R. S. Mo. 1929, reading in part as follows:

"If an applicant for examination for operator passes such examination to the satisfaction of the examining board and has paid the fee required and complied with the requirements pertaining to instructors provided in this article, the state board of health shall issue a certificate to that effect, signed by the president and secretary and attested by its seal."

The above statute is plain, unambiguous and conveys a meaning which is obvious. When the language of a statute is plain as here, there is no need of resorting to auxiliary rules in the construction of a statute.

While the obvious meaning is apparent, we do, however, invite your attention to the use of the word "signed", as used. Ordinarily, the word "signed" indicates the signing of an instrument with one's own hand, or to affix a signature to; to ratify by hand or seal. See Webster's New International Dictionary. Hansen vs. Owens, 64 S. W. 800, 805.

In the case of Cummings vs. Landes, 117 N. E., 22, 23, the Supreme Court of Iowa considered a statute which required that an original notice be signed by the plaintiff or his attorney, and in passing upon the word as used in the statute said:

"This is to authenticate it as coming from the plaintiff in the action. A written signature is not in terms exacted. To sign, in the primary sense of that expression, means to make a mark, and the signature is the sign thus made. By long usage, however, influenced, no doubt, by the spread of learning, signature has come ordinarily to be understood to mean the name of a person attached to something by himself, and therefore to be nearly synonymous with 'autograph.' This signification is derivative, however, and not inherent in the word itself. In re Walker's Estate, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104. Looking at the original meaning of the word, in connection with the usage since the people generally have become able to write their own names, we have no trouble in reaching the conclusion that, as employed in the statute, no more is exacted than that the name of plaintiff or that of his attorney be attached to the notice by any of the known methods of impressing the name on paper, whether this be in writing, printing, or lithographing, provided it is done with the intention of signing or be adopted in issuing the original notice for service."

In the case of *In re Deep River Nat. Bank*, 47 Atl. Rep. 675, 677, the Supreme Court of Connecticut considered a statute, reading in part as follows:

" ** in actions against the representatives of deceased persons no acknowledgment or promise shall be sufficient evidence of a new or continuing contract to take the case out of the statute of limitations, unless the same be contained in some writing made or signed by the party to be charged thereby."

In this case proof was made that letters containing the alleged acknowledgments were dictated by the deceased to a stenographer and were by the latter, at the direction of the deceased, typewritten and signed with the deceased's name by means of a rubber stamp, and in passing upon the typewritten signature of the deceased the court said:

" ** in the absence of any express or implied requirement of law that one shall subscribe a writing with his own hand, he may properly sign it by means of such a stamp used by himself, or by another at his direction."

In the case of *Herrick vs. Morrill*, 33 N. W. 849, 850, the Supreme Court of Minnesota considered a summons in a civil action upon which the written names of the plaintiff's attorneys had been printed rather than affixed by the attorneys themselves. The court, in passing upon the propriety of such printed names on the summons, said:

"In the latter case it was held that a written signature purporting to be that of the plaintiff in the action, but made by his agent in his presence and by his express direction, was sufficient. This does away with the necessity of a signature in the proper handwriting of the party or his attorney, and it logically follows

that there need be no written signature at all; that any signature, whether written, printed, or lithographed, which the party issuing the summons may adopt as his own, will be sufficient."

From these considerations, it will be noticed that where the statute requires a certificate or other writing to be signed by certain individual, it is a sufficient compliance with the statute if the parties who are supposed to sign such written instrument or certificate direct another to do the signing. It will also have been noticed that the names of the parties may be written, printed or lithographed.

From this, it follows that all certificates to practice cosmetology and hairdressing require the signatures of the President and the Secretary of the State Board of Health. It will be observed, however, that the present Commissioner of Health now performs the duties heretofore conferred by law upon the Secretary of the State Board of Health, which office was abolished by the Laws of Mo. 1933, page 269.

CONCLUSION

In view of the above, it is the opinion of this department that all certificates to practice cosmetology and hairdressing shall be signed by the President of the State Board of Health and the Health Commissioner, or that the name of the President of the State Board of Health or Health Commissioner may be attached to the certificate by any of the known methods of impressing the name of such President or Health Commissioner on the certificate by another at their direction.

Yours very truly,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

INHERITANCE TAX: Taxability of moneys received as damages under Federal Employers' Liability Act.

January 26, 1937



Mr. R. J. Green
Farmers Bank of Trenton
Trenton, Missouri

Dear Sir:

This department is in receipt of your request for an opinion as to the following:

"I have been appointed appraiser to determine any tax due as Inheritance in the estate of Charles A. Collier, Deceased, who came to his death by accident, and the Administratrix, having brought suit to recover under the Federal Employers Liability Act, and it thought that a compromise settlement will be made, and in such case the amount paid will go into the estate and finally disbursed to his sister who is sole heir to the net estate.

I desire a ruling from your department as to whether or not same would be subject to a tax under the Inheritance law. Thanking you, and awaiting the favor of an early reply, I am."

In the first place, there are four forms of transfer of property subject to inheritance taxation in Missouri (Section 570, Laws Missouri 1931, Page 130):

- 1) By will;
- 2) By the intestate laws of Missouri;
- 3) In contemplation of death or intended to take effect in possession or enjoyment after death;
- 4) In trust where the transferor has retained the income for life or the right to name the persons who shall possess the property or income therefrom.

Section 51, Title 45 U.S.C.A., provides:

"Section 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. (Apr. 22, 1908, c. 149, Section 1, 35 Stat. 65.)"

The damages received, therefor, if any, under and by reason of this Federal Act are received in case of death by the personal representative of the deceased employee for the benefit of the beneficiaries named in the Act. Whatever these beneficiaries receive, they received, not by reason of any of the four forms of transfer taxable under the inheritance tax laws of Missouri, but purely by reason of this federal law. In the case of Wells v. Davis, 303 Mo. 388, 1.c. 402, 404, the Court, in speaking of this Act, said:

"It is held everywhere, however, that a case of action of the class here under consideration is not assets of the estate of the deceased, is not subject to the claims of creditors of the deceased, and is for the exclusive benefit of the persons designated as beneficiaries under the law which gives the right."

* * * * *

"The representative does not hold it in his

strict representative capacity as representing all the persons interested in an estate; but, being the representative, he becomes by virtue of the Act the trustee of a statutory express trust. The money he may recover is not to be administered, but is to be distributed and not according to the law of the state of his appointment, or the order of a probate court, but in accordance with the Act. These various considerations are discussed in numerous cases."

CONCLUSION

In view of the foregoing, it is the opinion of this department that money received as damages under the Federal Employers' Liability Act by a personal representative of a deceased employee is not subject to tax under the inheritance tax laws of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, JR., Assistant
Attorney General

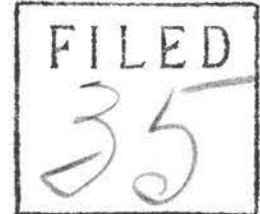
Approved:

(Acting) Attorney General

PROSECUTING ATTORNEYS: In interest of justice of Prosecuting Attorneys may proceed to prosecute by way of information, even when indictment be pending.

February 10, 1937.

2-11



Honorable Joseph L. Gutting
Prosecuting Attorney
Clark County
Kahoka, Missouri

Dear Sir:

We acknowledge your request for an opinion dated January 16th, which reads as follows:

"During the August Term of Circuit Court for Clark County the Grand Jury returned an indictment of 2nd degree murder against Guy Greger, who was at that time a constable of Lincoln Township, he having shot and killed a man in a road house in another township while under the influence of liquor. At the December term of said Court my predecessor, who was and is a good friend of the defendant, refused to contest an application for change of venue filed by defendant against the inhabitants of Clark Co., and so refused after the judge in open Court stated that the application was not good. Also against the wishes of the father and mother and brothers of the deceased and against the wishes of their private attorney he recommended that the case be sent to Scotland County where the father of the prosecutor there is defending the defendant. My Predecessor refused to recognize their private attorney in Court and he would not consider my desires as his successor and the one to try the case, in the matter at all. It is considered by everyone who knows about the case

that the state is at a great disadvantage in Scotland County.

"My question is this: Can I file an information before a justice of peace in this county (Clark) and have him re-arrested here and then dismiss the indictment now pending on a change of venue against him in Scotland County upon the same offense. Then after a preliminary hearing is held and is sent to Circuit Court, I can have the say as to where the case shall go upon a change of venue. In other words, can the state have an indictment and an information pending against the defendant at the same time after a change of venue has been granted to another county upon the indictment as stated above, and then the prosecutor dismiss the indictment at the next meeting of the Circuit Court in Scotland County and proceed upon his information back in the original jurisdiction--Clark County?"

Section 3502 R. S. Mo. 1929, provides how felonies are to be prosecuted in Missouri and reads in part as follows:

"All felonies shall be prosecuted by indictment or information,* * *. But that mode of procedure which shall be first instituted by the filing of the indictment or information for any offense shall be pursued to the exclusion of the other, so long as the same shall be pending and undetermined; and the court in which the prosecution shall be first commenced by the filing therein of the indictment or information, and the issuing of a warrant thereon, shall retain jurisdiction and control of the cause to the exclusion of any other court so long as the same shall be pending and undisposed of:* * *."

Section 3550, R. S. Mo. 1929, provides:

"If there be at any time pending against the same defendant two indictments for the same offense, or two indictments for the same matter, although charged as different offenses, the indictment first found shall be deemed to be suspended by such second indictment, and shall be quashed."

It has been held that a second indictment, after a change of venue on the first, can be returned by the Grand Jury of the county where the offense was committed.

In State v. Goddard, 62 S. W. 697; 162 Mo. 198, 1. c. 221, the Court said:

"After the reversal of this cause on the former appeal, a change of venue was awarded to Cass county, and while the cause was pending in the circuit court of that county, a new indictment was preferred by the grand jury of Jackson county in the criminal court of Jackson county, and thereupon a nolle prosequi was entered by the prosecuting attorney of Cass county, and the defendant discharged from his recognizance in the circuit court of said county. It is insisted by defendant that the dismissal of the case pending the first indictment in Cass county was and is a complete bar to any other or further prosecution of defendant for the crime therein charged. This point is much belabored, but is clearly untenable, either upon principles of the common law or any provision of our Constitution or statutes."

It has been held that a second indictment suspends the first, and in State v. Vincent, 4 S. W. 436; 91 Mo. 662, 1. c. 665, the Court said:

"It may, however, be stated that the statute recognizes the right of the state to file a new indictment for the same offence, and declares that the one first found shall be deemed to be suspended by the second, and shall be quashed. R. S., sec. 1808. It is a matter of no consequence, in proceedings upon the second indictment, whether the first be in fact quashed or not."

Section 11316, R. S. Mo. 1929, provides for the duties of Prosecuting Attorneys in criminal cases, and reads in part:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, * * * and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend as the case may be, * * *."

The statutes make it a misdemeanor for the prosecuting attorney to corruptly dismiss an indictment, but we find no statutory prohibition against dismissing an indictment absent corruption. See Section 3851, R. S. Mo. 1929.

In the case of *Ex parte Donaldson*, 44 Mo. 149, 1. c. 154, the Court held that to dismiss a case it is sufficient that the prosecuting attorney have leave of the Court before proceeding into trial, and the Court said:

"Then, before any further steps were taken by the court, the circuit attorney entered a nolle prosequi. This he had a right to do, with assent of the court, at any time before the prisoner was

put upon his trial. The prisoner never had any judgment of discharge entered in his favor; he was never put in jeopardy, and we can see nothing to prevent his being further held amenable."

In the case of State v. Taylor, 171 Mo. 465, 1. c. 473, the court said:

"By section 2522, Revised Statutes 1899, it is provided that a new indictment may be found against the same party for the same offense against whom there is an indictment pending at the time, and, as indictment and information are now concurrent remedies (State v. Kyle, 166 Mo. 287), the same rule applies to them. But in the case at bar the information was dismissed before the indictment was presented by the grand jury, and as its dismissal was no bar to the finding of an indictment there is no merit in the plea in bar."

CONCLUSION.

According to Sections 3502 and 3550, supra, felonies in Missouri are prosecuted either by indictment or information, but the Legislature has expressly provided that the mode of procedure first instituted shall be pursued so long as the cause be pending and undetermined.

According to Section 11316, supra, the prosecuting attorney is duly bound to prosecute criminal cases, and it is his duty to follow and prosecute criminal cases where changes of venue have been taken.

This department is of the opinion that Legislature, in giving the prosecuting attorney the power to prosecute criminal cases, intended that the prosecuting attorney do what is necessary and proper to bring a criminal to trial, and that the prosecuting attorney

February 10, 1937.

conduct the progress of the case in a fair and impartial way. To that end we interpret the statutes, and where a pending and undetermined criminal indictment should be dismissed in the interest of honest government, fair play and justice to both the State and defendant, then under his statutory power the prosecuting attorney should so act, and dismiss same, and in such a case where in the interest of honest government, fair play and justice, the prosecuting attorney, by information starts the prosecution all over again, he is perfectly within the law.

In such a case we are of the opinion that filing a second information suspends the necessity for further proceeding to try the cause under the first indictment, even in the jurisdiction of the changed venue, and the prosecuting attorney may dismiss the first indictment, on leave of the court, in the exercise of his duties to prosecute criminal causes.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

WOS:H

CORPORATIONS--Officer liable criminally for violation of
state law where officer participates in such
violation or has prior knowledge thereof.

March 23, 1937

3-24



Hon. Joseph L. Gutting
Prosecuting Attorney
Clark County
Hiller Building
Kahoka, Missouri

Dear Sir:

We have your request of February 3, 1937, for an
opinion which is as follows:

"Following are the facts of a bad check
upon which I would like to know your
opinion as to whether a prosecution can
be maintained thereon against Earl
Hayden.

This draft is payment MID*WEST GRAIN CO.
in full for items COAL GRAIN
listed below

No. 2023.

LABELLE, MO. April 23--36

Pay to the
order of----Harr Bennett \$52.20
Fifty two & 20/100 dollars

Mid-West Grain Co. (printed)
Earl Hayden (written)

Corn \$52.20 Mgr.
PRESENT THROUGH
Citizens Bank Edina Mo (Written)

Said check was sent to the above bank and
returned by the bank unpaid on May 4th,
1936 because of insufficient funds. (not
protested at that time).

A few days later Bennett saw Earl Hayden and Hayden said he would see that the check was paid, he said he was looking to Brightwell, his partner in the business, to pay it. The check was never paid and on January 19th, 1937, the check was duly protested. I as Prosecuting Attorney sending Hayden a registered letter that the check was unpaid and he was being given five days as set out by the statutes to pay the same and that the check was being sent to the bank for payment of regular protest.

My questions are: Will the fact that it was not duly protested until January 19th, 1937 affect the prosecution. Is not the maker liable altho he signed as Manager of a company.

Please send me approved form of insufficient fund and no funds bad check information."

I enclose herewith copy of opinion with reference to the applicability of Section 4305 R. S. Missouri 1929, wherein checks are drawn on banks in which there are insufficient funds to pay them.

This opinion points out that the question of five days notice is in itself equivalent to a protest, is merely a matter going to the intention with which the check was issued.

The principle question in this opinion is whether or not there is any liability on the drawer of this check to sign as "manager" of the company. On this proposition we find the general rule stated in 14a C. J. page 244 as follows:

"Also at least where the crime charged involves guilty knowledge or criminal intent, it is essential to the criminal liability of an officer or servant of a corporation that he actually and personally do the acts which constitute the offense or that they be done by his direction or permission."

This seems to be the universal law followed in this state in *State vs. Parsons and Harris*, 12 Mo. App. 205, *State vs. Yocum*, 206 S. W. 336.

The corporation may only act through its officers and agents. We quote from *State vs. Fairbanks (Ind.)* 115 N. E. 769, 1. c. 771, as follows:

"Corporations act only by and through their officers and agents, and it seems that the Legislature intended to place the punishment where it would be effectual. It seems to be the settled law that:

'In the absence of a statute to the contrary, an officer of a corporation cannot be punished criminally for the corporation's unlawful act or default, unless he participates therein as an aider, or abettor, or accessory, even though the corporation's offense consists in the violation of a statute which imposes imprisonment as a penalty.' *Rex v. Hayes*, 14 Ont. Law Rep. 201, 8 Ann. Cas. 380.

This seems to be the holding in many jurisdictions. *People v. Clark*, 14 N.Y. Supp. 642; *State vs. Parsons*, 12 Mo. App. 205."

In *State vs. Burnam (Wash.)* 128 Pac. 218, 1. c. 219, the Court said:

"I think that any person or persons participating in the violation of the statute by the corporation may, under our statutes, be indicted as principals, either because they have directly committed the act, or have aided and abetted in such commission."

March 23, 1937

The same Court in State vs. Thomas, 212 Pac. 253, held that the managing officer of a corporation is individually liable criminally for misappropriating moneys of the corporation, and that acting as an officer in such transaction was no defense.

I enclose herewith copy of information with reference to insufficient fund checks taken from the case of State vs. Taylor, 73 S. W. (2) 378, which information we believe is in proper form.

It is therefore the opinion of this office that the protesting of a check, so far as the criminal law is concerned, goes only to the intent of the maker and the date of such protest is therefore immaterial; that the maker of the check which is returned for "insufficient funds" is liable criminally for such act even though he may have executed such check as an officer of a company or corporation.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

FER:MM
Enclosures-2

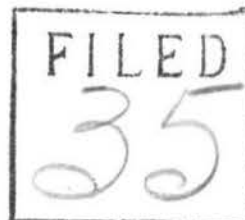
APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

CHIROPRACTIC: A person graduating prior to 1927 may take examination, if such, the time, completed the standard course instruction of three years of six months each.

March 29, 1937.

3-30



Mr. Louis J. Gualdoni,
Committeeman 24th Ward,
St. Louis, Missouri.

Dear Mr. Gualdoni:

This is to acknowledge your letter dated March 26, 1937,
as follows:

"I will appreciate it very much if you will
please render me an opinion on the following:

Dr. Geneveve P. Marr, a Chiropractor of Cuba,
Missouri, has recently made application for exam-
ination to the State Board of Chiropractic Exam-
iners and same was refused on the grounds that her
Chiropractic course did not consist of three years
of nine months each as required by the Chiropractic
Law at this time but of three years of six months
each, which was accepted at the time of passage of
the Law in 1937.

Dr. Marr informs me that she graduated from
the Palmer School of Chiropractic, Davenport, Iowa,
which is a recognized Chiropractic College, in 1922,
with three years of six months each, having a total
number of 4,560 thirty minute hours to her credit.
The reason for Dr. Marr not making application at
that time was due to the fact that she had not been
expected to live as she was suffering from a broken
neck, which disabled her for a number of years. En-
closed herewith are affidavits verifying same.

The question at this time is; due to the above
condition, is it possible for the Chiropractic Board
to accept Dr. Marr's application and permit her to
take the examination at this time.

Please forward this opinion to Dr. Jerome F.
Fontana, Secretary of the Chiropractic Board, 2605a
Chippewa Street, St. Louis, Missouri as soon as pos-
sible."

Mr. Louis J. Gualdoni, 2.

3-29-37.

On March 12, 1935, and October 27, 1935, we rendered opinions to Hon. Lawrence J. Fontana and Dr. Jerome F. Fontana, respectively, wherein we quoted from the provisions of the statutes relating to Chiropractic.

In the opinion dated March 12, 1935, we held, the failure of a person to obtain a license to practice chiropractic, without examination, within thirty days after the organization of the board, due to illness, was no valid reason or exception to allow said person to become licensed without taking the examination. We enclose copy of that opinion.

The opinion dated October 27, 1935, holds that Sec 13549, Revised Statutes of Missouri, 1929, which fixes the period of the chiropractic course of "not less than three years of nine months each, and requires actual attendance of not less than 2,045 hours" only applied to those persons who matriculated in a chiropractic school or college after the passage of the act. The act was passed in 1927. We are enclosing copy of that opinion.

The facts in the present case disclose that Dr. Genevieve P. Marr obtained a degree from the Palmer School of Chiropractic, Davenport, Iowa, in 1922, and failed to take the examination or become licensed in 1927, or at the time of the passage of the chiropractic act, due to illness.

The sole question for determination is whether or not she has sufficient college hours to enable her to take the examination. Her course of study (and we take knowledge of the fact that in 1922 such was the standard course), consisted of "three years of six months each, having a total number of 4,560 thirty-minute hours to her credit."

It is to be noted that she has more hours of actual attendance (if we understand the letter correctly) than is prescribed by Section 13549, for the reason that Section 13549 requires not less than 2,045 hours and she has "4,560 thirty-minute hours."

However, Dr. Marr did not attend a term of three years of nine months each, but only attended "three years of six months each."

As pointed out in the opinion dated October 27, 1935, Section 13549, which provides for the chiropractic course of study, applies only to those persons who had matriculated in a chiropractic school or college after the passage of the act. Dr. Marr did not matriculate after the passage of the act; in fact, she received her course of study several years before the law was enacted. Thus it is our opinion that the requirement of Section 13549, that the chiropractic course "shall cover a period of not less

than three years of nine months each", would not apply in Dr. Marr's case, for the reason that she did not matriculate in a chiropractic school or college after the passage of the act.

Section 13549 specifically provides:

"Any person desiring to procure a license authorizing him or her to practice chiropractic in this state shall make application therefor to the board on a form prescribed thereby, giving his or her name, sex, age, which shall not be less than 21 years, name of school or college of which he or she is a graduate, and shall furnish the board satisfactory evidence of preliminary education as required in this chapter, and of good moral character, and that he or she is a graduate of a chiropractic school or college teaching chiropractic in accordance with the requirements of this chapter, which shall be determined by the board, together with such other information as the board may require."

Having hereinbefore concluded that Dr. Marr had not matriculated in a chiropractic school or college prior to the passage of the act, and consequently Section 13549, requiring three years of nine months each attendance, was not applicable to her situation, and as there is no other provision found in the statutes giving relief in her situation, it is our opinion that it would be within the sound discretion of the board to determine if the chiropractic school or college she graduated from in 1922, was, at the time, teaching only a three year of six months course, then, if true, Dr. Marr would in fact be a graduate from a school or college determined by the board to meet the requirements of the statutes.

If Dr. Marr could not take the examination without attending a school having a term of three years of nine months each, it would mean that she will have to go back to school. However, having obtained her degree prior to the passage of the act, we are of the opinion that the board may accept the standard course of study then prescribed (three years of six months each) and permit her to take the examination. The purpose of the applications is to keep persons who do not have the necessary educational or moral qualifications from taking the examination. However, in view of the

Mr. Louis J. Gualdoni, 4.

3-29-37

facts presented in Dr. Marr's case, we believe that she should be entitled to take the examination, and, of course, her right to practice would be determined by her passage or failure of examination.

We are sending a copy of this opinion to Dr. Pontana, as requested, and are returning herewith to you the affidavits annexed to your letter.

Yours very truly,

James HornBestel
Assistant Attorney General.

APPROVED:

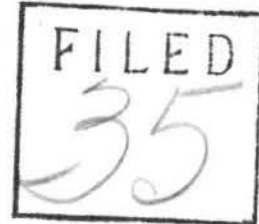
J. E. TAYLOR
(Acting) Attorney General.

JLH/LD

MOTOR VEHICLES: The value of a motor vehicle stolen is not to be considered in determining the sentence of the one convicted of having stolen such motor vehicle.

April 1, 1937

4-10



Mr. W. W. Graves
Prosecuting Attorney
Kansas City, Missouri

ATTENTION: Mr. Russell T. Boyle

Dear Mr. Graves:

This will acknowledge receipt of your request for an opinion, which reads as follows:

"Please give us your interpretation of Section 7786, R. S. 1929, with regard to the penalty for stealing an automobile.

We desire to know whether your interpretation of this Section would be that the value of the automobile stolen would make no difference as to the penalty. In other words is the theft of an automobile under the value of \$30.00, a felony and punishable by penitentiary sentence or is it a misdemeanor and punishable by a jail sentence."

In the course of this opinion, we first differentiate between felonies and misdemeanors. In this respect, we direct your attention to Section 4471, R. S. Mo. 1929, which defines a felony as follows:

"The term 'felony,' when used in

this or any other statute, shall be construed to mean any offense for which the offender, on conviction, shall be liable by law to be punished with death or imprisonment in the penitentiary, and no other."

Section 4473, R. S. Mo. 1929, defines a misdemeanor as follows:

"The term 'misdemeanor,' as used in this or any other statute, shall be construed as including every offense punishable only by fine or imprisonment in a county jail or both."

In the case of State vs. Melton, 117 Mo. 618, 619, 620, 23 S. W. 889, the Supreme Court had before it for consideration an appeal taken to the St. Louis Court of Appeals and subsequently certified to it by reason of its jurisdiction over felonies. Section 12, Article VI, Constitution of Missouri. In this case, the defendant received a sentence of six months in the county jail. The Supreme Court, in passing upon its jurisdiction in "cases of felonies" said:

"The crime charged is a felony, as the offense denounced by the statute may be punished by imprisonment in the penitentiary. The fact that less punishment than imprisonment in the penitentiary was assessed in this case, does not reduce the offense to a misdemeanor."

In the case of State vs. John Underwood, 254 Mo. 469,

April 1, 1937

470, 162 S. W. 184, the court had before it for consideration what is now Sections 4471 and 4473, supra, and in passing upon these statutes said:

"The distinction between felonies and misdemeanors made by our statute renders appellant's contention without merit. As we held in State v. Woodson, 248 Mo. 705, the term 'felony,' under our code, means any offense for which the offender on conviction shall be liable to be punished with death or imprisonment in the penitentiary. (Sec. 4923, R. S. 1909.) The term 'misdemeanor' includes every offense punishable only by fine or imprisonment in a county jail or both. (Sec. 4925, R. S. 1909.)

The offense with which the appellant is charged is one for which he was liable to be punished by imprisonment in the penitentiary, but the minimum punishment for this offense was by fine or imprisonment in the county jail or both. His offense, therefore, was not changed from a felony to a misdemeanor by the assessment of his punishment at a fine and imprisonment in a county jail, * * * *

To the same effect is a ruling in the case of State vs. Clayton, 100 Mo. 516.

From the foregoing considerations, it will be noticed that where one has been convicted of an offense and shall be liable by law to be punished by death or imprisonment in the penitentiary, such persons shall be deemed guilty of a felony, whereas, the term misdemeanor, as used in any statute, is construed to include every offense punishable only by fine or imprisonment in the county jail, or both.

April 1, 1937

Applying the principles above announced, in construing subdivision (a) in Section 7786, R. S. Mo. 1929, which reads as follows:

"Any person who shall be convicted of feloniously stealing, taking or carrying away any motor vehicle, or any part, tire or equipment of a motor vehicle of a value of \$30.00 or more, or any person who shall be convicted of attempting to feloniously steal, take or carry away any such motor vehicle, part, tire or equipment, shall be guilty of a felony and shall be punished by imprisonment in the penitentiary for a term not exceeding twenty-five years or by confinement in the county jail not exceeding one year, or by fine not exceeding one thousand dollars (\$1,000) or by both such fine and imprisonment."

it will be noticed that if any person shall be convicted of feloniously stealing, taking or carrying away any motor vehicle, they shall be deemed guilty of a felony and shall be punished as aforementioned.

The value of the automobile stolen would make no difference in determining the punishment. You will note the statute is written in the alternative and when the value of the thing stolen is to be taken into consideration it only pertains to any part, tire or equipment of motor vehicles of the value of \$30.00 or more. Thus, a person convicted of the theft of any part of a motor vehicle over the value of \$30.00 could receive the maximum punishment, to-wit, twenty-five years in the penitentiary.

This construction of the statute is further substantiated in view of subdivision (b) of Section 7786, supra, wherein it reads:

"Any person who shall be convicted

April 1, 1937

of stealing, taking or carrying away any motor vehicle tire or any part or equipment of a motor vehicle under the value of \$30.00 shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding one hundred dollars (\$100.00) or by both such fine and imprisonment."

Had the Legislature intended to make the theft of an automobile under the value of \$30.00 a misdemeanor, it is logical to assume that it would have been included in the above subdivision (b). It is obvious, therefore, that the Legislature intended that if any person should steal a motor vehicle that such person should be deemed guilty of a felony and punished as above specified in subdivision (a).

CONCLUSION

It is the opinion of this department that the value of the automobile stolen is not to be considered in determining the punishment a person is to receive, except to say that the court should instruct on the minimum amount of punishment to be received, as well as upon the maximum amount. State vs. Liston, 318 Mo. 1222, 25 S. W. (2nd) 780. Further, that the theft of an automobile under the value of \$30.00 is a felony and punishable as indicated in subdivision (a) of Section 7786, supra.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS:rt

TAXATION & REVENUE: County Court need not readopt each year method theretofore adopted as to collection of revenue under Section 9787 R.S. 1929.

April 6, 1937



Mr. Willard H. Guest
Assistant Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Sir:

This office is in receipt of your letter of February 20, 1937, in which you request an opinion as to the following:

"In sec. 9787 R. S. Mo. 1929 it is provided that when counties have already adopted methods of plats and abstracts to facilitate the assessment and collection of revenue that in that event they are not amendable to preceding sections with reference to land lists and various recorders and assessors methods.

"St. Louis County has been operating under 9787 and we would like to get an opinion as to whether it is necessary to reaffirm this adoption each and every year, in other words, if for example the County Court ordered the lists to be made up under Section 9787 for the year 1936 is it necessary for the Court to order these lists to be made up under that section for the year 1937?"

This question stated more concisely, we think, is this; "Must the county court of St. Louis County re-

affirm, each year, by an order of record, the mode it has heretofore adopted under Section 9787, Revised Statutes 1929, as to the collection of the revenue?"

This is a question which does not appear to have precedent in this state; therefore, we must ascertain, if possible, what was the legislative intent when this section was adopted.

In *State ex rel. Norvell-Shapleigh Hardware Co. v. Cook* 77 S. W. 559, 1. c. 560, a case concerning the construction of a statute, the court said:

"It is our opinion . . . that the construction of a constitutional or a statutory provision should never be adopted which results in the requirement of useless and absurd acts, except where its terms are positive and unavoidable."

In *State v. St. Louis-San Francisco Ry. Co.* 300 S.W. 274, 1. c. 276, another case involving the construction of a statute, the court said:

"A construction should never be given to a statute or a constitutional provision which would work such confusion and mischief, unless no other reasonable construction is possible."

In *Bowers v. Missouri Mut. Ass'n.* 62 S. W. (2d) 1058, 1. c. 1063, the court said, when interpreting a statute before them:

"Laws are passed in a spirit of justice and for the public welfare and should be so in-

terpreted if possible as to further those ends and avoid giving them an unreasonable effect."

In the case of Bragg City Special Road Dist. v. Johnson et al. 20 S. W. (2d) 22, l. c. 25, the Supreme Court said, in ruling on the construction of a statute before them:

"It has been ruled by this court many times that in the construction of statutes which are not clear in meaning the results and consequences of any proposed interpretation may properly be considered as a guide as to the probable intent of the lawmaker from the language used."

With the rulings that are set forth in the cases quoted from, supra, in mind let us proceed to a discussion of what was the intention of the legislature in adopting Section 9787, Revised Statutes 1929. This section provides for the county court, in those counties having a population of more than 40,000, to adopt by an order of record any suitable method for securing a full and accurate assessment of all property in said county liable to taxation. It cannot be construed, we think, to require the county court to reaffirm this adoption each year, to do so would be useless and absurd and place a burden upon our county courts, and would hinder, rather than further, the public welfare of our county organizations. What would be the result of such a construction? It can be seen that it would not facilitate the collection of revenue and with this as a guide as to the intent of the legislature, this section cannot be interpreted to place an additional burden on county courts. Also in the first sentence of said Section 9787, Revised Statutes 1929, is provided a means by which those counties having

less than 40,000 in population may adopt a method of collection of revenue, contemplated by this section, by a majority vote of the people at a general election.

It would be a greater absurdity to construe this section to require, in those counties which have adopted a method to collect revenue, by majority vote, an election each year and resubmit the plan to be reaffirmed by the voters.

Therefore, we think the only reasonable construction which can be given this section is, that once adopted by an order of record by the county court the method of collection of revenue requires no reaffirmance unless there is a material change made in the plan or method heretofore adopted.

Respectfully submitted,

COVELL R. HEWITT,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB:LC.

COUNTY COLLECTOR: Rate of per cent for collection of taxes.

5-12
May 4, 1937.



Mr. J. W. Guerrant,
County Collector,
Callaway County,
Fulton, Missouri.

Dear Mr. Guerrant:

We wish to acknowledge your request for an opinion wherein you state as follows:

"We should like to have you render an opinion on the following question.

What bracket would a collector be under -- 10 or 11?

"We are enclosing you a form as audited December 1936, which shows the amount of beer and utility license collected. Through an error, the county clerk collected the beer and liquor license amount and this was credited to the capital school fund. Later, by order of the county court it was transferred to county revenue fund."

Your enclosure reads as follows:

"To land tax book, 1935.....	\$169,590.08
To additions to land tax book, 1935....	81.48
To personal tax book, 1935.....	22,877.35
To additions to personal tax book, 1935	10.63
To interest on current tax books since Jan, 1, 1936	89.79
To income tax book, 1935	1,685.28
To additions to income tax book, 1935..	1.96

May 4, 1937.

To interest collected on income tax book, 1935, since June 206
To M. and M. tax book, 1935	4,539.06
To additions to M. and M. tax book, 1935	
To collections on licenses from March 1, 1935 to February 29, 1936	220.00
Total	<u>\$199,096.69</u>

Utility locally assessed	\$ 636.86
Beer and liquor licenses	755.00"

Section 9935, Laws of Missouri, 1933, page 454, provides for the rate of per cent which county collectors may charge for the collection of taxes, in part, thus:

"The collector, except in counties where the collector is by law paid a salary in lieu of fees and other compensation, shall receive as full compensation for his services in collecting the revenue, except back taxes, the following commissions and no more:

"I. In each county in this state wherein the whole state, county, bridge, road, school (school) and all other local taxes, including merchants' and dramshop licenses, assessed and levied for any one year amount to _____ dollars or less, a commission of _____ per cent on the amount collected.

* * * * *

"X. In all counties wherein the total amount of all such taxes and licenses levied for any one year exceeds one hundred and fifty thousand dollars and is less than two hundred thousand dollars, a commission of two and one-fourth per cent on the first one hundred and fifty thousand dollars collected and one-fourth of one per cent on whatever amount may be collected over one hundred and fifty thousand dollars.

May 4, 1937.

"XI. In all counties wherein the total amount of all such taxes and licenses levied for any one year exceeds two hundred thousand dollars and is less than two hundred and fifty thousand dollars, a commission of one and three-fourths per cent on the first two hundred thousand dollars collected and two per cent on whatever amount may be collected over two hundred thousand dollars."

The purpose of the above sections is to determine the amount of compensation a county collector is to receive for his services in collecting the current revenue.

With respect to the item marked "utility locally assessed," we direct your attention to an opinion rendered by this department under date of August 21, 1935, to Mr. Lewis A. Duval, Prosecuting Attorney, a copy of which is enclosed, wherein we held, among other things, that franchise taxes and railroad taxes assessed under the provisions of Article XIII, Chapter 59, R. S. Mo. 1929, should not be included in the amount of taxes assessed and levied for the purpose of determining the collector's commission under the provisions of Section 9935, Laws of Missouri, 1933, page 454.

And with respect to the same item, we also direct your attention to an opinion rendered by this department under date of May 14, 1936, to Mr. R. W. Starling, Prosecuting Attorney, a copy of which is enclosed, wherein we held that taxes locally assessed against electric power and light companies are to be included in the total amount of taxes locally assessed and levied, for the purpose of determining the collector's commission under the provisions of Section 9935, Laws of Missouri, 1933, page 454.

Section 10066, Laws of Missouri, 1933, pages 422 and 423, reads in part:

" * * * and all property, real and personal, including the franchises owned by telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, gas pipe lines, gasoline pipe lines, and express companies, shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of

private persons. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, * * * *."

The Starling opinion dealt primarily with the collector's commission for taxes locally assessed and levied against electric power and light companies, but, in our opinion, taxes locally assessed and levied against telegraph, telephone, electric transmission lines, oil pipe lines, gas pipe lines, gasoline pipe lines, and express companies should also be included in determining the collector's commission under the provisions of Section 9935, Laws of Missouri, 1933, page 454.

We turn now to the item marked "beer and liquor licenses." In an opinion rendered by this department to Mr. Peter H. Huck, Prosecuting Attorney, under date of August 24, 1934, a copy of which is enclosed, we held that in the absence of any specific direction on the part of the Legislature, the collection of the county liquor license fees is properly the duty of the county collector.

The above conclusion was based on Section 24, Laws of Missouri, 1933-1934, Extra Session, page 87, which has since been repealed, as follows:

"The County Court in each county is hereby authorized to make a charge for licenses issued to retail dealers in all intoxicating liquor, the charge in each instance to be determined by the County Court, by order of record, but said charge shall in no event exceed the amount provided for in Section 22 of this act, for state purposes."

Under the present law, Section 25, Laws of Missouri, 1935, page 276, there is a specific direction on the part of the Legislature that every holder of a permit or license pay the permit or license fee into the county treasury of the county wherein the premises described and covered by such permit or license are located. There being no duty on the county collector to collect the permit license fees, we are of the opinion that the county collector may not include same in

Mr. J. W. Guerrant

-5-

May 4, 1937.

the amount of taxes assessed and levied for the purpose of determining the collector's commission under the provisions of Section 9935, Laws of Missouri, 1933, page 454.

You can not under the statute include the "beer and liquor licenses" item, which you state amounts to \$755.00, so that adding the "utility locally assessed" item in the amount of \$636.86, which, as we pointed out, can not include franchise taxes and railroad taxes, together with the other items which you show to be in the amount of \$199,095.69, makes the total sum of \$199,732.55.

Your taxes and licenses levied for the one year having exceeded \$150,000.00 and being less than \$200,000.00, we are of the opinion that you come within subsection or bracket 10 as to the rate of per cent which you as county collector may charge for the collection of county taxes.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

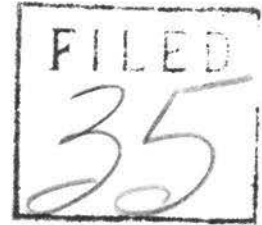
APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

PROSECUTING ATTORNEY - ELIGIBILITY TO APPOINT AS PROBATION OFFICERS IN
COUNTIES OF LESS THAN 20,000

June 15, 1937.



Mr. Percy W. Gullie,
Prosecuting Attorney,
Oregon County,
Alton, Missouri.

Dear Sir:

We wish to acknowledge your request for an opinion
wherein you state as follows:

"I would appreciate your opinion on
a little matter that has been called to
my attention by the Prosecuting Attorney
of Howard County, in regard to the
several Prosecuting Attorneys over the
State in Counties with less than 20,000
inhabitants being appointed as Probation
Officer of their respective Counties.
Mr. Jack H. Denny's letter is as follows:

"Section 14,171, R. S. 1929, provides
as follows: The Circuit Judge shall
designate or appoint an officer of the
County or some other person to serve as
Probation Officer under the direction of
the Court in cases arising under this
article. The Court may also designate
or appoint one or more persons to act
as deputy Probation Officers. Section
14,174 provides that in Counties of less
than twenty thousand inhabitants the
Probation Officer may receive such salary
as the Circuit Court may with the approval
of the County Court prescribe, not exceed-
ing \$300.00 per annum.

"In my county it is the custom in cases arising under the Juvenile Court Act for the Prosecuting Attorney to file the petition alleging the child to be neglected and delinquent, for him to summon the parents, to bring the child before the Court, to arrange with some person, usually the Sheriff, to keep the child someplace, separate and apart from the jail, and to otherwise handle the case. While the Circuit Judge as Judge of the Juvenile Court draws an additional salary for juvenile work, and the Clerk of the Court draws an additional salary for Juvenile work, the Prosecuting Attorney draws no additional salary for his work.

"I have suggested to my Circuit Judge that he appoint me as Probation Officer and recommend to the County Court that I draw an additional \$300.00 a year for my services. Since heretofore I have performed the same service gratuitously. This would not be a violation of the provisions of the State Constitution which provides that no person shall hold two offices at the same time. The Circuit Judge states that he is perfectly willing to do so, but he does not wish to establish the precedent of appointing the Prosecuting Attorney to this office and he suggested that I write to each of the Prosecuting Attorneys and endeavor to make such procedure a general practice over the State."

"Please advise if this practice would be legal and good procedure?"

Oregon County, having a population of 12,220 inhabitants (official census 1930), comes within Article 9 of Chapter 125, R. S. Mo. 1929, relating to juvenile courts in counties under 50,000 inhabitants.

Section 14171, R. S. Mo. 1929, provides for the appointment of a probation officer by the circuit judge:

"The circuit judge shall designate or appoint an officer of the county or some other person to serve as probation officer under the direction of the court in cases arising under this article. The court may also designate or appoint one or more persons to act as deputy probation officers."

Section 14175, R. S. Mo. 1929, provides that it is the duty of every county officer to aid the probation officer:

"It shall be the duty of every county, town or municipal officer or department, to render such assistance as lies within his power to further the objects of this article. All associations or other agencies receiving any child under this law are hereby required to give such information to the court or any officer appointed by said court as said court or officers may require."

The question in the instant case is whether the duties of prosecuting attorneys and probation officers are so incompatible as to render it improper that one person should hold both offices at the same time.

In the case of State ex rel. v. Bus, 135 Mo. l. c. 338, the Court in holding that where one officer has some supervision over the other, or is required to deal with, control, or assist him, the offices would be incompatible, said:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of

the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

Were it not for Section 14171, supra, which specifically provides that the circuit judge may designate an officer of the county, which necessarily includes the prosecuting attorney, the latter office might be said to be incompatible with the office of probation officer, inasmuch as by virtue of Section 14175, supra, it is made the duty of every county officer to render the probation officer every assistance possible.

Section 14174, R. S. Mo. 1929, provides the salary of the probation officer, in part, as follows:

"The probation officer may receive such salary as the circuit court may with the approval of the county court prescribe, not exceeding one thousand dollars per annum in counties of twenty thousand inhabitants and less than fifty thousand inhabitants, and not exceeding three hundred dollars per annum in counties of less than twenty thousand inhabitants."

The Court in the case of Board of Commissioners v. Wharton, 261 Pac. (Colo.) 4, 1. c. 5, in holding that an officer who may and does hold two offices is entitled to compensation, said:

"And where an officer may, and does, hold two offices, he is entitled to the compensation attached to each. Lindsley v. Denver, 64 Colo. 444, 453, 172 P. 707, and many cases there cited."

Mr. Percy W. Gullie

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June 15, 1937.

From the foregoing, it is the opinion of this department that it would be proper for the same person to hold the office of prosecuting attorney and the office of probation offices in counties of less than fifty thousand inhabitants, and further that said person would be entitled to the compensation of both offices.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

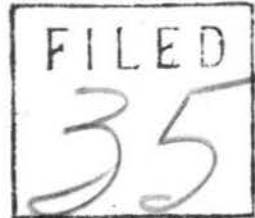
APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

ESCHEATS: When payment may be made out of Escheats Fund.

June 18, 1937. 625.



Mr. John L. Graves,
Bond Attorney,
Jefferson City, Missouri.

Dear Mr. Graves:

We wish to acknowledge your request for an opinion under date of June 11th, wherein you state as follows:

"This department would appreciate an opinion of your office on the enclosed court order of the Circuit Court of Nodaway County, Missouri, directing the payment of \$238.38 to the order of the Department of Public Welfare of the State of Ohio, which amount being the interest of Jennie Mitchell, deceased, in the above partition suit.

"The enclosed court order sets out the facts and we do not re-state them in this request for your legal opinion."

The court order makes the following recitals:

"Now on this 8th day of June, A. D. 1937 this cause coming on for hearing upon the application of the Department of Public Welfare of the State of Ohio by Mrs. Margaret M. Allman, it's director, and also the answer of Virgil Rathbun, Esquire, Prosecuting Attorney of Nodaway

County, Missouri and it appearing to the Court from evidence duly heard that heretofore, to-wit: on the 19th day of April A. D. 1937, more than ten days before this date, that there was served on the said Prosecuting Attorney of Nodaway County, Missouri a written notice of hearing on the 19th day of April A. D. 1937 and that service thereof was duly acknowledged by the said Prosecuting Attorney; and it also appearing to the Court that there was heretofore tried in this Court a certain proceedings wherein Isaac H. Crain, et al. were plaintiffs and Hattie Zinninger, et al. were defendants which was an action in partition and which was duly proceeded within this Court to a final decree, in which said final decree the Court found that one Jennie Mitchell, an incompetent person, confined in the Dayton State Hospital at Dayton, Ohio, was entitled to an undivided one-third interest in said land and it was by said decree ordered that distribution be made on that basis.

"The Court further finds that the purchase price of said land as sold at said partition sale, was the sum of \$875.00 and that the value of the interest of the said Jennie Mitchell in and to said land was, at the time of the rendering of the decree herein, of the value of \$238.38.

"The Court further finds that heretofore, to-wit: on the 1st day of August, A. D. 1923 the Sheriff of Nodaway County, Missouri paid into the hands of the Treasurer of the State of Missouri, as due the Jennie Mitchell, the sum of \$238.38 which amount is still in the hands of the Treasurer of the State of Missouri to the account of the Escheats Fund in said office of the Treasurer of the State of Missouri.

"THE COURT FURTHER FINDS that the said Jennie Mitchell was committed to the Dayton State Hospital on the 26th day of May, A. D. 1894

and died at said Dayton State Hospital on the 26th day of August, A. D. 1916 seized and possessed of her interest in the land partitioned herein, being the sister of the deceased. That no administration was ever granted on the estate of the said Jennie Mitchell in the State of Ohio, or elsewhere, and that she died intestate, unmarried and without issue.

"That at the time of her death there was due the Department of Public Welfare of the State of Ohio from the said Jennie Mitchell or her estate the sum of \$975.61 for her care, no part of which has been paid. That under the statutes of the State of Ohio administration can still be granted on her estate and the statute of limitations of actions does not run against the State of Ohio and the said claim of the Department of Public Welfare would be allowed if such an estate were opened, but that the said Jennie Mitchell died seized and possessed of no other property other than her interest in the land partitioned herein, the proceeds thereof being in the hands of the State Treasurer of the State of Missouri as above setforth. That the requirements of opening an estate for the said Jennie Mitchell, Deceased, would be unfair to the Department of Public Welfare of the State of Ohio who would be entitled to the entire proceeds thereof. That the costs of administration, considering the amount involved would be prohibitive.

"WHEREFORE, it is by the Court Ordered that the State Auditor of the State of Missouri shall issue his warrant on the State Treasurer of the State of Missouri to be paid out of the Escheats Fund of the State of Missouri for the sum of \$238.38 payable to the order of the Department of Public Welfare of the State of Ohio, the same to be credited to the account of the said Jennie Mitchell, Deceased, and to deliver said warrant to their Attorneys of record or Charles H. Morgan of Newton,

Jasper County, Iowa the authorized representative and agent of the said Department of Public Welfare of the State of Ohio and take his receipt therefor.

"It is further Ordered that a copy of this Order under the seal of the Court, shall be furnished to the State Treasurer of the State of Missouri and also that a copy of this Order, under the seal of the Court, be furnished to the State Auditor of the State of Missouri."

Section 623, R. S. Mo. 1929, provides as follows:

"Within twenty-one years after any money has been paid into the state treasury by an executor or administrator, assignee, sheriff or receiver, any person who appears and claims the same may file his petition in the court in which the final settlement of the executor or administrator, assignee, sheriff or receiver was had, stating the nature of his claim and praying that such money be paid to him, a copy of which petition shall be served upon the prosecuting attorney, who shall file an answer to the same."

From the above it will be noted that the court, in order for the State Auditor to issue his warrant on the State Treasurer, must ascertain two facts from the claim presented: (1) that the person is dead, and (2) that the person applying for the fund is rightfully entitled to the same.

In the instant case the court found both facts. The question might be raised whether a State is a "person" within the meaning of the above section. However, in our opinion, there is no doubt that the term as used would include a State.

In the case of *City of Louisville v. Commonwealth*, 62 Ky. 295, 1. c. 296, the Court points out that a general law concerning persons may include artificial as well as natural persons, including each separate State:

"A general law concerning persons may include artificial as well as natural persons; and every corporation is a legal person. Even the United States, and each separate State, and every county in each State, are quasi corporations, and each of all such corporations is, in law, a person."

Section 624, R. S. Mo. 1929, provides as follows:

"The court shall examine the said claim, and the allegations and proofs, and if it find that such person is entitled to any money so paid into the state treasury it shall order the state auditor to issue his warrant on the state treasurer for the amount of said claim, but without interest or costs; a copy of which order, under seal of the court, shall be a sufficient voucher for issuing such warrant."

The above section places the burden upon the court to examine the claim and the allegations of the claim.

In the instant case the court examined the claim and the allegations supporting it, and found in favor of the Department of Public Welfare of the State of Ohio.

The judgment shows that service was had on the Prosecuting Attorney of Nodaway County and by him acknowledged, and further that upon the cause coming on for hearing he made answer. This case was tried in the court which had previously determined the deceased's interests as a one-third interest in land, which interest brought \$238.38 at a partition sale, and was the amount paid into the hands of the Treasurer of the State of Missouri by the Sheriff of Nodaway County, Missouri.

June 18, 1937

The court thus having jurisdiction of the parties and of the subject-matter, this judgment can not be attacked collaterally, as stated by the court in the case of Leahy v. Mercantile Trust Co., 296 Mo. 561, 247 S.W. 396, 1. c. 404:

"Have we a judgment in the Circuit Court which can be attacked collaterally? Absent jurisdiction of parties to an action, and absent jurisdiction of the subject-matter, apparent upon the face of the record, a judgment may be attacked collaterally, but not otherwise."

And in the case of Mississippi and Fox River Drainage District v. Ruddick, 228 Mo. App. 1143, 64 S. W. (2d) 306, 1. c. 308, the court said:

"Where a court has jurisdiction of the subject-matter and of the parties, its judgment, in the absence of fraud in procuring it, imports absolute verity and can not be attacked by evidence outside the record. Strobel v. Clark, 128 Mo. App. 48, 106 S.W. 585. And where a court of general jurisdiction has acquired jurisdiction of a case, any subsequent error or irregularity will not oust it therefrom nor subject a judgment, in the exercise of that jurisdiction, to collateral attack. State v. Wear, 145 Mo. 162, 46 S.W. 1099. Its judgment, however erroneous, is not void so as to be subject to collateral attack. Harter v. Petty, 266 Mo. 296, 181 S. W. 39; Forest Lbr. Co. v. Mining Co. (Mo. Sup.) 222 S. W. 398; Abernathy v. R. Co., 287 Mo. 30, 228 S. W. 486."

Sections 623 and 624, supra, having been complied with, we are of the opinion that payment may be made out of the Escheats Fund to the order of the Department of Public Welfare of the State of Ohio, in the amount of \$238.38, being the amount of the claim found by the court to be due.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

TAXES:

House Bill No. 70, providing for the remission of taxes applies to personal and real taxes not reduced to judgment.

June 22, 1937.

6-24

Mr. Donald Gunn
1020 Telephone Building
1010 Pine Street
St. Louis, Missouri



Dear Sir:

This Department is in receipt of your request for an opinion, which reads as follows:

"I am writing you as attorney for William F. Baumann, Collector of the Revenue of the City of St. Louis.

We note that House Bill #70 has been passed by both branches of the legislature and is now awaiting the Governor's signature, to become a law. The bill contains an emergency clause and will become effective immediately. We, therefore, write you at this time so that we may have an opinion on certain questions in our possession immediately the act becomes effective, at which time we will undoubtedly be swamped by taxpayers seeking to take advantage of the bill.

Will you be good enough to advise us your answers to the following questions:

1. Does the act apply to both personal and real estate taxes for the year 1936?

2. Does the act waive court costs accumulated on suits filed prior to the passage thereof, but not reduced to judgment.
3. Does the act waive court costs accumulated on suits filed prior to the passage thereof, and reduced to judgment prior to said passage?
4. Does the act waive attorney's fees in situations such as were outlined in questions 2 and 3.
5. Does the act waive interest and title fees where these items have been heretofore included in a judgment obtained for delinquent taxes?
6. If question 5 is answered in the negative, does the act waive interest of 6% on judgment, which has accumulated since the rendition thereof, as provided by law on all judgments?"

House Bill No. 70, provides as follows:

"Section 1. In payment of the taxes assessed against any person whose name appears upon the personal delinquent lists of any year or years prior to January 1, 1937, and in payment of the taxes assessed against any real estate which appears upon the lists of delinquent and back taxes of any year or years prior to January 1, 1937, including delinquent taxes for the year 1936, the collectors of revenue of the counties and cities of this state are hereby empowered and directed to accept the original amount of said taxes as charged against any such

person or real estate relieved of the penalties, interest and costs accrued upon the same except the commission of said collectors of revenue, as same are now provided by law for the collection of delinquent taxes; provided, however, that such remission of penalties, interest and costs shall be in full if said taxes are paid not later than June 30, 1937; if paid after June 30, 1937; and not later than August 31, 1937, then such remission shall be 75 per cent of such penalties, interest and costs; if paid after August 31, 1937, and not later than October 31, 1937, such remission shall be 50 percent of such penalties, interest and cost; if paid after October 31, 1937, and not later than December 31, 1937, then such remission shall be 25 percent of such penalties, interest and costs, provided further, that after December 31, 1937, all penalties interest and costs as aforesaid shall be restored and be in full force and effect for the full period of time since their accrual and as if this act had not been passed.

Section 2. The provisions of this act shall cease and be of no effect after January 1, 1938.

Section 3. As the expeditious collection of such taxes and lists is necessary for the maintenance of the State Institutions and for the support of Public Schools, an emergency exists within the meaning of Section 57 of Article 4 of the Constitution of this State and also an emergency exists within the meaning of Section 36 of

Article 4 of the Constitution of this State, and this act shall be in force and take effect from and after its passage and approval by the Governor."

We take your questions up in the order they are enumerated in your request.

I.

In your first question you asked whether the act applies to both real and personal taxes for the year 1936. In Section 1 of the act, it specifically states that it shall apply to taxes assessed "against any person whose name appears upon the personal delinquent list", to taxes assessed "against any real estate", and to include "delinquent taxes for the year 1936."

Therefore, both real and personal taxes for the year 1936 are within the provisions of the act.

II.

The second question as to whether the act waives court costs accrued on suits filed prior to passage of the act but not reduced to judgment.

House Bill No. 70 is identical so far as this question is concerned, with a statute passed by the Legislature in 1933, Laws of 1933, page 423. The Supreme Court en banc in State ex rel Crutcher v. Koeln, 332 Missouri 1229, had the 1933 Statute before it for interpretation. It held that:

"As used in the Chapter on Taxation in the Revised Statutes; the expressions "commissions", "interest", "fees" and "costs", are included in the Generic term penalty."

In State ex rel McKittrick v. Bair, 333 Missouri 1, 63 S.W. (2d) 64, the court again had before it the remission statute in which case the collateral issues arising as to fees and costs were involved and the court en banc through Judge Hayes succinctly stated the rule as follows:

"So we think that under proper construction of the statute assailed in the instant case * * * that penalties are remitted in the manner provided in No. 80 upon proper tender of payment of the original taxes without penalties, fees or costs before judgment rendered."

The court said further:

"A taxpayer exercises the first option, may pay the original tax without more and all penalties are thereby discharged and his pending tax suit, if any, will be abated."

Under the rulings in the above case, we are of the opinion that the remission statute in question discharges all court costs against the delinquent taxpayer if he pays the original tax, plus the collector's commission, and the same has not been reduced to judgment.

III.

The third question relates to court costs when the suit to collect delinquent taxes has been reduced to judgment prior to the passage of the act. 12 C.J. paragraph 584, page 984, states:

"The Legislature may not under the guise of an act affecting remedies, annul, set aside, or impair final judgments obtained before the passage of the act."

This rule is recognized in the Bair Case, supra, wherein the court specifically points out that the rules laid down applied to suits that have not been reduced to judgment. The court said at l.c. 14:

"From the statute itself, it is obvious that the attorney's right to fees accrues as a whole after collection made or judgment rendered."

And further:

"It only fixes the status of the attorney as his right to compensation and the amount thereof when in the tax suit the liability therefor becomes fixed upon the taxpayer's property by the final judgment in the case."

And still further at l.c. 16:

"Under a proper construction of the statute * * * the penalties are remitted * * * before judgment rendered."

It is, therefore, our opinion when the delinquent taxes have been reduced to judgment, that the remission statute does not in any way apply.

IV.

The fourth question deals with attorney fees in suits which have or have not been reduced to judgment. The rules cited in answer to questions 2 and 3 apply to this question.

In the Bair Case, supra, concerning fees due tax attorneys, the court held:

"From the statute itself, it is obvious that the attorney's right to fees does not accrue *pari passu* with the rendering of each act of service in a given case, but accrues as a whole after collection made, or judgment rendered."

* * * *

"The fees of the *** attorney and of the interveners are subordinate to the general legislative power to impose, increase, diminish, or remit penalties for tax delinquencies;"

As the court held that the attorney fees were costs within the purview of the statute in that case, there can be no doubt but that attorney fees are remitted by the instant law in case the suit has not been reduced to judgment.

V.

Question five concerns the status under House Bill No. 70 of interest and title fees which have been included in a tax judgment.

In view of the rules set forth in answer to question three, it is our opinion that the act does not apply in any way to cases where judgment has been obtained prior to the effective date of House Bill No. 70, and so the interest and title fees must be paid by the taxpayer when he satisfies the judgment.

VI.

Question six deals with whether the act waives the interest of six percent upon the judgment as is provided for by statute in relation to judgments. This is similar to question five and comes within the same reasoning of question three. We hold that the remission statute does not waive the interest on judgments against delinquent taxpayers.

June 22, 1937

While it is not a part of the request, we quote for your information certain rules laid down in *State ex rel McKittrick v. Bair*, *supra*, which may assist you in this matter.

"Concerning this matter it is our view, (1) that none can proceed to final judgment before the expiration of the act on January 1 next; (2) a taxpayer exercising the first option, may pay the original tax without more and all penalties are thereby discharged and his pending tax suit, if any, will be abated; (3) exercising the second option, the taxpayer, if suit be pending against him, must in addition to the original tax pay one-fourth of all penalties formerly chargeable, in full discharge of the whole and the suit will likewise abate; and (4) the same process and result will apply in a general way to the remaining options. We think this mode of procedure seems practical and just, and accomplishes the legislative purpose, as we have determined it."

However, it should be noted that under House Bill No. 70, the collector's commission must be paid in every case.

CONCLUSION

It is therefore, the opinion of this Department that House Bill No. 70, which deals with the remission of delinquent taxes applies to both real and personal taxes and to taxes for the year 1936 and prior years.

It is further the opinion of this Department, that court costs and attorney fees in suits for delinquent taxes that have not yet been reduced to judgment are remitted by this statute and the taxpayer, exercising the first option, upon the payment of the original amount of taxes together with the collector's commission, is entitled

Mr. Donald Gunn

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June 22, 1937

to a discharge; exercising the second option, he is required to pay the original tax plus the collector's commission and one-fourth of the interest, penalties and costs and so on, depending upon the time at which the taxes are paid. However, all costs and attorney fees which are included in any judgment obtained prior to the effective date of House Bill No. 70, must be paid by the taxpayer redeeming.

Yours very truly,



HARRY G. WALTNER JR.
Assistant Attorney-General

APPROVED:

J. E. TAYLOR (Acting)
Attorney-General.

AO'K MR

RATES - MOTOR CARRIERS - JOINT SERVICE - Circumstances under which two carriers combining permitted routes are guilty of usurping unpermitted through routing.

August 3, 1937. 8/9

Hon. G. Derk Green,
Prosecuting Attorney of Linn County,
Marceline, Missouri.

FILED

35

Dear Sir:

A request for an opinion has been received from you under date of April 19, 1937, such request being in the following terms:

"The State Highway Patrol and a representative of the Public Service Commission filed a complaint a few days ago before a Justice of the Peace of this County against John Latta, who operates a truck line out of Brookfield, charging him with accepting property for transportation from a point on a regular route destined to a point on a regular route without having a certificate of convenience and necessity therefor. The facts involved were new as far as I could ascertain, and the Public Service Commission representative did not have any ruling from his department covering a similar fact.

"It was suggested and agreed that before this prosecution continued, an opinion should be obtained from your office. Then the case can probably be disposed of without trial, based upon your opinion.

"The facts are as follows: Defendant Latta has a permit for a regular route between St. Joseph and Brookfield, Missouri. Byers Transportation of Kansas City has a permit for a regular route from Kansas City to St. Joseph, Missouri. The Churchill Truck Lines have a permit for regular route between Kansas City and Brookfield. This particular shipment was shipped by the Koch Butchers Supply Company from North Kansas City, Missouri, to Johnson Brothers at Brookfield, Missouri, and was billed "Byers c/o Latta"

Hon. G. Derk Green

August 3, 1937.

on March 6, 1937. This shipment was delivered to the Byers Trucks, and was by them hauled to St. Joseph. When it arrived in St. Joseph, the Byers people unloaded it at their ware-house and notified Latta that it was there for delivery to Brookfield. Previous to that time, Latta had called at the Byers ware-house for the purpose of accepting this, but it had not arrived at the time he called for it.

"This indicated that he was expecting the shipment. However, when he was later called by Byers and notified that the shipment was there, Latta refused to accept it, because he had no authority to accept shipments originating in Kansas City and destined for Brookfield. The Byers people then stated that they would deliver the shipment to some other authorized trucker for delivery to Brookfield. Latta thereupon telephoned to the shipper, and upon instructions from the shipper, accepted the shipment at the Byers ware-house and delivered it in Brookfield. His arrest was brought about upon the complaint of Churchill. Latta did not have authority to render joint service with Byers from Kansas City to Brookfield.

"The shipper, Koch Butchers Supply Company, explaining the routing through Byers and Latta, claims that they could not find any other truck line with equipment of adequate size to handle the shipment which consisted of a crated counter approximately 13 feet long, 3½ feet thick and 4½ feet high. However, the equipment of Churchill can be shown to be sufficient to handle this shipment, and of equal capacity of Latta's.

"Patrolmen say that this is merely a means of evading the law, and that they have had considerable trouble with carriers 'chiseling' in this way. However, I do not believe we could establish by evidence, the fact that Latta has done this before.

"We would like your opinion as to whether or not Latta is guilty of a violation by accepting this shipment. In view of the fact that the Public Service Commission and the Highway Patrol are not positive on this point,

Hon. G. Derk Green

August 3, 1937.

and no similar case having been called to my attention, we considered it proper to ask for this opinion from your office. Please advise me as soon as possible, as this case is being delayed awaiting your opinion."

Laws of Missouri of 1935, page 321, Section 5267(e) provides as follows:

"It shall be unlawful for any motor carrier, except one having a certificate of convenience and necessity authorizing such service, to accept persons or property for transportation from a point on a regular route destined to a point on a regular route, or where through or joint service is being operated between such points, and any motor carrier so offending shall be guilty of a misdemeanor and punished as provided by section 5275 of this act."

You do not state in your letter whether John Latta is a common motor carrier or a contract hauler but it would seem to make no difference under which kind of permit he operates, as Laws of Missouri of 1931, page 304, Section 5270(e) contains the same provision applying to contract haulers.

Although the language of the section above quoted is not as clear as it might be, we believe that it is sufficiently definite to make it unlawful for John Latta and Byers Transportation Company to maintain joint service between Kansas City and Brookfield under an agreement whereby Byers Transportation Company would do the transporting from Kansas City to St. Joseph and Latta from St. Joseph to Brookfield. Nor would the fact that only one shipment was made prevent the acceptance of this one shipment from being a violation of law, because if Latta and Byers Transportation Company should decide to make and carry out such an arrangement for joint service, the first shipment pursuant to this arrangement would be as much of a violation of law as the last such shipment.

On the other hand, we believe that it is equally clear that if a shipper like Koch Butchers Supply Company should engage Byers Transportation Company to haul a shipment from Kansas City to St. Joseph, without the knowledge of Latta, and after the shipment had arrived in St. Joseph the shipper

Hon. G. Derk Green

August 3, 1937.

should for the first time communicate with Latta and enter into a contract with Latta for the carriage by him of this shipment from St. Joseph to Brookfield, the acceptance by Latta of this shipment would be precisely within the terms of his permit, and would not be illegal. Of course, if Latta made a practice of accepting freight under these circumstances, it would tend to show that even although he might not have advance knowledge of the proposed shipments from Kansas City to St. Joseph, that he was deliberately avoiding such advance knowledge so that he could evade the charge of being a party to prohibited joint service, but under the facts as stated in your letter, no practice of this sort could be established, and therefore your inquiry must be treated as dealing only with a single instance of this kind of a shipment.

We will also assume that the actual contract between Latta and the shipper was not entered into and did not become binding until the time of the telephone conversation between Latta and the shipper after the goods had arrived in St. Joseph. We thus have a situation, as we interpret your letter, where the shipper at the time of shipment contemplated a through shipment under a joint service from Kansas City to Brookfield, where the billing showed on its face that this was the intention, where Latta knew this to be a fact before the shipment reached the junction point, declined to accept the shipment after its arrival at the junction point, but then, within a short time, entered into a contract with the shipper to complete the carriage and did complete it so that it was handled exactly in the manner which the shipper intended at the time of shipment from the point of origin.

We have been unable to find any judicial constructions of the statutes above referred to, nor have we been able to find any Missouri cases which would give us any assistance. However, the case of Baltimore & Ohio Southwestern Railroad Co. v. Settle, 260 U.S. 166 (1922), involved a situation so similar to the facts in your case, and contains an analysis and argument which fits so well the situation in your case, that we believe that it will serve as the basis for this opinion.

In the Settle case a shipper at point of origin delivered to a railroad freight consigned to Oakley, paid the freight for this shipment and received at Oakley delivery of the loaded cars, and then, within a few days, reshipped the cars by the same railroad from Oakley to Madisonville, also paying the freight for that shipment. The through rate from the point of origin to Madisonville was higher than the total of the local rates from the point of origin to Oakley, and

Hon. G. Derk Green

August 3, 1937.

from Oakley to Madisonville, and the railroad sued the shipper for the difference between the total freight paid by the shipper and the amount which would have been paid under the through rate.

The court said:

"The contention of the shippers is that the character of a movement, as intrastate or interstate, and, hence, what the applicable rate is, depends solely upon the contract of transportation entered into between shipper and carrier at the point of origin of the traffic; that when an interstate shipment reaches the destination named in this contract and, after payment of charges, delivery is taken there by the consignee, the contract for interstate transportation is ended; that any subsequent movement of the commodity is, of necessity, under a new contract with the carrier and at the published rate; and that, since this lumber came to rest at Oakley before that new movement, the reshipment from there to Madisonville (both stations being within the State of Ohio), was an intrastate movement. * * * whether the interstate or the intrastate tariff is applicable depends upon the essential character of the movement. That the contract between shipper and carrier does not necessarily determine the character was settled by a series of cases in which the subject received much consideration. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498; *Ohio Railroad Commission v. Worthington*, 225 U.S. 101; *Texas & New Orleans R. R. Co. v. Sabine Tram Co.*, 227 U.S. 111; *Railroad Commission of Louisiana v. Texas & Pacific Ry Co.*, 229 U.S. 336. And in *Baer Brothers Mercantile Co. v. Denver & Rio Grande R. R. Co.*, 233 U.S. 479, 490, this Court held that a carrier cannot, by separating the rate into its component parts, charging local rates and issuing local way bills, convert an interstate shipment into intrastate transportation, and thereby deprive a shipper of the benefit of an appropriate rate for a through interstate movement.

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August 3, 1937.

"* * * Madisonville was at all times the destination of the cars; Oakley was to be merely an intermediate stopping place; and the original intention persisted in was carried out. That the interstate journey might end at Oakley was never more than a possibility. Under these circumstances, the intention as it was carried out determined, as matter of law, the essential nature of the movement; and hence that the movement through to Madisonville was an interstate shipment. For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a through shipment; and when the intention with which a shipment was made is in issue, the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic.

"The mere fact that cars received on interstate movement are reshipped by the consignee, after a brief interval, to another point, does not, of course, establish an essential continuity of movement to the latter point. The reshipment, although immediate, may be an independent intrastate movement. The instances are many where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed part of it, even though some further shipment was contemplated when the original movement began. Shipments to and from distributing points often present this situation, if the applicable tariffs do not confer reconsignment or transit privileges. The distinction is clear between cases of that character and the one at bar, where the essential nature of the traffic as a through movement to the point of ultimate destination is shown by the original and persisting intention of the shippers which was carried out."

Hon. G. Derk Green

August 3, 1937.

We have felt warranted in quoting so much of the opinion in this case because Mr. Justice Brandeis expresses himself in clear and forceful language which, mutatis mutandis, applies with equal force to your case. In both the Settle case and your case, the question is whether a combination of two local services over a route for which there is an authorized through service can be used to the detriment of the through service. In the Settle case this made a difference in rates, whereas in your case it means a difference in the identity of the carriers, but we do not regard this difference as of any importance. In both cases the original intention of the shipper, although it could have been changed at the intermediate junction point, was not changed but was persisted in and carried out as planned. In both cases the contract of carriage between the intermediate point and the point of ultimate destination was not entered into until the goods had come to rest at the intermediate point, and the first lap had been finished and the first contract of carriage completely executed.

The only significant difference between the Settle case and your case is that in the Settle case the parties to each of the two contracts were the same, whereas in your case the contracts are with different carriers. However, since Latta knew about the proposed shipment before it arrived at the junction point, since the shipment was billed through him, and since after an unimportant protest he ultimately carried out his part of the carriage exactly according to the originally planned intention of the shipper, we believe that this eliminates the importance of this variation from the Settle case. The last paragraph quoted above from the Settle case shows that it would not always be easy to draw the line in cases of this kind, but in your case we believe that, even in a criminal prosecution, the facts would bring Latta across the liability line.

In conclusion, it is our opinion that under the facts stated in your letter, John Latta was guilty of a violation of the Public Service Commission Laws in accepting the shipment in question.

Very truly yours,

EDWARD H. MILLER,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

COUNTY BUDGET ACT:

HOUSE BILL 177:

CIRCUIT CLERKS: Shall only receive additional compensation out of excess which exists in any class at the close of the fiscal year; the transfer of the fund can be made under the authority of Sections 12167 and 12168, R. S. Mo. 1929.

August 24, 1937

Honorable G. Derk Green
Prosecuting Attorney
Linn County
Marceline, Missouri



Dear Sir:

This Department is in receipt of your letter of June 26 relating to the budget as affected by the recent act relating to the salary of circuit clerks. Your letter is as follows:

"I would like to request an opinion in regard to the effect of the circuit clerk bill upon payments made as compensation to the Circuit Clerks through the county court. This bill was signed by Governor Stark on June 22nd and contained an emergency clause. The county court suggests to me that money for the payment of this additional compensation was not provided for in the 1937 budget. As a result, there is no money in Class 4 to pay for this and this is the class out of which such expense is payable. However, there is plenty of money in Class 3 in this county, out of which the additional amounts could be paid, and it is possible that there will be money left in Class 4 at the end of the year.

"We would like an opinion as to whether or not this additional money to the circuit clerk can be paid out of funds in

Class 3 at the present time. Also, whether or not this amount can be paid to the circuit court out of any funds remaining in Class 4 at the end of the year after payment of other items covered by the budget.

"We would also be glad to have your opinion generally covering the interpretation of this bill, its effect and the method in which the matters involved should be dealt with by the county court and the county treasurer."

According to the provisions of the County Budget Act, page 340 et seq., Laws of Missouri 1933,

"The county courts of the several counties of this state are hereby authorized, empowered and directed and it shall be their duty, at the regular February term of said court in every year, to prepare and enter of record and to file with the county treasurer and the state auditor a budget of estimated receipts and expenditures for the year beginning January 1, and ending December 31."

Under Section 8, page 345, is the following provision:

"The county clerk shall within five days after the date of approval of such budget estimate, file a certified copy thereof with the county treasurer, taking his receipt therefor, and he shall also forward a certified copy thereof to the state auditor by registered mail.

There is no provision in the Act empowering the county court to revise, alter or change the budget after it has been completed and filed in the proper manner. The Act affecting the salary of the circuit clerks being passed since the filing of the budget, consequently, no provision has been made in the various counties for paying the additional compensation of the clerks.

Section 1 of the Act places the solemn duty on the county court of sacredly preserving priority of payment according to the classes as enumerated in Section 2.

In view of the fact that the Act affecting the salaries of circuit clerks, and the same also applies to the Act restoring the county treasurer, we can come to no other conclusion than that there is no manner by which these officers can be paid out of the first five classes of the Budget Act at the present time. In fact, Section 3, page 342, of the Act, contains an express provision to the following effect:

"No officer shall receive any salary or allowance for supplies until all the information required by this section shall have been furnished."

Therefore, there remains but one possibility as far as the classes are concerned, and we refer to class six, page 343, which is as follows:

"After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose. Provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class

six. Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

The salaries of the officers being legal demands and claims, we deem the expression "for any lawful purpose" to be the authority for the county court to pay the officers, provided the conditions, as imposed in class six, can be complied with.

Referring to your question as to a balance or surplus remaining in any one class, the Budget Act did not repeal or abrogate the entire financial structure of the county but only repealed such statutes as were in conflict therewith.

We therefore refer you to Sections 12167 and 12168, Revised Statutes Missouri 1929; said sections being as follows:

"Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

"Nothing in the preceding section shall be construed to authorize any county court to transfer or consolidate any funds not otherwise provided for by law,

August 24, 1937

excepting balances of funds of
which the objects of their
creation are and have been
fully satisfied."

The above sections have existed in our statutes for many years prior to the passage of the Budget Act, yet we are of the opinion that they do not in anywise conflict with the terms of the Budget Act and can be applied thereto.

Therefore, if at the close of the fiscal year there remains any funds in any class, after the payment of all items which have been included in the budget, we are of the opinion that such excess may be used for the payment of the increase in the salary of the circuit clerks.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN LC

Taxation: The Robinson Clinic, Inc. *not* exempt from the
Sales Tax: provisions of the 2% Sales Tax Act.

September 23, 1937.

Hon. W. W. Graves,
Prosecuting Attorney
Jackson County,
Kansas City, Mo.

Attention: Mr. Samuel S. Shapiro.

Dear Sir:

This office acknowledges receipt of yours of September 17, 1937 requesting an official opinion from this department as to whether or not The Robinson Clinic, Inc. of Kansas City, Missouri is within the exemptions set out in Section 46 of the Sales Tax Act, Session Act 1937, page 568, and attached to said request was an "outline of the facts" set out by The Robinson Clinic, Inc., which outline is as follows:

THE ROBINSON CLINIC, Inc.

1-Incorporated in Jackson County, Missouri on January 3, 1934 under the act relative to charitable corporations, Article X of Chapter 32 of R. S. Mo. 1929.

2-The Robinson Clinic, Inc. owns and operates the Neurological Hospital, located at 27th & Paseo, in Kansas City, Missouri, affording hospitalization to nervous and mental patients. The hospital is available to charity patients and the patients of any reputable doctor.

3-The following figures are those of the various hospitals in Kansas City, Missouri as submitted to the American Medical Association for the year 1936, showing the comparative charitable use of each:

	FREE	PART PAY	FULL PAY
Neurological Hospital	7%	33%	60%
Menorah Hospital	4%	26%	70%
Research Hospital	3%	--	97%
St. Joseph's Hospital	18%	17%	65%
St. Luke's Hospital	6%	23%	71%
St. Mary's Hospital	16%	17%	67%
Trinity Lutheran	1%	10%	89%

These figures show that the Neurological Hospital carries a greater percentage of



part pay patients than any of the other hospitals, and a greater percentage of free patients than four of the seven listed.

Free patients are defined as those paying nothing. Part pay patients are defined as those who do not pay sufficient to compensate for their keep; they are an actual loss.

4-The top salary paid to any individual is \$100 per month. No profits are paid to any individual; what profits there have been so far have been put into the purchase of equipment and purchase of the building.

5-The Neurological Hospital is fulfilling a civic purpose and need; and unquestionably relieving the state of the care of patients who would otherwise be in a state institution.

If that institution is exempt from the provisions of this Act, it is by virtue of the provisions of Section 46 of said Act, which is as follows:

"In addition to the exemptions under Section 3 of this Act there shall also be exempted from the provisions of this Act all sales made by or to religious, charitable, eleemosynary institutions, penal institutions and industries operated by the Department of Penal Institutions or educational institutions supported by public funds or by religious organizations, in the conduct of the regular religious, charitable, eleemosynary, penal or educational functions and activities, and all sales made by or to a State Relief Agency in the exercise of relief functions and activities."

If The Robinson Clinic, Inc. is within the class exempt by said Section, it will have to fall within one or more of the following classifications of said Section, to-wit:- A charitable institution or eleemosynary institution.

In determining this question it has been necessary to make an examination of the Certificate and Articles of Incorporation of said corporation, and we find that said clinic was incorporated under Article X, Chapter 32, R. S. Mo. 1929 for the following purposes:

"To own, operate and conduct a charity and pay hospital, a school for teaching the vocation of nursing, an asylum for the care, education and maintenance of orphans and indigent persons and also other enterprises of a benevolent and charitable nature; to furnish medical aid and surgical aid to such persons as may, under regulations prescribed by the Board of Directors Association, become attendants at said school, patients or inmates of said hospitals, asylums or any other benevolent and charitable enterprises, conducted by said association; to take, hold, alienate, mortgage and convey real and personal property; to borrow money and execute notes, bonds, mortgages and deeds of trust securing the payment of same on any property owned by said corporation; to receive, accept and retain any trust, the purposes whereof is within objects of the association and may receive and take any deed, bequest or devise in its corporate capacity any property, real and personal, for the uses and purposes of such trust and execute the trust so created; to invest and reinvest its money; and to sell, let or lease its property for the purpose of the proper exercise of its power herein granted."

An alleged constitutional or statutory grant of exemption from taxation will be strictly construed. 61 C. J., page 392, para. 396; State ex rel. Y. M. C. A. v. Gehner, 11 S. W. (2d) 30.

A Claim for exemption cannot be sustained unless it is thoroughly found to be within the letter and spirit of the law. Readlyn Hospital v. Hath, 272 N. W. 1. c. 92.

We find from the "outline of the facts" attached to your letter requesting this opinion that the business of The Robinson Clinic, Inc. for the year 1936 consisted of 7% free patients, which service would be classed as purely public charity; that 33% of said business was partly paid or was from those from whom not sufficient pay was received to compensate the hospital for their keep and would be classed as partly public charity subjects; and that 60% of the business of said institution was from patients who paid the full amount of the charge for their treatment and to whom charity does not apply.

Under the foregoing rule of strict construction of exemption statutes, the character of the charity referred to in the foregoing exempting section, should be a purely public charity.

We find that The Robinson Clinic, Inc. was incorporated under the Act of the Missouri Statutes relative to charitable corporations, however the taxing authorities are not bound by the Articles incorporating an institution, if its activities are not within the purposes for which such institution is incorporated. 61 C. J., page 459, Section 513; Benjamin Rose Institution v. Meyer's, 110 N. E. 924:

"To be entitled to exemption, an institution must be purely charitable and where its primary activities are other than charitable and its charitable activities are subordinate and incidental, it is not entitled to exemptions as a charitable or benevolent institution." 61 C. J., page 455, Section 505; 61 C. J., page 459, Section 514.

Although The Robinson Clinic, Inc. has been incorporated under the Act relative to charitable corporations and the "outline of the facts" included with your request reveals that this clinic owns and operates the Neurological Hospital which does some charitable work, the rule is that even though an institution may be incorporated as a charitable institution, yet if a substantial portion of its activities is not charitable, it cannot claim exemptions from taxation. (see cases cited supra). It further appears that 7% of the patients cared for by this clinic are those who would be termed as purely public charity patients, while 60% of the patients are full

Hon. W. W. Graves.

-5-

September 23, 1937.

page patients for whom the exemption, on account of being charitable patients would not apply, and 33% of the patients pay some of the amount, but not sufficient to compensate the institution for their keep.

CONCLUSION

In view of the foregoing rules of strict construction of Tax Exemption Statutes and the fact that only a small percent of the patients of The Robinson Clinic, Inc. are charity patients, it is the opinion of this Department that said clinic is not exempt from the provisions of the 2% Sales Tax Act.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General.

APPROVED:

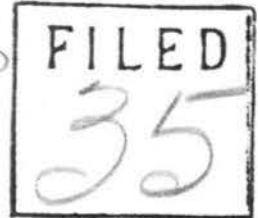
J. E. TAYLOR
(Acting) Attorney-General.

TWB:LB

COUNTY COLLECTOR: Is entitled to be reimbursed by county court for postage expended during term if not barred by five year statute of limitations.

October 16, 1937

Hon. Joe Grandhomme
Collector of Revenue
St. Francois County
Farmington, Missouri



Dear Sir:

This department is in receipt of your letter of September 8, 1937, in which you request an opinion, as follows:

"It has been a custom in this county for the collectors to add to the tax bill for postage on all statements rendered, whereas if said taxes were not paid the collector would take the loss of his postage. The same being true on all commercial mail. Whereby we have a loss in postage of an amount of \$100 to \$150. per year.

In talking to one of my fellow collectors, he informs me that he has an opinion from you which states that the collector is entitled to be reimbursed from the county for all the loss in postage.

In view of the above, since the first of this year 1937, the county has been reimbursing me with my postage loss, on the strength on the above opinion.

Now the point that I would like to know, is can I receive reimbursement from the county for the loss in postage for the past years of my term."

The opinion referred to in your letter, we take, to be one written to Morgan M. Moulder, Prosecuting Attorney.

Hon. Joe Grandhomme

October 16, 1937

of Camden County, Missouri, on January 20, 1937, in which it is concluded, as you state, that a county collector is entitled to be reimbursed for stamps and postage used in the carrying out of his duties. However, this opinion does not directly pass upon the question before us here.

In *Ewing v. Vernon County*, 216 Mo. 681, a suit was filed by a recorder against the county for the recovery of postage expended by the recorder over a period of four years one and one-half months. The court held that the recorder was entitled to be reimbursed for this postage and allowed recovery for the full period. The court said at l.c. 695:

"Where * * * the law requires an officer to do what necessitates an expenditure of money for which no provision is made, he may pay therefor and have the amount allowed him. * * * Thus it is customary to allow officers expenses of fuel, clerk hire, stationery, lights and the office accessories."

In the early case of *Boone County v. Todd*, 3 Missouri 140, the county clerk of Boone County, Missouri, brought a mandamus action to compel the county court to allow and pay a claim for several years rent (the opinion does not state the number of years) for an office which the clerk furnished out of his own funds. The court held that the clerk was entitled to be reimbursed for the total amount of rent for the several years, for the office he was compelled to furnish, where the county court had neglected to furnish the same.

The decisions in *Saylor v. Nodaway County*, 60 S.W. 1057, and *St. Louis County Court v. Ruland*, 5 Missouri 268, are to the same effect. Recovery was allowed for the full amount of the officers' expenditures in connection with the legitimate expenses incurred in the performance of his official duties.

While we do not find a case in this state or in any other state where this point has been directly passed upon, in the cases above cited, the officers were contending for and were permitted to recover for their expenses, as in the *Ewing Case*, for a period of more than four years.

Hon. Joe Grandhomme

October 16, 1937

The point before us here was not raised in these cases but the effect of these holdings, we think, is that the officer may recover their necessary expenditures for the past years of his term.

The account for postage which the collector may have, under the opinion of this department heretofore mentioned, is an obligation or liability on the part of the county to the collector. This being such an account, it would fall within the five year statute of limitations, being Section 862, R.S. Missouri 1929, which is in part as follows:

"Within five years: First, all actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 861, * * * *."

Section 861, R.S. Missouri 1929, is the ten year statute of limitations providing when actions upon any writing shall be barred.

CONCLUSION

Therefore, it is the opinion of this department that the collector is entitled to be reimbursed for all postage expended by him in the carrying out of his official duties, but that an action to enforce the payment of said postage account would be barred by the five year statute of limitations, if said statute is properly plead and relied upon.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

Dec. 17, 1937

fact, is in a form which this Department has heretofore approved. It is necessary that the publisher's affidavit and the affidavit of publication strictly comply with the terms of said section and by a comparison of the same, which you enclosed, we find that the two material elements in which the respective forms differ are: "consecutively for more than one year prior to the first publication" and "the terms of an act of the fifty-sixth general assembly of the State of Missouri passed at its regular 1931 session and approved May 14, 1931, repealing Section 13775, Chapter 114." There are other differences which we deem in law as immaterial, but due to the fact that the two forms of affidavits differ so materially in the two instances which we present, and as the notices are always strictly construed, we deem the present form of the publisher's affidavit to be no longer suitable for use.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

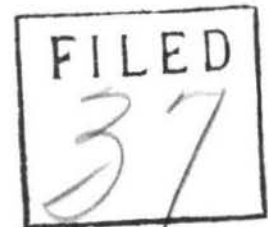
J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

Municipalities: Cities of the fourth class are prohibited from issuing warrants in excess of the amount on hand in the treasury, by Section 7015, R. S. 1929. A warrant so issued is void.

May 8, 1937.

5-13



Honorable B. W. Harwood, Jr.,
Mayor
Camdenton, Missouri

Dear Sir:

This Department is in receipt of your letter of April 28, 1937, requesting an opinion, as follows:

"The City of Camdenton is a city of the fourth class and has issued warrants amounting to about \$2,000.00 under the provisions of sections 7192, 7193, and 7195, R. S. Mo. 1929. All of these warrants were issued without money in the treasury to pay same. All of them have been presented for payment and on all the treasurer has certified 'no funds' on the back thereof and signed his name.

"Section 7015, R. S. Mo. 1929, Chapter 38, Article 8, relating to 'Cities of the Fourth Class' forbids the drawing of any warrant, unless money is in the treasury to pay same.

"The city of Camdenton will hold their next regular meeting of the board of aldermen next Monday night at which I will be pressed to sign my name to warrants in payment of the salary of the city marshal and in payment of the claims of other creditors. No money is in the treasury to pay same, unless the previously issued warrants are void.

"As mayor, elected to my first term this April, I respectfully request your opinion by return mail or as soon as possible, whether or not, under the circumstances indicated, this city can legally issue warrants."

Section 7015, R. S. Mo. 1929, is in part as follows:

"No money shall be paid out of the treasury except on a warrant signed by the mayor and attested by the city clerk. No warrant shall be drawn upon the treasurer, nor shall any ordinance appropriating money be passed, unless there is an unexpended balance to the credit of the city in the fund in the treasury upon which such warrant is drawn, to meet such warrant, or a sufficient sum of unappropriated money in the fund in the treasury upon which such ordinance is drawn, to meet such ordinance. * * * * *

In the case of O'Dell v. Scranton, 103 S. W. 570, the Court had before it a question of the legality of a warrant issued by a city of the fourth class in excess of the funds in the city treasury. In passing upon this question the Court said at l. c. 575:

"In the exercise of the power in question, the city was restricted by the following provision in its charter (section 5954, Rev. St. 1899 (Ann. St. 1906, p. 3008)): 'No money shall be paid out of the treasury except on a warrant signed by the mayor and attested by the city clerk. No warrant shall be drawn upon the treasurer, nor shall any ordinance appropriating money be passed unless there is an unexpended balance to the credit of the city in the fund in the treasury upon which such warrant is drawn, to meet such ordinance.' The

"fact is conceded that, when the act of the mayor was ratified by the board and the warrant was drawn, the funds in the treasury that could be used for its payment were insufficient for that purpose. The warrant was for the sum of \$219, and the money in the treasury amounted to but \$185.50. The board, therefore, had no power to issue the warrant, and its act, in so doing, must be held void. The purpose of the statute under consideration is in the highest degree salutary. It is to prevent cities of this class from going into debt."

In *General Mfg. Co. v. City of Portageville*, 28 S. W. (2d) 119, a case in which the same question was before the Court as in the *O'Dell* case, *supra*, it is said at l. c. 120:

"The warrant was issued and presented April 1, 1928, but not paid for want of funds. This warrant was void because there were no funds in the treasury with which to pay it when it was payable."

In *Cheaney v. The Town of Brookfield*, 60 Mo. 53, the Court at l. c. 54, in deciding a case similar to this question said:

"And although a warrant signed by the proper officer, prima facie imports validity, and a subsisting cause of action, (Dill. Mun. Corp., Sec. 411) yet it is always competent for a municipal corporation, as was done in the court below, even after the issuance of a warrant upon its treasury, to set up the defense of ultra vires. * * * * *

"Those who deal with the officers of a corporation must ascertain, at their peril, what they will indeed be conclusively presumed to know, that these public agents are acting strictly within the sphere limited and prescribed by law, and outside of which they are utterly powerless to act."

May 8, 1937.

Therefore, it is our opinion, in view of the above cases, that Section 7015, R. S. Mo. 1929, does not authorize the officers of cities of the fourth class to issue any warrant which is drawn for an amount in excess of the amount that is on hand in the city treasury, but specifically prohibits such action by said city officials. Any such warrant so issued is void, illegal and ultra vires, and in a suit to enforce the collection of a warrant so issued, said city has a valid defense which may be set up and will defeat the collection of said warrant or warrants.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

LLB:EG

TAXATION: House Bill No. 70 is applicable to taxes levied for drainage or levee purposes.

June 22, 1937.

Mr. Roy W. Harper,
Attorney for County Collector,
Caruthersville, Missouri.



Dear Mr. Harper:

We wish to acknowledge your request for an opinion under date of June 16th, wherein you state as follows:

"Will you please advise us if the act recently passed by the Legislature and signed by the Governor knocking off penalties on delinquent taxes, subject to certain conditions and for certain times, applies to drainage and levee taxes."

This department, under date of April 11, 1933, in an opinion rendered to Hon. Forrest Smith, State Auditor, a copy of which is enclosed, in answer to an inquiry whether Senate Bill No. 80 dealing with the remission of penalties, interest and costs on delinquent and back taxes which became delinquent on or before January 1, 1933, was applicable to taxes levied for drainage or levee purposes, held:

"In answer to your sixth inquiry, to-wit, is this Senate Bill applicable to taxes levied for drainage or levee purposes, be advised that it is the opinion of this office that this bill applies to such taxes."

You make inquiry whether House Bill No. 70 passed by the 59th General Assembly and signed by the Governor on June 8, 1937, remitting penalties, interest and costs on

delinquent and back taxes which became delinquent on or before January 1, 1937, is applicable to taxes levied for drainage or levee purposes.

House Bill No. 70 is substantially the same as Senate Bill No. 80 with the exception of the years to which they are applicable, and the former bill saving to the collectors their commissions on delinquent taxes.

The Springfield Court of Appeals in the case of Pate v. Ross, 84 S. W. (2d) 961, has had occasion to pass on the question of whether Senate Bill No. 80, referred to in the aforementioned opinion to Hon. Forrest Smith, applied to drainage districts.

The Court in holding that it did include taxes assessed for drainage district purposes, said:

"In applying the foregoing rules of construction to this case, we find the title to the act called Senate Bill No. 80, found on page 423, Laws 1933, reads as follows: 'An Act in relation to delinquent and back taxes and to personal and land delinquent tax lists, and for the relief of persons whose names or property appear on said delinquent lists or either or any of them or whose personal or real estate taxes became delinquent on or before January 1, 1933, with an emergency clause.'

"The title clearly indicates the primary legislative intent to be for the relief of all persons whose personal or real estate taxes had become delinquent on or before January 1, 1933. What were the conditions at the time the act was enacted? It is well known that many tax-

payers were in financial distress (and for that matter they still are). On all sides were cries for relief from the situation in which our people found themselves. The Legislature apparently heeded those cries and enacted the law under consideration as well as other relief legislation. The fact that the emergency clause refers to the necessity of expeditious collection of taxes for the maintenance of schools and state institutions as constituting an emergency, does not, in our opinion, change one iota the object declared in the title of the act which was fundamentally to relieve the taxpayers from the burdens of penalties and cost accrued on their delinquent taxes. There is nothing in the act to indicate the Legislature intended to limit that relief to taxes for the support of state institutions and public schools. No mention is made in the emergency clause of taxes due counties or other political subdivisions. Surely it would not be contended that penalties due on county taxes were not intended to be included in the remission of costs. The act simply refers to taxes assessed against any real estate. Certainly the tax levied to pay the costs of drainage improvements is a tax assessed against land and is payable at the same time and collected in the same manner as are other taxes. Section 10823, R. S. Mo. 1929 (Mo. St. Ann. Sec. 10823, p. 3546); Chilton et al. v. Drainage District (Mo. App.) 63 S. W. (2d) 421.

"We perceive no more reason to relieve the taxpayer from the penalties and costs in the one case than in the other. If the avowed object of the law in question was for the relief of the taxpayer, then to hold the owner of land against which the drainage tax has been assessed, liable for the penalties that had accrued, would partially, at least, defeat the very object of the law itself.

"It is suggested that Senate Bill 94, passed at the same session of the Legislature, Laws 1933, p. 425 (Mo. St. Ann. Secs. 9945, 9949, et seq., pp. 7984-7988 et seq.), by which the whole system of collecting general taxes was changed, but which provided that nothing therein should change the method of collecting drainage assessments, indicates a legislative intent to differentiate between drainage taxes and other taxes. We can perceive reasons why the Legislature placed that proviso in the law above referred to, but no good reason appears for considering that question. Senate Bill 94 has nothing to do with the remission of penalties provided for in Senate Bill No. 80. The latter stands alone as a relief and remedial measure. It is said that, 'Under the general rule, statutes providing for the remission of penalties being remedial, should be liberally construed; and should be extended to all cases coming within the reason of the rule of the statutes.' 61 C. J. 1493. The only case called to our attention in which the particular question here involved was passed upon held that drainage taxes as well as state, county, and school taxes were included in a general statute relieving the taxpayer from penalties. *Livesay v. DeArmond et al.*, 131 Or. 563, 284 P. 166, 68 A. L. R. 422.

"We think a fair construction of the statute requires us to hold that it includes taxes assessed for drainage improvements."

The same reasoning would also clearly be applicable to the remission of penalties, interest and costs on taxes levied for levee purposes.

June 22, 1937

In view of our former opinion to Hon. Forrest Smith, State Auditor, on April 11, 1933, and the opinion of the Springfield Court of Appeals, it is the opinion of this department that House Bill No. 70, passed by the 59th General Assembly and signed by the Governor on June 8, 1937, remitting penalties, interest and costs on delinquent and back taxes which became delinquent on or before January 1, 1937, is applicable to taxes levied for drainage or levee purposes.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General .

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General .

MW:HR

UNEMPLOYMENT

COMPENSATION ACT- Emergency clause Constitutional.

July 10, 1937



Honorable Frank G. Harris
Acting Governor of Missouri
Jefferson City, Missouri

Dear Governor Harris:

We have your request of July 7, 1937, for
an opinion, which is as follows:

"The Social Security Board of
the Federal Government requires
an opinion as to the validity
of the emergency clause on Senate
Bill No. 36- the Unemployment
Compensation Act. Will you
please give me your opinion on
this question?"

Senate Bill No. 36 was finally passed in the
form of a Committee Substitute for Senate Bill No. 36,
and may be generally known as the Unemployment Compensation
Law of Missouri. Section No. 25 of that Act provides
as follows:

"Because of the fact that unemploy-
ment and economic insecurity is
seriously affecting the health,
morals and public welfare of this
state, making it imperative to
create systematic accumulation of
funds and provision for benefits
for periods of unemployment, an
emergency is created within the
meaning of the Constitution of
this state and this Act shall be
in full force and effect from and
after its passage and approval."

Section 57, Article IV of Missouri Constitution, with reference to the referendum, reads as follows:

"The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety and laws making appropriations for the current expenses of the state government, for the maintenance of the state institutions and for the support of public schools) either by petitions * * * *, etc. "

The 'second power' above referred to is one reserved to the people entitling them to reject at the polls certain legislative acts.

Unless this act is necessary for the "immediate preservation of the public peace, health or safety" it is subject to referendum.

This in turn depends upon the construction to be given the language used. Our Supreme Court, en banc, (1921) in State ex rel. Pollock vs. Becker, 233 S. W. 641, 1. c. 649, said:

"The word 'preservation' say the lexicographers, presupposes a real or existing danger; and 'immediate preservation' is indicative of a present impelling necessity, with nothing intervening to prevent the removal of the danger. By the 'public peace' we mean that quiet, order and freedom from disturbance guaranteed by law. Neuendorf v. Duryea, 6 Daly (N.Y.) 276; Id. 52 How. Prac.(N.Y.) 269; Gribble v. Wilson, 101 Tenn. 612, 49 S. W. 736.

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"Laws in regard to 'public safety' are allied in their application and effect to those enacted to promote the public peace, preserve order, and provide that security to the individual which comes from an observance of law. By the 'public health' is meant the wholesome sanitary condition of the community at large. 1 Bl. Com. 122; Anderson's Law Dict."

In the interpretation of the emergency clause of C. S. S. B. No. 36 we must keep in mind the language of our Supreme Court in *State ex rei. vs Carr*, 178 Mo. 229, 1. c. 233:

"It is one of the cardinal rules for the construction of statutes, that the spirit and purpose of the enactment is an invaluable guide to the meaning thereof, for the letter of the law often killeth, while its spirit maketh alive."

The emergency clause itself recites as a fact the existence of unemployment and economic insecurity in Missouri. This statement of fact by the Legislature is supported by the statistics. We are advised by the Missouri Reemployment Service that they have as of June 30, 1937, 68, 610 unemployed workers. The National Reemployment Service has as of July 1, 1937, 108,883 registered and unemployed workers, and there are approximately 30,000 unemployed being given temporary work by the WPA. We are also advised that the percentage of unemployment in Missouri is larger than in virtually every state in the Union.

In view of these figures, and the general unrest now existing in the ranks of practically all organized labor, it is indispensable that unemployment compensation acts be immediately organized and put into operation.

We realize, however, that the Legislature is without power to attach an emergency clause to a referable act, *Fahey vs. Hackmann*, 237 S. W. 752; 291 Mo. 351, and whether an act by the Legislature comes within the exception enumerated in the referendum clause (Article IV, Sec. 57) is a judicial question. *State ex rel. vs. Westhues vs. Sullivan*, 283 Mo. 547, 1.c. 582; *State ex rel. Pollock vs. Becker*, *supra*.

In determining whether an act is necessary for the immediate preservation of public peace, health or safety, we must take into consideration the face of the act, the history of the legislation, contemporaneous declarations of the Legislature, the evil to be remedied, and the natural or absurd consequences of any particular interpretation, *State vs. Stewart*, 187 Pac. 641, 57 Mont. 144.

In this State it has been held that the urgent need of sanitation alone was sufficient to make effective an emergency clause in a health measure, *State vs. Curtis* (1928) 4 S.W. (2d) 467, 1.c. 471.

In this State courts take judicial notice of current history, *State vs. Becker*, *supra*; *Title Guaranty Trust Co. vs. Sessinghaus*, 28 S. W. (2d) 1001, 325 Mo. 420; *State ex rel. Crutcher vs. Koeln*, 61 S.W. (2d) 750, 332 Mo. 1229.

That the destined goal of all good government is to promote the general welfare of all the people is now an accepted fact, universally recognized in Democracies and rendered more than lip service by the accepted leaders. Missouri faces the problem of doing something for approximately 256,000 workers, not permanently employed, and of preventing further unemployment by C. S. S. B. No. 36. It is in the face of these conditions of economic insecurity

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that the Legislature by Section 25, C. S. S. B. No. 36 declared that the immediate operation of the Bill was necessary for the public welfare of the State. We find the rule of law wherein the legislative acts are presumed to be Constitutional. The Supreme Court in Kavanaugh vs. Gordon, 244 Mo. 695, 1. c. 722, said:

"The constitutionality of the law is not to be lightly drawn in question. A statute sleeps at the start in the nursing bosom of many friendly presumptions. But, however delicate the task, courts may not put away from them the grave duty of saying one is unconstitutional when it is so beyond a reasonable doubt. (State ex rel. v. Warner, 197 Mo. 650)."

The Journal of both the House and Senate shows that C. S. S. B. No. 36, and the emergency clause, were duly passed at the last Session of the Legislature. The Bill was duly and properly signed, delivered to the Governor, and approved by him. Under these circumstances there is a presumption that the Bill and all of its parts has been properly passed, and that all the requirements of the Constitution have been complied with, State ex rel. vs. Field, 119 Mo. 593, 1. c. 611, This is the rule in many other states, Mo., Kan. & Texas Ry. Co. vs Simons (1907) 75 Kans. 130; Field vs. Clark, 143 U. S. 649, 672.

It is therefore the opinion of this office that the emergency clause of C. S. S. B. No. 36 comes within the spirit and purpose of Article IV, Section 57, of the Missouri Constitution, and that in fact an

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emergency within the meaning of that Constitutional provision exists, and that the act is not referable, but is now in full force and effect.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER/R

PAROLE BOARD-

Rights to enter into compact
with other states.

July 21, 1937

7/24



Honorable Frank G. Harris
Acting Governor of Missouri
Jefferson City, Missouri

Dear Governor Harris:

This will acknowledge your request of the 20th inst. wherein you submitted a letter to Governor Lloyd C. Stark from Governor Carl E. Bailey of Arkansas, requesting an opinion from this Department as to the authority of the Governor of this State or the Parole Board recently created by the 59th General Assembly to enter into such a compact, copy of your letter being as follows:

"Governor Stark has referred to me the attached copy of letter from Hon. Carl E. Bailey, Governor of Arkansas, Act No. 172 of said State, passed by the General Assembly of Arkansas.

"Inasmuch as I will be Chairman of the new Parole Board I will very much appreciate your opinion as to whether or not the State of Missouri, through its proper officer, may enter into such compact as is provided in this act."

And copy of the letter from Governor Bailey of Arkansas to Governor Stark is as follows:

Honorable Frank G. Harris

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July 21, 1937

"The Arkansas General Assembly this year enacted a measure which provides that the state may enter into compacts with other states for the purpose of effecting cooperative supervision of persons on parole or probation. A copy of the new law, which is Act No. 172, accompanies this communication.

"My purpose in writing is to make a formal request that you as Governor of Missouri join in a compact with Arkansas such as is provided for. You may be interested in the fact that the General Assembly also enacted legislation under which we are setting up a new parole system with the State Parole Officer under whom eighteen state policemen are working. The state Police Commission, state Public Welfare Commission, and state Penal Board are cooperating, and we are confident that within a few months we shall have one of the most efficient, satisfactory parole systems in the country".

There seems to be only one question involved in this inquiry: That is whether the State of Missouri, through its proper officer, may enter into such a compact as is provided by Act No. 172 of the Arkansas General Assembly of 1937.

The rule seems to be as follows:

"Rules and orders made by administrative boards must accord with the authority conferred upon the board by law".

Honorable Frank G. Harris

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And also the further rule is:

"The powers and authority of
public officers are fixed and
determined by the law".

Lamar Tp. v. Lamar, 261 Mo. 171, 169 S. W. 12, AnnCas 1916D
740; 79 A. L. R., Federal Trade Commission vs. Raladam Co.,
l.c. 1197.

From an examination of Committee Substitute for
House Bills Numbers 511, 12, 13 and 14, which set out the
powers and duties of the Board, especially in Section 5
thereof, and from an examination of Act No. 172 of the
Arkansas General Assembly of 1937, we fail to find that
the Legislature of Missouri has by any part of the Act au-
thorized the State of Missouri, through its proper officer,
to enter into any such compact as is proposed by the said
Arkansas Act.

CONCLUSION

From the above considerations we are of the
opinion that the State of Missouri, through its proper
officer, may not enter into the compact with the Governor
of the State of Arkansas as is provided by Act No. 172
of said State, passed by the General Assembly of Arkansas
in the year 1937.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

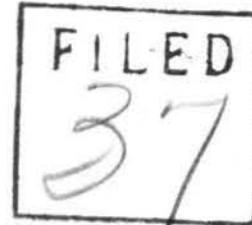
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB/R

CASEY BILL:--Constitutionality--emergency clause.

July 26, 1937



Honorable Frank G. Harris
Acting Governor
State of Missouri
Jefferson City, Missouri

Dear Governor Harris:

We have your request of July 19, 1937, for an opinion on the Casey Bill, which involves the following points:

- "1. The constitutionality of the bill.
2. The validity of the emergency clause.
3. Whether or not this act contains all legislation now in effect in Missouri directly or indirectly affecting the Social Security plan in this state."

We shall treat these matters in the order in which they are presented.

I.

The constitutionality of
the Casey Bill.

In passing upon the constitutionality of the Casey Bill (CSSB 125), we shall briefly refer to certain legislative procedural provisions of the Missouri Constitution.

Article IV, Section 26: Every bill shall be read on three different days in each house.

While the House Journal (page 1270), and the Senate Journal (page 1261), recites that the Casey Bill was read the third time and passed, the original bill itself recites on its face that it was duly enrolled and correctly printed (Art. IV, Sec. 29), and these facts in themselves are sufficient to comply with this provision of the Constitution. State ex rel. vs. Taylor, 123 S. W. 892, 224 Mo. 393, 476; State ex rel. vs. Drabelle, 170 S. W. 465, 261 Mo. 515.

Article IV, Section 28: No bill shall contain more than one subject, which shall be clearly expressed in its title.

This provision is intended to prevent inclusion of incongruous and unrelated matters in the same measure, and to guard against inadvertence and fraud in legislation. International Shoe Company vs. Shartel, 279 U.S. 429, 49 Sup. Ct. 380, 73 L. Ed. 781; 29 Fed. (2) 604, 50 S. Ct. 79.

This provision of the Constitution is to be given a broad and liberal construction. Thomas vs. Buchanan County, 51 S. W. (2) 95, 350 Mo. 627. Graves vs. Purcell, 85 S. W. (2) 543. It is the duty of the Courts to uphold an act under this provision of the Constitution if such can be done without doing violence to the language used and the evident intent of the act itself. It is only necessary that the title indicate the subject in a general way without going into detail. State vs. Thomas, 256 S. W. 1028, 301 Mo. 603.

By reference to the title we find that the act has one subject, namely, the grant of Social Security benefits to certain classes of persons in distress. All of the provisions fairly relate to this same subject matter and the act therefore under this section is valid. Ex Parte Loving, 77 S. W. 508, 178 Mo. 194; Southard vs. Short, 8 S. W. (2) 903, 320 Mo. 932. Thomas vs. Buchanan County supra. It is said that if

the title is a fair index of the act and matters necessary to render the act effective are included in the act although not specified in the title, any such omissions will not render the act invalid. Ex Parte Hutchins, 246 S. W. 186, 296 Mo. 331. State vs. Cox, 137 S. W. 981, 234 Mo. 605. To be invalid the title must be comprehensive enough to include disconnected and incongruous subjects. State vs. Branson, 21 S. W. 1125, 115 Mo. 271.

By reference to the title we find that it repeals a number of statutes, specifically naming each, and enacts in lieu thereof 26 new sections. This meets the requirement of Section 28, Article IV of the Missouri Constitution. State vs. Campbell, 259 S. W. 430; State vs. McEniry, 190 S. W. 272, 269 Mo. 228.

Article IV, Section 31: No bill shall become a law unless on its final passage a majority of the members of each house vote therefor and the vote taken by yeas and nays and entered in the journal.

The Senate Journal (pages 1259, 1260, 1261) and the House Journal (pages 1268, 1269, 1270) set out the Conference Committee Report on the Casey Bill and show that a majority in each house voted for the passage of the bill, to-wit, twenty-nine senators out of a total membership of thirty-four, and one hundred and six representatives out of a total of One hundred and fifty. The adoption of the Conference report by both the House and Senate meets the requirement of this section of the Constitution. Browning vs. Powers, 38 S. W. 943.

The Casey bill was duly passed by both houses of the Legislature, signed by the presiding officers and received the approval of the Governor June 23, 1937. This meets the requirement of Article IV, Sections 37 and 38.

Section 20 of the Casey bill specifically establishes certain special funds relating to the purposes covered by the act. It is also provided in this section that the State Treasurer shall be treasurer and custodian of all funds and moneys. This meets the requirement of Article IV, Section 43 that all state moneys must go into the treasury. The creating

of a special fund does not violate this section. State ex rel. Fath vs. Henderson, 60 S. W. 1093, 160 Mo. 190. The grant of public money for purposes of relief and old age pensions is specifically authorized by Article IV, Sections 46 & 47 of the Missouri Constitution.

Section 11 of the Casey Bill sets up certain qualifications and limitations for the recipient of benefits under the act. The only important one for consideration in this opinion is Subdivision (5) which excludes from the benefits of the act inmates of public institutions at the time of receiving benefits. This type of limitation has heretofore been approved in this state. State ex rel. Palmer vs. Thompson, 297 S. W. 62, 317 Mo. 903.

Article XIV, Section 9: The appointment of all officers not otherwise directed by this Constitution shall be made in such manner as may be prescribed by law.

This provision delegates to the Legislature the authority to specify by statute who shall make various appointments. State ex rel. Harvey vs. Wright, 158 S. W. 823, 251 Mo. 325.

Section 6 of the Casey Bill provides for the appointment of officers, employees and others by the State Administrator with the consent of the State Commission.

Article IV, Section 53: Prohibiting the passage of special and local laws.

The Casey Bill relates to persons and things as a class and includes all persons who are or may come within like situations and circumstances. It is therefore a general law as distinguished from special and therefore meets this requirement of the constitution. State vs. McCann, 47 S. W. (2) 95, 329 Mo. 748. State ex inf. vs. Southern, 177 S. W. 640, 265 Mo. 275. State ex rel. vs. Lee, 5 S. W. (2) 83, 319 Mo. 976.

It is therefore the opinion of this office that the Casey Bill is constitutional.

II.

The validity of the
emergency clause.

The emergency clause (Section 26) recites that the state is without necessary administrative facilities to carry out the purposes of the bill and that the bill itself is necessary to the advancement of the public peace, health, safety and public welfare of the state. These facts are worthy of consideration even though their enumeration is not conclusive and binding upon the courts. *Fahey vs. Hackmann*, 237 S. W. 752, 291 Mo. 351; *State ex rel. Westhues vs. Sullivan*, 283 Mo. 547, 1. c. 582.

In determining whether an act is necessary for the immediate preservation of public peace, health or safety, we must take into consideration the face of the act, the history of the legislation, contemporaneous declarations of the Legislature, the evil to be remedied, and the natural or absurd consequences of any particular interpretation. *State vs. Stewart*, 187 Pac. 641, 57 Mont. 144.

In this State it has been held that the urgent need of sanitation alone was sufficient to make effective an emergency clause in a health measure. *State vs. Curtis* (1928) 4 S. W. (2d) 467, 1. c. 471.

In this State courts take judicial notice of current history. *State vs. Becker*, supra; *Title Guaranty Trust Co. vs. Sessinghaus*, 28 S. W. (2d) 1001, 325 Mo. 420; *State ex rel. Crutcher vs. Koeln*, 61 S. W. (2d) 750, 332 Mo. 1229.

An examination of the act itself (Section 1) shows that the commission is created for the purpose of administering state plans and laws involving pensions or assistance to persons over seventy years of age, or who are incapacitated from earning a livelihood and are without means of support; aid to dependent children; aid or relief in cases of public calamity; and child welfare services. Administering to those who have reached and passed the age of seventy, who are incapacitated and without means of support (Art. IV, Sec. 47)

is included within the sphere of Article II, Sec. 4, declaring the purpose of government to be promotion of the "general welfare of the people".

The grant of aid or relief in cases of public calamity (Art. IV, Sec. 46) is based upon the situation affecting the public peace, health and safety of the state. In the last two years agriculture in the State of Missouri felt the devastating affects of two state wide droughts, and in the last year a large portion of the growing plant life which survived the drought was swept away by the flood waters of the Mississippi. In addition to that some one-quarter of a million Missouri citizens are now without permanent employment.

The act covers aid to dependent children and child welfare services. Commenting upon the power of the State to relieve the unfortunates our Supreme Court in State ex rel. Cave vs. Tincher, 258 Mo. 1, 1. c. 24, said:

"The conclusion is, therefore, authorized that the State in its character of parens patriae may provide for the comfort and promote the well being of not only infants but persons of defective understanding, or so burdened with other misfortunes or infirmities as to be unable to care for themselves. So important is this governmental function that the limitations of the Constitution are to be so construed, if possible, as to not interfere with its legitimate exercise. (Jarrard vs. State, 116 Ind. 98; Ex parte Ah Peen, 51 Cal. 280; McLean Co. vs. Humphreys, 104 Ill. 378; Re John Sharp, 15 Idaho, 120, 18 L.R.A. (N.S.) 886.)"

The above doctrine is recognized in other states. Griffin vs. Griffin, 187 Pac. 598. The Casey Bill merely extends the helping hand to those children who have been deprived of parental support, Section 16. That the welfare of the children has always been close to the heart of the State is now universally admitted. Millions are spent for their education, training and welfare. They are set apart and exempted from the application of many provisions of the criminal code. Speaking of children, the appellate division of the Supreme Court of New York, In Re: Vasko, (1935) 263 N.Y.S. 552, 1. c. 555, 556, said:

"Children come into the world helpless, subject to all the ills to which the flesh is heir. They are entitled to the benefit of all laws made for their protection,--whether affecting their property, their personal rights, or their persons--by the Legislature, the sovereign power of the state."

Speaking on the meaning of aid to dependent children, we find the Court of Appeals of Maryland, (1933) 165 Atl. 618, 1. c. 633, in the case of Mayor and City Council of Baltimore City vs. Fuget, using this language:

"To us it is clear that what is here attempted to be accomplished by the passage of the acts in question is not a pension within the meaning of this provision of the Constitution, nor is it even called a pension. The object and purpose of the act is to provide, in some cases, for the care and maintenance of dependent children at their homes 'under the guidance of their mother,' and not to commit them to an institution at possibly a greater cost to the state, thereby taking them from the care and control of their mother and the association of their brothers and sisters, if any, as well as depriving

them of the environment of a home and subjecting them to the care of others who have not in them the interest of a mother. It is not a pension to the mother, nor is the act passed for the mother's benefit, except in so far as it enables her to enjoy the association of her children. But it is for the benefit and welfare of the children; and the aid or assistance afforded them by the act lasts only so long as the necessity therefor exists. It lacks the attributes of a pension."

Whether or not the emergency clause is constitutional depends upon whether or not the act is referable under Section 57, Article IV, of the Missouri Constitution, which section in part provides:

"The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety and laws making appropriations for the current expenses of the state government, for the maintenance of the state institutions and for the support of public schools) either by petitions * * *, etc."

We have heretofore attempted to point out that from the act itself, the emergency clause, the existing economic conditions of the state, the history of the legislation and existing conditions to be remedied, that the act is one which clearly and beyond the question of any doubt comes within the meaning of any law necessary for immediate preservation of the public peace, health and safety of the state.

The journals of both the House and Senate show that the Casey Bill and the emergency clause were duly passed at the last session of the Legislature. Senate Journal page 1261, House Journal page 1271.

July 26, 1937

It is therefore the opinion of this office that the emergency clause attached to the Casey Bill is valid and constitutional and that the act is not referable but became effective upon being approved by the Governor June 23, 1937.

III.

Does the act contain all
legislation in effect in
Missouri affecting the
Social Security Plan.

The Casey Bill contains all the state laws now operative with reference to a single state plan for the purposes set out in Section 1 of the act. In Section 2 the State Social Security Commission is designated as the State Agency in any state or federal act involving any of the purposes of this bill. In addition thereto Section 25 provides that all provisions of law in conflict with this act are hereby repealed.

It is therefore the opinion of this office that the Casey Bill now contains all legislation now in effect in Missouri directly or indirectly affecting old age pensions, and to dependent children, relief and child welfare services under the Social Security plan in this state.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

PENAL INSTITUTIONS: Governor's power to pardon and parole.

October 15, 1937.



Honorable Frank G. Harris
Lieutenant Governor for the
State of Missouri
Jefferson City, Missouri

Dear Governor Harris:

We acknowledge your request for an opinion dated
October 11, 1937, which reads as follows:

"Please give us your opinion on
the following matter:

"The Constitution of Missouri pro-
vides that the Governor of this
state has power to grant reprieves,
pardons and paroles.

"Under the provisions of Section
8477, R. S. Mo. 1929, the Legis-
lature has provided that no inmate
shall be paroled from the Inter-
mediate Reformatory until he has
served seven-twelfths of the time
for which he was sentenced.

"I would like to know if this
legislative act has any force in
the light of the constitutional
provision relating to the Gover-
nor's power to grant reprieves,
pardons and paroles."

In the matter of reprieves, commutations and pardons,
after conviction of the crime, Article V, Section 8 of the
Missouri Constitution provides:

"The Governor shall have power to
grant reprieves, commutations and
pardons, after conviction, for all

offenses, except treason and cases of impeachment, upon such condition and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. He shall, at each session of the General Assembly, communicate to that body each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, the date of the commutation, pardon or reprieve, and the reason for granting the same."

In State v. Sloss, 25 Mo. 291, 294, where the Legislature attempted a scheme to release prisoners convicted of a crime, the Act was held unconstitutional, and the Supreme Court said:

"Although questions have sometimes arisen whether a power properly belonged to one department of government or another, yet there is no contrariety of opinion as to the department of the government to which the power of pardoning offenses properly appertains. All unite in pronouncing it an executive function. So the framers of our constitution thought, and accordingly vested the power of pardoning in the chief executive officer of the state."

Pursuant to the Constitution above quoted, the Governor of this State is authorized by the Legislature to grant pardons under Section 3798, R. S. Mo. 1929, which provides:

"In all cases in which the governor is authorized by the Constitution to grant pardons, he may grant the same, with such conditions and under such restrictions as he may think proper."

The power to pardon includes the power to parole. A parole is but a conditional pardon, for in State v. Asher, 246 S. W. 911, 913, the Supreme Court said:

"It must follow from the foregoing that a parole is a conditional pardon, and that a 'parole' given by the Governor is but an exercise of the power vested in him by the Constitution and statute with respect to the issuance of conditional pardons."

As to the Governor's power to attach conditions, when commuting a sentence, the Court said in Ex parte Strauss, 7 S. W. (d) 1000, 320 Mo. 349, 351:

"The Governor may therefore attach to a commutation granted by him any condition he chooses, provided it is not illegal, immoral or impossible of fulfillment."

The Legislature has provided in Section 8477, R. S. Mo. 1929, relating to the Intermediate Reformatory for young men and their parole, as follows:

"* * * * No inmate shall be paroled from said reformatory until he shall have served seven-twelfths of the time for which he was sentenced,* *
* *."

CONCLUSION.

The inmates of the Intermediate Reformatory are there because committed pursuant to a judgment and sentence of the criminal courts of this State. Justices of criminal courts are merely human beings, and human action and human intelligence is so imperfect in all mankind that at times an injustice may be perpetrated by the enforcement of inhuman rigid penalties in compliance with a judgment and sentence of a court. The criminal code is to be enforced in spite of unjust consequences resulting from human imperfections, unless the culprit be pardoned or paroled. Such is the theory of our State government as evidenced by our Constitution, statutes and judicial decisions.

To alleviate this occasional unjust result of a rigidly enforced criminal code, the people of this State have made provisions in their Constitution and fundamental law for executive clemency in such exceptional cases. To hinder, control or curtail executive clemency, where clemency is due, was not intended by the framers of our Constitution, any act of the Legislature to the contrary notwithstanding.

This department is of the opinion that Section 8477, supra, insofar as it expresses a limitation on the Governor from pardoning or paroling inmates of the Intermediate Reformatory until after serving seven-twelfths of the time for which sentenced, is in direct violation of Article V, Section 8 of the Missouri Constitution. Said legislative Act is an invasion of the constitutional prerogative of the Governor in such matters, and to that extent is unconstitutional and of no legal force.

Respectfully submitted

APPROVED:

WM. ORR SAWYERS
Assistant Attorney General.

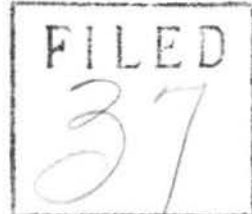
J. E. TAYLOR
(Acting) Attorney General.

WOS:H

PROBATE JUDGE: Fee received for solemnizing marriages
to be accounted for in annual settlement.

November 15, 1937

Hon. T.H. Harvey, Judge
Probate Court of Saline County
Marshall, Missouri



Dear Sir:

This department is in receipt of your letter of October 16, 1937, in which you request an opinion as follows:

"Will you please give me your opinion as to whether or not the fees of the Judge of the Probate Court for performing or solemnizing marriages, are to be accounted for as a part of such Judge's compensation."

A probate judge is authorized by the laws of Missouri to solemnize marriages (Section 2976, R.S. Missouri 1929). He is allowed a fee of two dollars for solemnizing each marriage (Section 11782, R.S. Missouri 1929).

Section 11782, R.S. Missouri 1929, provides that every probate judge shall, within thirty days after the expiration of each year of his term, file with the circuit clerk a statement verified by affidavit "containing a full account of all fees collected" by or for such judge during said year. This section further provides that within three months after the expiration of his term of office, a probate judge shall file with the circuit clerk a statement verified by affidavit "of all fees which accrued, but were not collected during his term of office". Further, it is provided that the probate judge must give bond before collecting "any fee whatsoever" and that said bond shall be conditioned upon the faithful performance of his duties, and the prompt and full payments when due "of each and every of the amounts to the extent and in the manner herein required" into the county treasury.

The language of Section 11782, *supra*, which we have quoted and underlined wherein it speaks of "all fees collected" or other words of similar import, with reference to what fees a probate judge shall account for in his settlement, could not have reference to any fees except those which are specifically provided and allowed a probate judge, for his services by said section, which sets out that probate judges "shall be allowed fees for their services as follows: For solemnizing a marriage, \$2.00." In other words, this section makes this a part of the service of a probate judge for which he shall charge a fee.

Section 2976, R.S. Missouri 1929, authorizes a judge of court of record to solemnize marriages. He is only authorized to perform a marriage because he is such a judge; said service is thereby an incident to his office. Section 2984, R.S. Missouri 1929, requires that all who are authorized to solemnize marriages shall keep a record thereof.

In *Ex parte Andrews*, 18 S.W. 2nd l.c. 582, the court has said:

"The legislative intention is to be ascertained from the words used in a statute. Another rule of construction is that effect is to be given to every word, clause and sentence within a statute. *Hannibal Trust Co., Executor v. Elzea et al.*, 315 Mo. 485, 286 S.W. 371."

Following the above rules of statutory construction, we think we have aptly illustrated in the foregoing paragraphs that the intention of the legislature in the act was that all fees enumerated must be accounted for by the probate judge in his annual settlement. To reach a different conclusion would do violence to the rule that effect must be given to every word, clause and sentence in a statute.

We have ascertained further that those charged with conducting the audit of county officials' accounts have always construed the fee in question here as an accountable fee. In *Automobile Gasoline Co. v. City of St. Louis*, 32 S.W. 2nd l.c. 283, it is said:

"The construction of a statute by those charged with the duty of enforcing it, when it has long prevailed, while not binding upon the courts, is entitled to weight where the meaning of the statute is uncertain."

CONCLUSION

Therefore, it is the opinion of this department that the \$2.00 fee allowed a probate judge for solemnizing a marriage must be accounted for by him in his annual settlement to the circuit clerk.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED By:

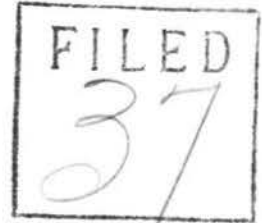
J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

CRIMINAL LAW -- 'Arson' as distinguished from willful burning of property.

November 20, 1937

Honorable Frank G. Harris, Chairman
Board of Probation and Parole
Jefferson City, Missouri



Dear Governor Harris:

We acknowledge receipt of your request for an opinion dated November 18, 1937, which reads as follows:

"Under Section 3811, Revised Statutes of Missouri, 1929, the Circuit Court is authorized to parole persons of previous good character who shall not have been previously convicted of a felony, except in cases of murder, rape, arson or robbery.

"Section 4040 of the Revised Statutes of Missouri, 1929, makes it a felony to set fire to, burn or cause to be burned any goods, wares, merchandise, etc. with the intent to injure or defraud the insurer.

"Section 4041 makes it a felony for one to attempt to set fire to or procure the burning of any buildings or property mentioned in preceding sections.

"I should like to have your opinion as to whether or not the Circuit Court is authorized to grant a parole to one of good character and who has not been previously convicted of a felony, who enters a plea of guilty either to a violation of section 4040 or section 4041 above mentioned. I should like very much to have this opinion reach me by Monday, November 22nd."

59 C. J., page 1112, Section 659, reads as follows:

"Penal statutes are to be interpreted by the aid of all the ordinary rules for the construction of statutes. The court should construe these statutes in the light of the evil to be remedied, and with the cardinal object of ascertaining and giving effect to the intention of the legislature, as the intention of the legislature, when it can be discovered, must control."

In the case of State v. Bartley, 263 S. W. 95, 1.c. 96; 304 Mo. 58, the court said:

"Criminal statutes are to be construed strictly; liberally in favor of the defendant, and strictly against the state, both as to the charge and the proof. No one is to be made subject to such statutes by implication. Where one class of persons is designated as subject to its penalties, all others not mentioned are exonerated. *** Such statutes are not to be 'extended or enlarged by judicial construction, so as to embrace offenses or persons not plainly (written) within their terms.' 'The reason of the rule is found in the tenderness of the law for individuals, and on the plain principle that the power of punishment is vested in the Legislature, and not in the judicial department'."

CONCLUSION

Your question presents a problem of statutory construction of the penal statutes. We must determine whether the crime of "arson", as the word is used in Section 3811, R. S. Mo. 1929, was intended to include other felonies the perpetration of which, having some of the cardinal elements of the common law crime of arson and the crime of arson prescribed by Missouri statutes.

The only statute in Missouri which we were able to discover where certain acts of wilfully setting fire to property is declared by the Legislature to be "arson" is Section 4036, R. S. Mo. 1929. Other acts of wilful setting of fire to property are defined by the Legislature only as felonies (see Sections 4038, 4039, 4040 and 4041, R. S. Mo. 1929).

If the Legislature intended persons who violate Sections 4040 and 4041, R. S. Mo. 1929, to be guilty of arson, they would have said so, as they did in Section 4036, R. S. Mo. 1929. These wilful burning of property crimes were passed at the same time and in the same act by the 1929 Legislature (see Laws of Mo. for 1929, page 167). At the passage of the act, the then existing arson statutes, and there were several, were repealed and the present law enacted.

Criminal statutes are generally construed in favor of the accused and against the State.

We are of the opinion that it was the intention of the Legislature that under the law the circuit court is to have power to parole from the bench one convicted of violating Sections 4040, or 4041, R. S. Mo. 1929, as said crimes are not defined as the crime of "arson."

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WOS:FE

COUNTY COLLECTOR: Must carry out the duties of county treasurer on and after January 1, 1937 and shall receive no additional compensation, in counties of less than 40,000 population

January 16, 1937

1-18

Mr. Robert W. Hawkins
Prosecuting Attorney
Pemiscot County
Caruthersville, Missouri



Dear Sir:

This Department is in receipt of your letter of January 2, inquiring as to the compensation of the Collector and now ex officio treasurer. Your exact question is as follows:

"Under the consolidation of the Treasurer's office and the Collector's office will the Collector and ex officio Treasurer be allowed the commission of one-half of one per cent for disbursing school money?"

We assume that you have in mind the consolidation of the treasurer's office with the collector. In the 1933 Session of the Legislature, page 338, the office of Treasurer was abolished by consolidating it with the office of collector.

Section 12130, Laws of Missouri 1933, page 338, continues the office of treasurer in counties of more than forty thousand inhabitants while Section 12132a abolishes it in counties of less than forty thousand; Pemiscot County being less than forty thousand section 12132a would govern, said section being as follows:

"On and after the expiration of the term of office of the county treasurer on the 31st day of December, 1936, in all counties of this state which now

January 16, 1937

or hereafter have a population of less than 40,000 inhabitants according to the last decennial United States census and not under township organization, the county collector shall take over all the duties now performed by the county treasurer and such collector shall be county collector and ex officio county treasurer and shall perform any and all duties now devolving upon the county collector and county treasurer. Such collector shall act as ex officio treasurer and perform the duties attached thereto with no additional remuneration other than such moneys as are allowed by law for his services as county collector, and he shall not be required to give any bond other than the bond given as county collector. All duties and obligations now imposed by law upon county treasurers in counties having a population of less than 40,000 inhabitants according to the last decennial United States census are hereby set over and made a part of the duties and obligations of the ex officio county treasurer as provided for in section 12132a."

On May 25, 1936, this department rendered an opinion to Honorable Forrest Smith, State Auditor of Missouri, in which the maximum compensation for county collectors is discussed and decided. A copy of this opinion is herewith inclosed.

Prior to January 1, 1937, the treasurer received, under Section 9266, Revised Statutes Missouri 1929,

"such compensation for his services as the county court may deem advisable, not to exceed one-half of one per cent. of all school moneys disbursed by him, and to be paid out of the county treasury."

Mr. Robert W. Hawkins

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January 16, 1937

Likewise, the treasurer was compensated under Section 12138, Revised Statutes Missouri 1929. The Act of the 1933 Legislature permitted the treasurer to serve out his present term and, as stated before, placed the duties of his office on the county collector. In other words, it abolished the office of county treasurer to become effective January 1, 1937.

Having determined the collector's compensation at the present time what, if anything, does he receive as additional compensation for carrying out the duties as ex officio treasurer. We think Section 12132a is plain and definite in its terms as to the compensation when it states,

"Such collector shall act as ex officio treasurer and perform the duties attached thereto with no additional remuneration other than such moneys as are allowed by law for his services as county collector."

It is our opinion that it was the intention of the Legislature to abolish the office of county treasurer in counties of less than forty thousand; that such duties as he formerly performed are to be performed by the county collector, and it was the further intention of the Legislature that the county collector carry out such duties without any additional compensation or fees.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

SOCIAL SECURITY COMMISSION:

Construction of Sec. 10 -
Moneys received from other
sources.

July 16, 1937. 7-16

FILED
38

Mr. Geo. I. Haworth,
Acting Administrator,
State Social Security Commission of Missouri,
412 East High Street,
Jefferson City, Missouri.

Dear Sir:

We have your letter of July 15th, 1937,
requesting an opinion on the following question:

"May the State Treasurer make
any disbursements from this
special account which are in
excess of the amounts appropriated
for the use of the State Commission,
which conflicts with or is in ex-
cess of the amounts appropriated
by House Bill 520?"

In answer to your inquiry, we call your
attention to that portion of Section 10 of C.S.S.B.
125, which in part reads as follows:

"For the purpose of establishing
and maintaining county offices, or
carrying out any of the duties of
the State Commission, the State Com-
mission is authorized to enter into
agreements with any political sub-
division of this state, and as a part
of such agreement the State Commis-
sion may accept moneys, services or
quarters as a contribution toward
the support and maintenance of such
county offices. Any funds so re-
ceived shall be payable to the State
Commission and deposited in the proper
special account in the State Treasurer's
office, and become and be a part of
state funds appropriated for the use
of the State Commission.* * *"

We turn to H.B. 520, that being the Appropriation Bill, to ascertain the amount of money appropriated for the use of the Commission. The Appropriation Act appropriates only state and federal funds for administration purposes. The Appropriation Act does not appropriate funds received from any other source.

There are two provisions of the Constitution of Missouri which may be briefly referred to in this opinion.

Article IV, Sec. 43, in part, provides:

"All * * * moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law.* * *"

Section 19 of Article X provides:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law.* * *"

The Supreme Court of Missouri in *State ex rel. v. Gordon* (1911) 236 Mo. 142, l.c. 158, passed upon the above two constitutional provisions in this language:

"The language of the foregoing provisions of the Constitution is clear and explicit, and forbids the payment of money from the State treasury 'received from any source whatsoever' or 'of any funds under its management' except in pursuance of regular appropriations made by law.* * *"

Mr. Geo. I. Haworth,

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7/16/37.

It is, therefore, the opinion of this office that disbursements from special accounts created by C.S.S.B.125 must be limited to the maximum amount appropriated in the Appropriation Act (H.B. 520).

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General.

APPROVED:

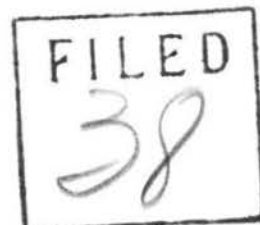
J. E. TAYLOR
(Acting) Attorney-General.

FER/LD

SOCIAL SECURITY COMMISSION: Refunds and recoveries received by commission to be deposited in State Treasury to credit of General Revenue Fund.

July 27, 1937

7-28



Honorable George I. Haworth
Acting Administrator
State Social Security
Commission of Missouri
412 East High Street
Jefferson City, Missouri

Dear Sir:

We have your request of July 22, 1937, for an opinion upon the following question:

"Can refunds and recoveries collected by this Commission be credited to the respective appropriation in the State Auditor's office, or is it necessary that such refunds and recoveries be credited to the general revenue fund?"

Your inquiry refers to Sections 4 and 20 of the Casey Bill, (CSSB 125).

Article IV, Section 43 of the Constitution of Missouri in part provides that all moneys received by the state from any source shall go into the treasury, and the General Assembly shall have no power to divert the same except by appropriations made by law.

Article X, Section 15 of the Constitution of Missouri provides that after such funds are deposited in the State Treasury they shall

"be disbursed by said Treasurer for the purposes of the State, according to law, upon warrants drawn by the State Auditor, and not otherwise."

The 1933 Session of the Legislature, Laws 1933, page 415, requires all moneys from whatever source received by any commission to be placed in the State Treasury.

Section 4 of the Casey Bill, referred to in your request, merely gives the Commission power "to administer, disburse, dispose of and account for funds,*"; all of which must be done in accordance with existing laws of Missouri, and in view of the judicial interpretation given the Constitution of this state.

Section 20 of the Casey Bill, referred to in your letter, merely establishes certain special funds. The establishment of special funds does not constitute a continuing appropriation. The amount of money that can be drawn from the State Treasury for any specified purpose is limited by the appropriation act authorizing the withdrawal.

Our Supreme Court in State ex rel. vs. Henderson, speaking of a special fund and its expenditure, 160 Mo. 190, l. c. 214, said:

"So without further elaboration we hold that the Act of April 19, 1899, was not an appropriation bill within the meaning of Section 43, article 4 of our Constitution, but on the contrary was an act to provide a tax to create a special fund, which could only be withdrawn from the Treasury by a subsequent appropriation act duly enacted,*".

Quoting from our Supreme Court on this matter in State vs. Hackmann, 264 S. W. 366, l. c. 367, the Court said:

"On the other hand, this court has held that a fund, raised by an act for a special purpose, could not be paid out of the state treasury except upon an appropriation by an act of the Legislature. State ex rel. Fath et al. vs. Henderson, 160 Mo. 190, loc. cit. 214, 60 S. W. 1093; State ex rel. vs. Gordon, 236 Mo. 142, loc. cit. 158, 139 S.W. 403. In the case last cited the court had under consideration a fund for the support and maintenance of the game department. It was held that the creation of a special fund is not a continuing appropriation of the fund, or of any part of it, to pay accounts drawn against it. That the creation of the fund is one thing, and the appropriation of money to pay accounts against the fund is quite another thing. The language of the Constitution is unequivocal; it requires an appropriation before payment of money received by the state 'from any source whatsoever.' The money collected by the board is received by the state; it goes into the state treasury. To make it more specific, the requirement that an appropriation by the Legislature will be necessary before money can be paid out of the treasury of the state, it is applied, not only to state funds, but to 'any of the funds under its management.'"

Whatever funds are received by the Commission which properly belong to any special fund shall go into the Treasury and be credited to such fund, but the maximum total withdrawals that may be made against such special fund is the amount authorized by an appropriation act. By reference to the appropriation act (H.B. 520), we find that there is appropriated for relief Nine Million Dollars. This is the total amount of money that may be withdrawn from the treasury under appropriation acts for this purpose.

Hon. George I. Haworth

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July 27, 1937

It is therefore the opinion of this office that any funds and moneys received by the Commission are to be credited to the general revenue fund, unless otherwise specifically provided.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

SOCIAL SECURITY:

Appropriation for Child Welfare in
House Bill No. 500 was mistake, and
is a nullity.

LEGISLATURE:

July 27, 1937

Mr. George I. Haworth
Acting Administrator
State Social Security
Commission of Missouri
412 East High Street
Jefferson City, Missouri



Dear Sir:

This Department is in receipt of your request
for an opinion which reads as follows:

"In House Bill 500, Section 3, there
is appropriated to the Board of
Managers of the State Eleemosynary
Institutions out of the State
Treasury, chargeable to the federal
allotment funds received from the
United States Childrens Bureau, the
sum of \$90,000.

"In House Bill 520, Section 6, there
is appropriated to the State Social
Security Commission out of the State
Treasury, chargeable to the federal
allotment funds received from the
United States Childrens Bureau, the
sum of \$90,000.

"In Committee Substitute to Senate
Bill 125 this Commission is charged
with the duty of administering or
supervising child welfare services,
therefore, it would appear that the
appropriation to the Board of
Managers of the State Eleemosynary
Institutions is in error, or is a
duplication of the appropriation.

"We would appreciate receiving an

Mr. George I. Haworth

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July 27, 1937

opinion from you as to which one of these appropriations shall stand; also, whether or not the Board of Managers of the State Eleemosynary Institutions can lawfully receive the funds which were appropriated to them."

House Bill No. 500, Section 3, approved July 1, 1937, provides as follows:

"There is hereby appropriated to the Board of Managers of the State Eleemosynary Institutions out of the State Treasury, chargeable to the Federal allotment funds received from the United States Children's Bureau, or other Federal Department; the sum of Ninety Thousand Dollars (\$90,000.00) or so much of the Federal funds as may be allotted to Missouri for Child Welfare Services from the U. S. Government."

House Bill No. 520, Section 6-B, approved July 1, 1937, provides as follows:

"There is hereby appropriated to the State Social Security Commission out of the State Treasury, chargeable to the Federal Allotment funds received from the United States Children's Bureau, or other Federal Department; the sum of Ninety Thousand Dollars (\$90,000.00) or so much of the Federal funds as may be allotted to Missouri for Child Welfare Services from the U. S. Government".

Committee Substitute for Senate Bill No. 125, passed June 23, 1937, provides in Section a for the repeal of Sections 14096 and 14096-a, found on page 189 of Session Laws of Missouri 1933. It further provides in part as follows:

"The State Commission shall also have power and it shall be its duty:

* * * * *

"to cooperate with the United States Children's Bureau in establishing, extending and strengthening child welfare services for the protection and care of homeless, dependent and neglected children, and children in danger of becoming delinquent, and to expend child welfare service funds for payment of part of the cost of district, county or other local child welfare services, and for developing state services for the encouragement and assistance of adequate methods of community child welfare organization, to administer or supervise all child welfare activities, including importation of children, licensing and supervising of child caring agencies and institutions except those conducted by any well known religious order, the operation of state institutions for children, and the supervision of juvenile probation under the direction of but not in derogation of the orders of juvenile courts. All powers and duties of the Commission shall, so far as applicable, apply to the administration of any other Act or state law wherein duties are imposed upon the Commission or the Commission is acting as a state agency".

Sections 14096 and 14096-a, Laws of Missouri, 1933, page 189 referred to supra, as being repealed, provide for the control and management of the State Children's Home to be exercised by the Board of Managers of State Eleemosynary Institutions.

Colligating the above provisions it will be noted that the management of the State Children's Home and the control of Child Welfare in Missouri by Committee Substitute to Senate Bill No. 125, has been taken from the Board of Managers of the State Eleemosynary Institutions and placed under the control of the State Social Security Commission. An appropriation of \$90,000.00. for the carrying out of this work is provided for by House Bill No. 520. However, House Bill No. 500, approved the same day as House Bill No. 520, also appropriated \$90,000.00 to the Board of Managers of the State Eleemosynary Institutions to be used for Child Welfare.

The question arises whether both of these appropriations will stand, and if not, which one is the valid one.

It is a rule of statutory construction that where two statutes cover in whole or in part the same matter, it is the duty of the court to harmonize them if possible and so give effect to both as though they constituted one act. State ex inf. Major vs. Amick, 152 S. W. 591; 247 Mo. 271.

Following out the above rule, the two appropriations would both stand and be valid. However, Committee Substitute to Senate Bill No. 125 repealed the statutes which gave the Board of Managers of the Eleemosynary Institutions control over the Children's Home and work in relation to Child Welfare. It therefore will be seen that the appropriation provided for by House Bill No. 500 is an appropriation of money to a board which has no power or right to expend it. This appropriation was manifestly a mistake or an oversight on the part of the Legislature. At the time that it was drawn up and voted upon the status of Committee Substitute to Senate Bill No. 125 was in doubt—that is, there was no way of knowing whether such bill

would be passed and approved- and so therefore the appropriation to the Board of Managers of the State Eleemosynary Institutions for Child Welfare was included in order that such work would not be left unprovided for.

The situation in this case is similar to that in State ex rel. Packard vs. Jorgenson, 31 N. Dak. 563, 154 N. W. 525. In that case the Legislature of North Dakota passed a bill appropriating six thousand dollars as a salary for the Tax Commissioner. In that case there was pending a bill substituting a single commissioner for the State Tax Commission which consisted of three members. In drawing up the appropriation bill, the salary of only one commissioner was provided for, it being contemplated that the act would be passed. However, the act was defeated, and a few days later the appropriation bill was passed, which still included the appropriation for only one commissioner. The Court said:

"It is apparent that the defeat of Senate Bill No. 261 was followed so closely by the passage of the budget bill that no time was given for consideration of this item, and that it was voted for and passed by inadvertence.

* * * * *

"It is our conclusion that the subdivision of the budget bill relied upon by respondent appropriating money for one tax commissioner was enacted through an inadvertence and is a nullity".

The situation described above is what probably occurred in the passage of House Bill No. 500, and through

Mr. George I. Haworth

-6-

July 27, 1937

mistake the appropriation for Child Welfare to the Board of Managers of the State Eleemosynary Institutions was allowed to remain in the bill.

CONCLUSION.

It is therefore the opinion of this Department that House Bill No. 500 insofar as it appropriates money to the Board of Managers of the State Eleemosynary Institutions for Child Welfare, which is chargeable to the Federal allotment funds received from U. S. Children's Bureau, which is provided for by Section 3 of the bill, is a nullity, because by Committee Substitute to Senate Bill No. 125 the control of Child Welfare in this state was taken from the State Eleemosynary Institutions and placed under the management of the State Social Security Commission.

It is further our opinion that House Bill No. 520 which appropriates money to the State Social Security Commission, chargeable to the Federal allotment funds received from the United States Children's Bureau, is a valid appropriation.

Respectfully submitted,

APPROVED:

AUBREY R. HAMMETT, JR.
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

APPROPRIATION ACTS: Construction of Sections 53a and 53b of
H.B. 509.

July 28, 1937



Honorable George I. Haworth
Acting Administrator
State Social Security
Commission of Missouri
412 East High Street
Jefferson City, Missouri

Dear Sir:

We have your request of July 20, 1937, for an
opinion, which request is as follows:

"Are the appropriations as made by
Sections 53a and 53b of House Bill
#509 valid appropriations, and
can these appropriations be charged
against the relief appropriation
of \$9,000,000 as provided for in
House Bill #520?"

The Casey Bill (CSSB 125) by Section 20 creates
five special funds in the State Treasurer's office, in-
cluded in which is the "relief fund". The general appro-
priation act H.B. 520, Section 1, appropriates Nine Million
Dollars for "aid or relief in cases of public calamity".

The Legislature took cognizance of the fact that
under the Casey Bill the State Treasurer and the State
Auditor have certain duties to perform in the auditing and
disbursing of these funds, particularly the relief fund.
How the costs of administering the relief fund should be
paid for the special services rendered by the State Treasurer
and State Auditor was purely a matter in the lap of the
Legislature. It was with this idea in mind that the Legis-
lature enacted Sections 53a and 53b of H.B. 509 appropriating

July 28, 1937

funds for handling relief accounts to the State Treasurer and the State Auditor and making such funds so appropriated "chargeable to the relief fund". This means that these appropriations must be deducted from the total of Nine Million Dollars for relief purposes appropriated in H.B. 520.

The Legislature has authority to create special funds in the treasury, but no moneys may be withdrawn from such fund except by an appropriation act. State ex rel. vs. Henderson, 160 Mo. 190. State vs. Hackmann, 264 S.W. 266.

It is therefore the opinion of this office that the appropriations made by Sections 53a and 53b of H.B. 509 are properly chargeable against the total sum of Nine Million Dollars provided for in H.B. 520.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

SOCIAL SECURITY COMMISSION: Definition of "elective officer"
as it is used in Section 9, C.S.S.B. 125

August 2, 1937.

8-3



Honorable George I. Haworth
Acting Administrator
State Social Security Commission
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your letter of July 22, 1937, in which you request an opinion as follows:

"In C.S.S.B. 125, Section 9, it is provided that "No elective officer shall be appointed a member of the county social security commission, and upon becoming a candidate for any elective office such member of the county social security commission shall forthwith forfeit his position on said commission."

We would appreciate your advising this Commission the legal definition of 'elective officer'."

You have set out in your request the pertinent part of C.S.S.B. 125, Section 9, which prohibits "elective officers" from being appointed to the County Social Security Commission. An officer, of course, is one who holds an office. In 46 C.J. 921, officers have been classed as private and public. We think it is necessary for a proper disposition of this question to ascertain what the intention of the legislature was when it enacted Section 9 of C.S.S.B. 125. By "elective officer" did they mean public officer or private officer, or both?

August 2, 1937

In *Boll v. Condie - Bray Glass & Paint Co.*, 11 S.W. (2d) Mo. Sup. 48, 52, the court in construing a statute, said:

"It is proper, in construing a statute, to consider the reasons prompting the lawmakers to enact the same. In speaking in behalf of this court regarding the construction of a statute, Lamm J., said: 'To that end it is trite doctrine that we should consider * * *, the evil sought to be removed; as well as the remedy provided, and so construe the law to further the remedy and retard the evil. Such is a venerable rule of construction, none the less alive because old.'"

This provision of the act was enacted for the purpose of making the County Social Security Commission a non-political body, and we are borne out in this by the fact that the legislature provided in said act that, no more than two of the members of said county commission shall be of the same political party.

In *State ex rel v. McKay*, 52 S.W. (2d) Mo. App., 229, 230, the court has stated, one of the fundamental rules which is often applied in statutory construction, as follows:

"A statute * * * will not be given a construction which will make it unreasonable or which will result in an absurdity."

To say that the term "elective officer" means both public and private officers, comes within this rule. It is absurd, when we have in mind the purpose of this enactment, to think that the legislature could have intended to include a private officer within the meaning of this term. It would be

August 2, 1937

unreasonable and unfair to include, within the prohibition of this clause, those men who hold private offices of employment, because an appointee, to the county commission, who holds a private office of employment would not be a political office holder and his appointment would in no way inject politics, as this term is usually used, into the function of the county commission, and would not defeat the intent of the legislature as it is expressed by this provision.

In State ex rel v. Moneyhan, 212 Mo. App. l.c. 581, the court in stating a rule to be followed to harmonize a statute with reason and properly express what was in fact intended by the legislature, said:

"To accomplish the * * * purpose, words omitted may be read into the statute. Lewis' Sutherland Statutory Construction (2 Ed.) Section 382; State ex rel v. King 44 Mo. 283."

Therefore, with above rules in mind, we think, to clearly express the intention of the legislature the word "public" should be read into this statute so that the prohibition will be placed against "elective public officers".

A public office or officer, has been defined in this state in State ex rel v. Morehead, 256 Mo. l.c. 690, when it is said that:

"A public office is defined to be a special trust or charge created by law * * *. In short, one clothed with the powers, exercising the functions and receiving the emoluments of a public office is a public officer."

In Board of Education v. McChesney, 32 S.W. (2d) 26, 27 (Kentucky) it is said that, "Election to office usually refers to a vote of the people * * *".

August 2, 1937

In re: Opinions of the Justices 139 A, l.c. 183 (N.H.), the court in defining elective offices said that they, "are those which are filled by the direct exercise of the franchise of the voters." In Schwab v. Boyle, 160 N.Y.S. l.c. 896; the court said, "The words 'elective officers' * * *, relate to officers selected by the qualified voters of the state, or some political subdivision of it." In State ex rel v. Bowman, 184 Mo. App., l.c. 552, it is said that, "An elective office is one where the officer is chosen by a vote of the qualified voters * * *." In Ayers v. Hutch, 56 N.E. 613 (Mass.) it is said, "The word 'elective'; and the words 'who are elected by the people' signify, it seems to us, officers whom the people are and have been accustomed to elect."

Therefore, it is the opinion of this Department that the term "elective officer" as used in C.S.S.B. 125, Section 9, means a person selected by a direct exercise of the franchise of the qualified voters to fill a public office of a city, state or political subdivision thereof.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB MR

STATE AUDITOR: Duty to audit claims against Relief, Child Welfare and Administration fund, created in the Casey Bill

August 4, 1937.

Honorable George I. Haworth
Acting Administrator
State Social Security Commission of Missouri
Jefferson City, Missouri



Dear Sir:

We have your request of July 28, 1937, for an opinion relative to the construction to be placed upon the Casey Bill (C.S.S.B. 125), and which questions are as follows:

"(1) Under the broad powers given this Commission is it the State Auditor's duty to audit, adjust, and settle claims against the Relief, Child Welfare, and Administration funds, or does this Commission have the authority to audit, adjust, and settle claims against these funds and then present the approved and certified claim to the State Auditor for issuance of a warrant?

(2) Can the judgment and discretion of the State Auditor override the judgment and discretion of the State Social Security Commission? In other words, if a claim against the Relief, Child Welfare, or Administrative funds is approved by the Commission and certified, can the State Auditor question the validity or regularity of the claim, or is he concluded by the certificate and is his act of issuing the warrant purely ministerial?"

Honorable George I.
Haworth

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August 4, 1937

We shall treat these questions separately.

I.

Authority to audit, adjust and
settle claims against the Re-
lief, Child Welfare and Adminis-
tration funds.

Sub-division 4 of Section 4 of the Casey Bill, provides that the State Commission shall have power "to administer, disburse, dispose of and account for funds * * *."

The above provisions merely gives the Commission the powers enumerated and does not repeal or supplant any existing law, inconsistent therewith, relative to the handling of state funds. For example, appropriation acts are still needed before funds can be paid out of the treasury and the general routine necessary for the payment of claims against the state is undisturbed by this section. We must, therefore, look to the general law of the state relative to the payment of funds.

Section 11404, R. S. Missouri, 1929, in prescribing the general duties of the State Auditor, provides:

"He shall: First, audit, adjust and settle all claims against the state payable out of the treasury, except only as such claims as may be expressly required by law to be audited and settled by other officers or persons; * * *."

An examination of the Casey Bill will reveal no such specific statutory authority to audit and settle claims in conflict with the above provision.

Honorable George I.
Haworth

3.

August 4, 1937

It is, therefore, the opinion of this office that the State Commission has no authority to audit, adjust or settle claims against the Relief, Child Welfare and Administration funds, in lieu of the statutory powers delegated to the State Auditor, but that the State Auditor is obligated by statute to audit, adjust and settle claims against these funds in the same manner as he audits, adjusts and settles claims against every other fund.

II.

The State Auditor is not concluded by the certificate of the Commission in the auditing, settling and allowance of claims against the Relief, Child Welfare and Administration funds.

It has long been settled in this state that the State Auditor is not concluded by certificates for the payment of money properly issued by public officers. In the case of Morgan v. Buffington, 21 Missouri 549, a member of the general assembly, Morgan, sought to compel the State Auditor to draw warrant for an amount certified by the Speaker of the House to be due Morgan as compensation for services as a member of the House. The court held that the certificate of the Speaker of the House of Representatives was not conclusive upon the auditor. In that case the Supreme Court at l.c. 552, said:

"The auditor of public accounts is an important officer, entrusted with the management of the revenues of the state. Whilst the treasurer holds the iron or brazen key of the treasury, the auditor holds the legal key, and it is through his instrumentality alone that money can lawfully be drawn from it. The state looks to him as the

Honorable George I.
Haworth

4.

August 4, 1937

protector of her treasure. The powers confided to him are necessarily large, and as by his mismanagement the state may at any time be rendered unable to fulfil her pecuniary engagements, so there should be a power in him to prevent such a state of things."

The Supreme Court in commenting upon the powers of the auditor in *State ex rel Gehner v. Thompson*, 316 Missouri 1169, 1.c. 1180, said:

"His duties and responsibilities in guarding the expenditure of the money belonging to the State are so weighty, and the necessity for their proper performance so directly pressing upon him, as to leave no room for implication This is a power, of course, which the Auditor cannot exercise in an arbitrary manner, so as to defeat the payment of a just claim against the State. The law expressly provides for a reference of the matter to the General Assembly in every case where there is a refusal on the part of the auditor to allow the demand and draw his warrant therefor. This may not be as speedy a way of obtaining justice as a party might desire, but still it is the way pointed out by the statute, and which he may pursue or not at his pleasure."

The auditor has a large discretion to exercise in the auditing, adjusting and settling of claims against the state. Before his general powers can be taken away from him in the auditing and settling of any claim it must be made to appear by an express provision of some statute. *State ex rel v. Wilder*, 196 Missouri 418, 428.

Honorable George I.
Haworth

5.

August 4, 1937

It is the duty of the State Commission under the Casey Bill, to determine the amount of Relief, Child Welfare or Administration cost. It is the duty of the State Auditor to determine when such claims are presented whether they are legal valid claims against the state and whether or not there are funds available for the payment of such claims.

It is, therefore, the opinion of this office that the auditor in auditing claims against the Relief, Child Welfare and Administration fund, may question the validity or regularity of the claim, that he is not concluded by the certificate of the State Commission as to the validity of the claim.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER MR

CONTRACTS: Senate Bill No. 182 has no application to existing contracts and those heretofore let.

August 6, 1937.

g-6



Honorable Charles A. Haskins,
Chief Engineer and Architect,
State Building Commission,
Jefferson City, Missouri.

Dear Mr. Haskins:

This department is in receipt of your letter of August 6, 1937, requesting an opinion as to the following:

"In reply to your opinion of July 17, 1937, may I submit one question relating to the application of Senate Bill No. 182?

"In your opinion, does Senate Bill No. 182 have any application to contracts already in existence and to contracts heretofore let?"

Section 15 of Article II of the Constitution of the State of Missouri provides:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, of making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly."

August 6, 1937.

When a State descends from its plane of sovereign and contracts with private individuals, it is regarded pro hac vice as a private person itself and is bound accordingly. Hall v. Wisconsin, 103 U. S. 5. This is a well settled principle of law and is clearly stated by Judge Black in the case of State ex rel. Walker v. Walker, 88 Mo. 279, wherein he says:

"Contracts made between the state and an individual are as binding upon the state as if the state was an individual. It cannot impair the obligation of its own contract. As was said in State v. Hawthorne, 9 Mo. 390, the legislature can no more violate a contract made by themselves or under their authority than they can rescind or alter or impair the obligation of one made between private individuals. This principle of law is well established."

Senate Bill No. 182 was signed by the Governor on the 24th day of June, 1937, and will become a law on the 6th day of September, 1937.

When Senate Bill No. 182 finally becomes a law, if it be sought to apply its provisions to contracts already in existence and those heretofore let, not only would such a construction render the statute unconstitutional for the reason that it impairs the validity of written contracts, but such a construction would render it unconstitutional for the reason that it would give to the statute a retrospective application. This cannot be done.

In the case of Bartlett v. Ball, 142 Mo. 28, the Supreme Court of Missouri said:

"Nor is it to be forgotten that retrospective laws are forbidden eo nomine by our constitution."

And in the case of Graham Paper Company v. Gehner, 59 S. W. (2d) 49, the Court said:

"Defendants are clearly correct. A new or an amendment of an existing

statute which reaches back and creates a new or different obligation, duty, or burden which did not exist before the new law itself became effective, or which makes the obligation or burden begin at a date earlier than the date of going into effect of the law itself, is retroactive in its operation and unconstitutional. A law is retroactive in its operation when it looks or acts backward from its effective date, and if it has the same effect as to past transactions or considerations as to future ones, then it is retrospective. *Leete v. State Bank*, 115 Mo. 184, 198, 21 S. W. 788."

CONCLUSION

In view of the foregoing, we are of the opinion that Senate Bill No. 182 has no application whatsoever to contracts entered into prior to the date Senate Bill No. 182 will become the law of the State of Missouri.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

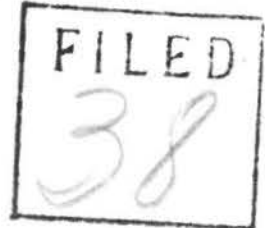
APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

COUNTY TREASURER: SALARY: BOND: Compensation to be allowed him and separate bond required of him as custodian and disburser of moneys of (1) schools; (2) Levee Districts under county court organization; and (3) Drainage Districts under county court organization.

September 23, 1937.



Mr. E. B. Hearnest
County Clerk
Mississippi County Court
Charleston, Missouri

Dear Sir:

We wish to acknowledge receipt of your letter of September 20th, wherein you request an opinion as follows:

"Since the County Treasurer's office has been reestablished please give us ruling on the following:

"Is the Bond for the Treasurer the same as before, \$20,000.00 for County, \$20,000.00 for Schools, \$20,000 for Ditches and \$20,000.00 for Levees--total \$80,000.00? According to the 1937 Statute (Sec. 12133, page 426) the Bond is not to be less than \$20,000.00 to be fixed by the County Court. Does that mean just one Bond of \$20,000.00 is required for all funds?

"Is Treasurer still allowed commission as follows:

" $\frac{1}{2}$ of 1% on School Expenditures
 $\frac{1}{2}$ of 1% on Levee
1% on Ditch

I.

Under House Bill 20, Section 12130, Session Acts, 1937, at page 425, the office of county treasurer is created in counties of less than 40,000 inhabitants, which said statute is as follows:

"There is hereby created in the several counties of this State, now or hereafter having a population of less than 40,000 inhabitants according to the last Decennial United States Census, a county treasurer, to be appointed by the Governor, and to take office immediately after the effective date of this Act and who shall enter upon the discharge of the duties of his office after his said appointment and qualification and who shall hold his office for a term ending on the first day of January, 1939, and until his successor is elected and qualified, unless sooner removed from office. Provided, that nothing in this section shall apply to counties under township organization."

The bond that a treasurer is required to execute and the amount thereof, is provided in Section 12133 of said House Bill 20, at page 426, which is as follows:

"The person elected or appointed county treasurer under the provisions of this article shall, within ten days after his election or appointment as such, enter into bond to the county in a sum not less than twenty thousand dollars, to be fixed by the county court, and with such sureties, resident landholders of the county, as shall be approved by such court, conditioned for the faithful performance of the duties of his office."

The county treasurer's compensation, as treasurer of the county, is provided for in Section 12138 of said House Bill 20, at page 427, which is as follows:

"Unless otherwise provided by law, the County Court shall allow the treasurer for his services under this article such compensation as may be deemed just and reasonable, and cause warrants to be drawn therefor."

Conclusion.

House Bill 20 of the 1937 Session Acts, repealed Senate Bill 76 of the 1933 Session Acts, reestablished the office of county treasurer and provided for his bond and compensation in Sections 12133 and 12138 thereof, which are verbatim with sections of the same number in Article 8, Chapter 85 of the 1929 Statutes, which were repealed by Senate Bill 76 of the 1933 Session Acts, and so, under House Bill 20, 1937 Session Acts, as in Article 8, Chapter 85 of the 1929 Statutes, the county treasurer must enter into a bond to the county in a sum not less than \$20,000.00 to be fixed by the county court, and approved by it, and which said court shall allow said treasurer for his services under this article such compensation as may be deemed just and reasonable. Such bond and compensation comprehend his acts as county treasurer.

The county treasurer is also, by statutes, made treasurer of the schools, levee districts under county court organization, and drainage districts under county court organization, with powers and duties as follows:

II.

There was an opinion written by this Department to Honorable Otto G. Schell, Treasurer of Miller County, on February 26, 1935, which shows the amount to be received by the county treasurer for fees from school moneys for his services as custodian and disbursing officer of such moneys, as provided in Section 9266, Revised Statutes of Missouri, 1929, a copy of which said opinion is enclosed herewith.

The bond for a county treasurer as custodian of school moneys is provided in the same section, to-wit, 9266, supra, which said section is as follows:

"The county treasurer in each county shall be the custodian of all moneys for school purposes belonging to the different districts, until paid out on warrants duly issued by order of the board of directors or to the treasurer of some town, city or consolidated school district, as authorized by this chapter, except in counties having adopted the township organization law, in which

counties the township trustee shall be the custodian of all school moneys belonging to the township, and be subject to corresponding duties as the county treasurer; and said treasurer shall pay all orders heretofore legally drawn on township clerks, and not paid by such township clerks, out of the proper funds belonging to the various districts; and on his election, before entering upon the duties of his office, he shall give a separate bond, with sufficient security, in double the probable amount of school moneys that shall come into his hands, payable to the state of Missouri, to be approved by the county court, conditioned for the faithful disbursement, according to law, of all such moneys as shall from time to time come into his hands; and on the forfeiture of such bond it shall be the duty of the county clerk to collect the same for the use of the schools in the various districts. If such county clerk shall neglect or refuse to prosecute, then any freeholder may cause prosecution to be instituted. It shall be the duty of the county court in no case to permit the county treasurer to have in his possession, at any one time, an amount of school moneys over one-half the amount of the security available in the bond; and the county treasurer shall be allowed such compensation for his services as the county court may deem advisable, not to exceed one-half of one per cent. of all school moneys disbursed by him, and to be paid out of the county treasury."

Conclusion.

Therefore, it is the opinion of this Department that the county treasurer, except in counties having adopted the township organization law, shall be allowed such compensation for his services, as custodian of school moneys, as the county court may deem advisable, not to exceed one-half of one per cent

of all school moneys disbursed by him, and to be paid out of the county treasury.

It is further the opinion of this Department that, before entering upon his duties as such custodian, the county treasurer shall give a separate bond, with sufficient security, in double the probable amount of school moneys that shall come into his hands, payable to the State of Missouri, to be approved by the county court, conditioned for the faithful disbursement, according to law, of all such moneys as shall from time to time come into his hands.

III.

The bond for a county treasurer of a levee district, organized under the county court, and the compensation he shall be allowed as such treasurer, are set out in Section 10969, R. S. Mo. 1929, which said section is as follows:

"The county treasurer of the county in which the greater part of any organized levee district lies shall be the treasurer of the levee fund of the district, until paid out upon the warrants issued by order of the board of directors of the levee district. Before receiving any funds belonging to the levee district, the treasurer shall give a separate bond, with sufficient security, in double the probable amount of the levee fund that shall come into his hands, payable to the state of Missouri, to be approved by the board of directors, conditioned for the faithful disbursement, according to law, of all such moneys as shall, from time to time, come into his hands to the credit of the levee fund of the levee district of which the county of which he is treasurer is part; and such bond shall be filed in the office of the clerk of the county court of the county in which said treasurer is appointed or elected. On the forfeiture of such bond, it shall be the duty of the clerk of the county court in whose office said bond is filed to collect the same for the use of the

levee district. If such clerk shall neglect or refuse to prosecute, any freeholder of the district may cause prosecution to be instituted. It shall be the duty of the board of directors in no case to permit the county treasurer having the custody of the levee funds of the district to have in his possession at any one time an amount of levee funds over one-half the amount of the security available in the bond. Such treasurer shall be allowed such compensation for his services as the board of directors deem advisable, not to exceed one-half of one per cent. of all levee funds disbursed by him, and to be paid out of the levee funds."

Conclusion.

Therefore, it is the opinion of this Department that before receiving any funds of such levee district the county treasurer shall give a separate bond to the State of Missouri to be approved by the board of directors, in double the probable amount of levee funds that shall come into his hands, and that for his services he shall be allowed such compensation as said board may deem advisable, not to exceed one-half of one per cent of all levee funds disbursed by him, and said compensation is to be paid out of the levee fund.

IV.

The bond of a county treasurer of a drainage district organized under and by virtue of the county court, as custodian of the funds of the district, is set out in Section 10832, 1929 Revised Statutes of Missouri, which said section is as follows:

"The treasurer of the county in which a drainage district is located shall act as treasurer of the district and shall be the custodian of the funds of the district, except as otherwise provided in this article. He shall receive and receipt for all such funds and shall enter into a separate bond for each district in the county in a sum to be

fixed by the court, not less than the probable amount of funds of said district to be in his possession at any one time. Such bond shall be payable to the district, shall be approved by the court, shall be signed by two or more resident freeholders in the county or by a surety company authorized to transact business in the state and shall be conditioned for the faithful and prompt disbursement according to law of all such funds as shall from time to time be in his possession. The premium on such bond may be paid by the district. Except as otherwise provided in this article, the treasurer shall keep all district funds received by him deposited in a bank or banks selected in the same manner and at the same time that the depository for county funds is selected. All interest accruing on district funds shall be credited to the district and any premium on a surety bond may be paid by the district."

The compensation of a county treasurer as treasurer of a drainage district, organized under and by virtue of the county court, for receiving, receipting for, preserving and paying out its funds, is set out in Section 10881, 1929 Revised Statutes of Missouri, which said section is as follows:

"County treasurers for receiving, receipting for, preserving and paying out funds of drainage and levee districts, shall receive one per cent. of sums paid out."

Conclusion.

Therefore, it is the opinion of this Department that the county treasurer, as treasurer of the drainage district organized under and by virtue of the county court, shall enter into a separate bond for each district in the county in a sum to be fixed by the court not less than the probable amount of

Mr. E. B. Hearnese

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Sept. 23, 1937.

the funds of said district to be in his possession at one time, which said bond shall be payable to the district and shall be approved by the county court, and that said county treasurer shall receive as compensation as treasurer for the district one per cent of sums paid out.

Very truly yours,

S. V. MEDLING
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

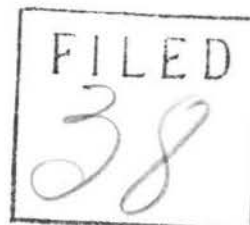
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STATE SOCIAL SECURITY
COMMISSION:

Benefits accruing to an individual entitled
~~to~~ thereto under the provisions of the act,
after the date which the commission has de-
termined such benefits shall be due and
payable, and the individual dies, such bene-
fits shall be administered as estates of
other deceased persons.

November 30, 1937

Mr. George I. Haworth
Acting Administrator
State Social Security Commission
Jefferson City, Missouri



Dear Mr. Haworth:

This is to acknowledge receipt of your
letter of recent date requesting an opinion from
this department, which reads as follows:

"Under Section 22 of C. S. S. B.
#125 it is provided that:

'Section 22. Delivery of benefits,
to whom. -- Benefits hereunder
shall be delivered to the applicant
in person, or in the event of his
incompetency, to his legally ap-
pointed guardian, and in the case
of a dependent child, to the person
or relative with whom he lives.
Benefits becoming due and payable
subsequent to the death of the in-
dividual entitled thereto shall be
cancelled.'

"Questions: 1 - What is the status
of an old age assistance check if
the beneficiary dies after the
check has been issued, but before
he can endorse and cash it?

"2 - Can the surviving heirs cash
the check under a probate court
order refusing letters or granting
letters of administration on the
deceased's estate?

November 30, 1937

"We would appreciate receiving an opinion from you on the above questions in order that we may know whether or not a legal representative can be appointed to receive a deceased beneficiary's old age assistance check."

You will note from Section 22, supra, as set forth in your opinion request, that "benefits becoming due and payable subsequent to the death of the individual entitled thereto shall be cancelled."

In order to determine your request for an opinion it is necessary to consider what is meant by the words "due and payable." A reading of the whole act does not disclose wherein any benefits are to become due and payable on a certain date. Therefore, we necessarily assume that the date which benefits are to become due and payable has been left to the Social Security Commission to determine, since it is their duty, under Section 4 of the Act, to adopt rules and regulations not inconsistent with the laws of this state.

It is proper for the present Social Security Commission to supply any details which the Legislature has omitted by necessary rules and regulations. Such details may only be supplied for the purpose of carrying into effect the provisions of the law itself. Ex Parte Cavanaugh, 313 Mo. 375, Sawyer vs. U. S., 10 Fed. (2d) 314.

After the commission has determined by its rules and regulations the date as to when the benefits are to become due and payable, then any benefits becoming due and payable subsequent to the death of the individual entitled thereto shall be cancelled. Therefore, benefits issued by the commission in the form of a check which has not been presented for payment prior to the death of the individual entitled thereto shall be administered as estates of other deceased persons.

On the other hand, should any benefits be given to an individual who has died prior to the due date of such benefits, then such benefits shall be cancelled as the statute indicates.

It is our understanding that the Social Security Commission has determined the date benefits shall be payable under the provisions of the Act, to be the first

Mr. George I. Haworth

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November 30, 1937

of each month for that particular month. To illustrate, benefits for the month of November would be due and payable on November 1st.

If an applicant should die on October 31st, and such applicant's benefits would become due and payable on November 1st, then such benefits shall be immediately cancelled.

In construing the word "shall" as used in Section 22, supra, your attention is directed to State ex rel. Stevens vs. Wurdeman, 246 S. W. 189, where the court, in speaking of the word "shall", said:

"Usually the use of the word 'shall' indicates a mandate."

CONCLUSION.

In view of the above, it is the opinion of this department that benefits which are due and payable prior to the death of the beneficiary, cannot be cancelled, whether or not a check has been issued for same, and that such benefits due a pensioner which are not received or cashed prior to his death are a part of his estate and should be administered upon in the same manner as any other property belonging to such deceased pensioner. Benefits not due and payable at the time of the death of the beneficiary should be cancelled by the Social Security Commission.

Yours very truly,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS:FE

being furnished with the necessary books and blanks by the county clerk at the expense of the county, proceed to make a list of the taxable personal property and real estate in your county, town or district, and assess the value thereof, etc."

Under Section 9800, R. S. Mo. 1929, it is provided that:

"The assessor, except in the City of St. Louis, shall make out and return to the county court, on or before the 20th day of January in every year, a fair copy to the assessor's book, verified by his affidavit annexed thereto, * * *"

And said section further provides:

"And upon a failure to make such return to the court on or before the day above mentioned, the court shall deduct twenty per cent from the amount of fees allowed to such assessor. * * *

It would therefore appear from the above statutes that the amount of fees an assessor is to receive as compensation for his services is not finally determined until the assessor has made out and delivered to the county court the tax books and this he must do before January 20th of the year following June 1st of the preceding year.

Section 9806, R. S. Mo. 1929, as amended by Laws of Missouri, 1931, page 359, provides in part as follows:

"The compensation of each assessor shall be thirty-five cents per list in counties having a population not exceeding forty thousand * * *"

which fixes the amount of the compensation of the Assessor in Pemiscot County, and said section further provides:

"one half of which shall be paid
out of the county treasury and the
other half out of the state
treasury: * * * "

Our construction of these statutes, with reference to when the assessor shall be paid, is that as soon as he has completed the assessment and returned the tax books to the county clerk that he is then entitled to his compensation for his work as assessor and he is not compelled to await the payment of the taxes by the taxpayers on his assessment. In other words, for example, the assessment made by the assessor of June 1st, 1936, should be completed and the books turned over to the county clerk on or before January 20, 1937, after which time the compensation due the assessor for making such assessment is due and payable out of the county treasury for the county's portion. If the assessment is completed before January 20th and properly certified, we see no objection to him being paid when that is done.

The State through its State Auditor, and it is the practice over a long period of time that when properly certified to the State Auditor, as provided by Section 9800, supra, that the assessment has been completed by the assessor, to then authorize the payment of the State's portion of the assessor's compensation.

It is, therefore, our opinion that after the completion of the assessment and the books delivered to the county clerk on or before January 20, 1937, the assessor's compensation is then due and payable and he does not have to await for his compensation until the payment of the taxes on said assessment. If that were not

Hon. Robert W. Hawkins

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Dec. 16, 1937.

true the assessor would be compelled to wait almost
a year for payment after his work has been completed.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

(Acting) J. E. TAYLOR
Attorney-General

CRH:EG

C O P Y

Re: INHERITANCE TAX: (1) When interest and penalties may be abated (2) Taxation of the interest of partner in partnership property.

March 22, 1937.



Honorable Mitchell J. Henderson,
Probate Judge,
Kansas City, Missouri.

Dear Judge Henderson:

This Department is in receipt of your letter of March 6, requesting an opinion as to the following facts:

"I am herewith enclosing to you the application of executor for extension of time in which to pay inheritance tax and for the abatement of penalties thereof, also an order they prepared for me and a short resume of the situation as reported to me by the inheritance tax appraiser and from personal knowledge of my own.

This estate was filed in the probate court some ten years ago but has been in litigation from that time to the present date. I do not mean, now, from the standpoint of taxes, that matter has never become a question until this moment. Most of the estate was in the form of partnership assets out of which grew the litigation that continued for so many years. Because of the successful termination of the litigation the estate is worth around three hundred thousand dollars. Now they are asking me to abate all interest and penalties. My personal opinion is that I have no right to charge interest or fix penalties against them because the appraiser could not make a report until the litigation which finally terminated the interests of all parties was ended.

The appraiser reports to me in writing that while the litigation was in progress he from time to time took it up with Judge Guinotte; Judge Guinotte told him there was nothing that he could do except wait until the litigation was con-

Honorable Mitchell J. Henderson

March 22, 1937.

cluded. Now it has been concluded and he is filing his report and wants me to approve it and to abate the interest and penalties. In addition thereto, I might add, that the partnership offices were in Missouri, the deceased died a resident of Kansas City, Missouri, but part of this estate was composed of land in the State of Kansas; I think about 38%, so they are filing here only 42% of the estate for taxation. It is their position that Kansas has a right to collect on that part of the estate that was in Kansas in land and Missouri has no right to assess it.

I would like to have an opinion from your office as to whether or not I should, in light of the facts, abate the interest and penalties, also as to whether or not they have a right to exclude from the appraised value of the property the lands located in the state of Kansas. If you are able to reach a conclusion about this matter from this letter and find that they are correct and will so advise me I will make the order they request. If there is some **doubt** about the matter I would like to set it down for hearing and have you assign some assistant attorney-general to take the matter up before me at a certain time so that I might hear them and you on this matter.

Would appreciate your writing me at your earliest possible moment as I would like to get it behind me."

I.

The application for an extension of time within which to pay inheritance taxes and for the abatement of penalties should be sustained.

The facts in this case, briefly, are as follows:

John Moffett died August 23, 1927 and under his will T. S. Moffett, a brother, of Kansas City, Missouri, was appointed as Executor of his Estate.

Honorable Mitchell J. Henderson

March 22, 1937.

A large claim of John Moffert against Moffert Brothers (John Moffett and T. S. Moffett) partnership, hereinafter several times referred to, in the opinion of the widow and most of the heirs of John Moffett should have been filed against the Moffett Brothers partnership estate, but the said T. S. Moffett refused to file said claim and Helen Moffett, widow of John Moffett, deceased, filed an application in the Jackson County probate court for the removal of the said T. S. Moffett. This application was continued a number of times in the hope that it would not be necessary to remove T. S. Moffett, and there were many conferences, but, after some three or four continuances, the matter was heard by a special judge, Samuel Strother, sitting for Judge Guinotte, whereupon the said T. S. Moffett was removed as executor of the John Moffett estate for conflict of interest and thereupon the Commerce Trust Company, which was also named in the will of John Moffett as an Executor, qualified and became Executor De Bonis Non of the said estate of John Moffett, deceased, on November 28, 1928. There was litigation from the very start regarding this claim of the John Moffett estate. Although the Commerce Trust Company filed such a claim in the probate court of Jackson County, Missouri, at Kansas City, as hereinafter stated, the said claim was included in the equity accounting suit, No. 7374, instituted by T. S. Moffett in the district court of Harper County, Kansas against the heirs and beneficiaries of John Moffett, deceased, hereinafter mentioned. This equity suit involved many issues between the John Moffett and T. S. Moffett people, but, when finally adjudicated recently, greatly clarified same.

As shown by the report of the appraiser of the John Moffett Estate, Samuel L. Trusty of Kansas City, Mr. Trusty reported the pendency of the Moffett equity accounting litigation, Suit 7374, in the district court of Harper County, Kansas, and Mr. Trusty was instructed by the probate court of Jackson County, Missouri, at Kansas City (Honorable Jules E. Guinotte) to defer making his appraiser's report until the outcome of that litigation, because until the final adjudication of said litigation no one could tell what the assets of the John Moffett Estate could consist of.

In the appraiser's report is shown a claim of the John Moffett Estate for \$152,947.63 against the Moffett Brothers (John Moffett and T. S. Moffett) partnership estate at the date of the death of John Moffett, August 23, 1927. This claim constitutes a large part of the estate of John Moffett, and, with the exception of some payments made on said account subsequent to the death of John Moffett, the final judgment of the district court of Harper County, Kansas, of \$142,452.24, part of said \$152,947.63 was the bone of contention in the litigation which has but recently been terminated in the state and federal courts. The outcome of that litigation determined whether said assets would or would not be in the John Moffett estate, as the entire amount was in question in said liti-

Honorable Mitchell J. Henderson

March 22, 1937.

gation. In other words, if the litigation in question had been lost by the John Moffett Estate, the aforementioned item of \$152,947.63, as reported by the appraiser, Mr. Trusty, would have been eliminated, and, in addition, there would have been a claim of some \$38,441.18 against the John Moffett estate. This is shown in abstract of said Harper suit on appeal in Kansas Supreme Court ("B" at Abs. 567 in Appeal No. 30826).

The appraiser, S. L. Trusty, in my opinion was fully justified in awaiting the outcome of the litigation before making his report. In fact, I do not see how he could make a report without doing an injustice to the heirs and beneficiaries, except after the termination of the litigation mentioned.

I find that there was other litigation than the equity accounting suit in the district court of Harper County, Kansas, which also make it difficult for the appraiser to determine what are the assets of the John Moffett estate. The more important cases are as follows:

Moffett v. Moffett, 131 K. 582; 292 P. 947
Clark v. Moffett, 136 K. 711; 18 P. (2nd) 555
Moffett v. Moffett, 290 U. S. 642; 290 U. S. 602
Moffett v. Robbins, 14 Fed. Supp. 602
Moffett v. Robbins, 81 Fed. (2nd) 431
Zombro v. Moffett, 44 S. W. (2nd) 149 (Mo. Sup. Ct.)

Section 578 R. S. 1929 provides, in part, as follows:

"All taxes imposed **** shall be due and payable at the death of the decedent, and interest at the rate of six percent (6%) per annum shall be charged and collected thereon for such time as said taxes are not paid, unless the payment of interest is abated or time of payment extended by order of the probate court, because without negligence final assessment of tax cannot be made; *****"

In view of this section of our statutes and in view of the facts set out above, this Department is of the opinion that the application for the extension of time within which to pay inheritance taxes in this estate and for the abatement of penalties should be sustained.

Honorable Mitchell J. Henderson

March 22, 1937.

II.

The interest of a partner in partnership property is taxable at the domicile of the deceased partner.

There is no question but that the lex rei sitae controls the title and disposition of real estate, so that if this were merely a case of a resident decedent owning real estate in Kansas there would be no question but that the real estate would be taxable in Kansas and not in Missouri. However, the appraiser's report shows that the real estate in question belonged not to John Moffett, the deceased, personally, but belonged to Moffett Brothers, a partnership, and to the partnership of Moffett Brothers and Andrews. The share of John Moffett in the partnership of Moffett Brothers and Andrews is valued at \$26,722.69. The appraiser, however, has set up as taxable in Missouri only \$15,787.29 for the reason that the balance is located outside of Missouri, the assets of the partnership being entirely real estate. The value of John Moffett's interest in the partnership of Moffett Brothers is set out in the report as \$86,117.20. However, the appraiser has here allocated to Missouri only \$39,834.74. The assets of this partnership consisted principally of live stock, wheat, farm equipment and real estate.

It is the opinion of this Department that when a co-partner dies, his interest in the partnership is the surplus after payment of debts and is therefore intangible personalty, even though the partnership owned real estate. *Blodgett v. Silbermann*, 277 U.S. 1. In that case the decedent was domiciled in the state of Connecticut, but was a member of the partnership of William Openhym of the state of New York. The partnership owned considerable real estate in the state of New York. In discussing this question the Court said:

"A partner has a right equal to that of his partners to possess specific partnership property for partnership purposes, but not otherwise. His right to specific partnership property is not assignable, nor is it subject to attachment or execution upon a personal claim against him; upon his death the right to the specific property vests not in the partner's personal representatives, but in the surviving partner; his right in specific property is not subject to dower, curtesy or allowance to widow's heirs or next of kin..... It is very plain, therefore, that the interest of the decedent in the partnership was simply a right to share in what would remain in the partnership assets after its liabilities were satisfied. It was merely an interest in the surplus, a chose in action. It is an intangible and carries with it a right to an accounting."

Honorable Mitchell J. Henderson

March 22, 1937.

In view of this decision of the Supreme Court of the United States, it is the opinion of this Department that the interest of John Moffett, deceased, in the two partnerships heretofore referred to is a right to an accounting, a chose in action, an interest in the surplus after the payment of debts, and is taxable as intangible personal property in the State of Missouri, the domicile of the decedent.

In conclusion, we wish to call the Court's attention to the deduction of \$5000.00 paid to R. O. Robbins as administrator's fee in Kansas. It is our opinion the administrator's fee paid in Kansas is deductible in Kansas, but not in Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, JR., Assistant Attorney General.

APPROVED:



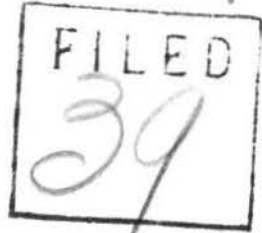
ACTING ATTORNEY GENERAL

JWH:EG

CHILDREN: Powers and duties of Superintendent of State Children's Home, and Juvenile Courts, with respect to commitment of children to State Children's Home.

May 22, 1937.

Mrs. W. W. Henderson,
Executive Director,
Missouri State Children's Bureau,
Jefferson City, Mo.



Dear Mrs. Henderson:

A request for an opinion has been received from you under date of January 29, 1937, such request being in the following terms:

"An opinion is requested from your office in the case of the four Bond children and three Beard children committed by Judge Nike G. Sevier to the State Children's Home at a special juvenile court hearing held Wednesday, January 27, 1937 at which representatives of the State Children's Bureau were present and stated to the juvenile judge that the superintendent of the Children's Home at Carrollton had indicated that she would accept only the three youngest Beard children.

"No question as to commitment of the four Bond children had been brought to the superintendent of the State Home prior to the hearing. However, when the superintendent was interviewed by the county welfare superintendent as to the Beard children, she had stated that the State Home was filled to capacity, that there was an epidemic of scarlet fever and chickenpox and that no children could be received nor could they be placed out in foster homes at this time, but, because she had, sometime ago, indicated she would accept the three youngest Beard children, she agreed to do so now.

"Question 1. Has a juvenile judge the right to commit children to the State Receiving Home at Carrollton without consulting the superintendent of the Home as to the available beds and accommodations at the Home for the children?

Section 14100, Sentence 2: 'Whenever the number of children shall exceed

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the capacity of the home, preference shall be given to the younger children and to those in greatest need, and the children received shall be divided among the several counties as justly as possible, taking into consideration the number of such children in each county and its population. The board or superintendent of said home shall notify the juvenile court of the number of children that can be received from such county, whenever vacancies exost.'

Section 14095: 'The purpose of said Home shall be to provide for neglected and dependent children a temporary home that will furnish for them, pending placement in permanent family homes, proper care and instruction.'

"It would seem that children committed to the State Home are committed under Chapter 125, Article 4, and that they are not committed as are juvenile delinquents under Section 14136 to 14158 covering juvenile courts in counties of less than 50,000 population.

"Question 2. If a juvenile judge commits children to the 'State Children's Bureau' under Section 12931 would the Bureau be compelled to accept children and place them in foster homes:

1. If no free homes could be found immediately?
2. If the Bureau had no fund appropriated by the Legislature for boarding home care for children?
3. If the county court of the county from which child was committed could not or would not pay the board of the child in a family home or an institution?

"Question 3. Has the superintendent of the State Children's Home the right to accept or reject children according to her judgment and interpretation of 'those in greatest need', and, 'taking into consideration the number of such children in each county and its population'?

"May I have as early a reply as possible to these questions?"

May 22, 1937.

Your three questions, in effect, can be resolved into the single question of whether the Board of Managers of the State Eleemosynary Institutions, acting through the Superintendent of the Children's Home at Carrollton, is, under the applicable statutes, given the right to decide when children shall be received into such home under a commitment of the juvenile court. We call to your attention that your question 2 relates to commitments under R. S. Mo. 1929, sec. 12931, which section, together with the other sections contained in Art. 1, Ch. 90 of the Statutes, was repealed by Laws of 1933, p. 400.

The answer to your questions must be found in an analysis of Art. 4, Ch. 125 of R. S. Mo. 1929, as amended by Laws of 1933, p. 189, transferring the control and management of the Children's Home at Carrollton from the State Board of Charities and Corrections to the Board of Managers of the State Eleemosynary Institutions, and vesting in the latter board the powers of the former. The scope of Art. 4 of Ch. 125 may be outlined by saying that it provides for the management of the Children's Home by the Board of Managers of the State Eleemosynary Institutions through a Superintendent, and that it also provides the machinery by which neglected children may be committed to the guardianship of such Board and to the Home itself.

I.

PROCEDURE FOR COMMITMENT OF CHILDREN.

R. S. Mo. 1929, sec. 14101, provides for the filing of a complaint to the judge of the juvenile court by any two citizens of that county alleging that a child is dependent on public support, in a state of habitual vagrancy or mendicity, or being improperly treated by its parents. The prayer of such complaint must ask that the child "be committed to the guardianship of the board". Sec. 14102 provides that the judge, upon the filing of the complaint, shall cite the parents or guardians of the child to show cause why the child should not be committed. Any person may appear on behalf of the child, and upon order of the judge the complainants and the prosecuting attorney of the county may be required to appear in support of the complaint. Sec. 14103 provides that the judge shall examine into the facts alleged and if he finds they are true, he shall cause the child to be examined by a physician and, upon certification by the physician that the child is of sound mind and

May 22, 1937.

free from chronic or communicable disease, "the judge shall enter an order committing the child to the guardianship of said board". Thus it will be observed that on a complaint filed and heard under these three sections, the judge has no alternative and is required, by law, to commit the child to the guardianship of the board if he finds the facts to be as alleged in the petition and if the child's health meets the statutory requirements. It should also be noted that there is no provision for the Board of Managers of the State Eleemosynary Institutions or the Superintendent of the Children's Home, or anyone on their behalf, appearing at this hearing or having anything to say about whether the child complained of shall be committed to the guardianship of the board.

Sec. 14101 contains the following provision:

"All commitments to said home shall be made by the juvenile court of the county of such child's bona fide residence."

This kind of commitment is something different from a commitment to the guardianship of the board as provided for in secs. 14101, 14102 and 14103. Each kind of commitment can only be made by the judge of the juvenile court. The commitment to the guardianship of the board must be made by the judge upon the establishment of the facts required by the statute, and the board has nothing to say about this kind of a commitment, but no such mandatory provisions apply with respect to commitments to the Home, and although such commitments must be made by the judge if made at all and can only be made by such judge, the question is whether the statutes contemplate that the board shall have any kind of control or voice in the judge's decision about a commitment to the Home.

II.

PROCEDURE AFTER COMMITMENT TO GUARDIANSHIP.

A commitment to the guardianship of the board and a commitment to the Home are not necessarily contemporaneous. Sec. 14105 provides that if, after a commitment to the guardianship of the board, the parents of the child committed shall refuse to surrender it, the judge of the juvenile court is to make an order requiring the proper officer of the court to produce the child in court and that the officer shall thereupon take the child and keep it at a proper place other

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than the county jail or almshouse, under the direction of the judge and at the expense of the county "until the child has been committed to the state home herein provided for or otherwise disposed of according to law". Also, sec. 14100 provides as follows:

"Only children under seventeen years of age who are dependent on the public for support, abandoned, neglected or ill-treated, and who are sound of mind, shall be received into said home; Provided, however, that nothing in this article shall be construed as preventing the board from receiving crippled children under 17 years of age, or children having infectious or contagious disease under 17 years of age or any other children under 17 years of age when adequate facilities or arrangements are established to care for them. Whenever the number of children shall exceed the capacity of the home, preference shall be given to the younger children and to those in greatest need, and the children received shall be divided among the several counties as justly as possible, taking into consideration the number of such children in each county and its population. The board or superintendent of said home shall notify the juvenile court of the number of children that can be received from such county, whenever vacancies exist. No child who can be received into the home shall be maintained in any county poorhouse or almshouse, but before any child under one year of age shall be ordered to said home, a written statement from the superintendent shall be obtained, showing that said child can be received and cared for in said home."

This last section shows that the General Assembly contemplated that there would be times when the Children's Home would be filled without being able to accommodate all of the children otherwise eligible for admission thereto who had been committed to the guardianship of the board. Otherwise there would not be this provision in sec. 14100 that the board or the Superintendent of the Home shall notify the juvenile court of the number of children that can be received from the county in which such court has jurisdiction. This recognition, coupled with the fact that the judge of any particular juvenile court has no discretion about committing a child to the guardianship of the board, shows that the General

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Assembly contemplated that there would be cases where the judge would make an order committing a child to the guardianship of the board but not committing it to the Home. Sec. 14100 provides that the judge shall be notified "whenever vacancies exist". If there is a vacancy for a child from a given county and the judge of the juvenile court of that county is notified, or even possibly if he is not notified, the statute expressly authorizes him to commit the child at the same time to the guardianship of the board and to the Children's Home, but, of course, that is not in issue here, as your inquiry deals with a situation where the board has notified the judge that no vacancy exists.

Sec. 14096, as repealed and re-enacted by Laws of 1933, p. 189, gives the Board of Managers of the State Eleemosynary Institutions "the general control and management of said home" and sec. 14099 provides that such board "shall prescribe regulations for the government and conduct of the institution". Thus the board is given a rather complete jurisdiction over the Children's Home and authorized to make its own decisions as to the conduct of the Home, which would presumably include the decision as to how many children can properly be cared for therein. The question of whether there is a vacancy in the Home would seem to be a question of fact which the board would be better able to decide than anyone else. As noted, sec. 14100 requires the board or the Superintendent to notify the court of the proper county "whenever vacancies exist" and since the board and the Superintendent could not give this notification unless they had determined that vacancies exist, it would seem that this power is also expressly vested in the board. Sec. 14100 also provides that the children received into the Home "shall be divided among the several counties as justly as possible, taking into consideration the number of children in each county and its population". Since the judge of the juvenile court of any given county could not be expected to know the situation as to delinquent children in other counties, this must mean that the board and the Superintendent of the Home are also given the power to decide which county is entitled to send a child to fill each vacancy as it occurs, and for the judge of the juvenile court of a county to make a commitment to the Home when he had been advised that there was no vacancy in the Home or that his county was not entitled to send a child to fill the next vacancy, would not seem to be in harmony with the intent of the statute. In other words, the phrase "when vacancies exist" as used in sec. 14100 must mean "when vacancies exist for that county". Sec. 14100 also says that whenever the number of children shall exceed the capacity of the Home "preference shall be given to the younger children and to those in the greatest need". It is

May 22, 1937.

not certain whether the statute contemplates that the judge of the juvenile court or the board shall decide which children from that county are in the greatest need, assuming that the court has been notified that a certain number of vacancies exist for that county and that there are more children in that county already committed to the guardianship of the board but not committed to the Home than there are vacancies, but it is unnecessary for us to pass on this question to answer your inquiry.

Sec. 14100 also says that before any child under one year of age shall be ordered to the Home, a written statement from the Superintendent shall be obtained, showing that said child can be received and cared for in said Home. The court is thus forbidden to make a commitment of such a child without procuring this written statement, and it might be argued that by expressly requiring this consent from the Superintendent in the cases of children under the age of one, that by implication the statute provides that no such consent is necessary with respect to children over the age of one, but in view of the other statutory provisions analyzed above and hereafter, we do not believe that such was the intent of the General Assembly and we do believe that this provision about children under one year of age was doubtless intended merely as an additional safeguard in the cases of very young children to avoid unnecessary transportation of them because of the risks involved, and thus we believe that it is not proper in any case for the judge of a juvenile court to make an order committing a child to the Home unless the board, through its Superintendent, has determined that a vacancy is available for that county.

Of course we do not mean to imply that the board and the Superintendent of the Home can act arbitrarily or unreasonably in deciding whether a vacancy exists, or whether a particular county is entitled to fill such vacancy, or that its decisions of this kind are not subject to review by the juvenile court. Suppose, for example, that on a hearing as to whether a child shall be committed to the Home, the board, through its representatives, appears in court and offers evidence that there is no vacancy and that other evidence is offered tending to show that there is a vacancy, that the county in which the judge is sitting is entitled to fill that vacancy, and that the board is attempting to discriminate against that county. Under such circumstances, in our opinion, the court, after hearing the evidence, could, if in the opinion of the court the evidence supported such an order, adjudge that there is a vacancy available to that county and could properly make an order committing a child from that county to the Home over the protest of the board

May 22, 1937.

and in the face of the board's finding that no vacancy did exist, and in our opinion such a judgment would be proper and would be upheld by the appropriate court of last resort. Also, we do not mean to say that even if the evidence at a hearing on the question of committing a child to the Home were all one way, and uncontradicted and showed plainly that there was no vacancy, that if the court in the face of such evidence should make an order committing the child to the Home, as was done in the instant case, that the board could refuse to obey the court's order and refuse to take the child. If the court should so act, the proper procedure for the board would be to seek a review of the court's decision by a higher court, or to seek to have it modified in that court, or in some way to obtain judicial relief from the improper order of the juvenile court, but so long as there is in force an order of the juvenile court making a commitment to the Home, the board has no alternative but to obey that order, even although the order is improper, until such order is modified or set aside or vacated or reversed. Thus our opinion here is confined to passing on the question of what we believe a court of last resort would decide is the right procedure under these statutes in construing them, and we are attempting to give you our opinion on what these statutes mean as a rule of conduct and procedure for the board and the several juvenile courts, as requested by you. We have not seen the order with respect to the Bond and Beard children, which, if it has become final, must be obeyed by the board unless and until it is in some way modified or set aside, as, plainly, the court had jurisdiction of the parties and the subject-matter. If a situation should arise in the future in which the board believes that under the statutes, as construed in this opinion, the juvenile court of a particular county proposes to act or has acted contrary to these statutes, prompt steps should be taken by the board, through its counsel, to make a proper record in that court so that it can be reviewed and required by a higher court to follow the mandate of the statutes.

No cases have been decided construing any of Article 4 of Chapter 125 which we have been construing herein, and our opinion is therefore based on an analysis of the statutes in this article.

In conclusion, taking up your questions in order, in the light of the foregoing analysis: As to question 1, a judge of the juvenile court has the power to commit a child to the Home without consulting the Superintendent of the Home, or even after consulting the Superintendent and being advised that there are no vacancies for that county, but such judge has not the right to do this if the representatives of the board have appeared in his court and shown that the board, acting reasonably and in the exercise of its sound discretion, has determined that there are no vacancies available for that county.

#9 - Mrs. W. W. Henderson

May 22, 1937.

We have already mentioned that your question 2 relates to procedure under a statute which is no longer in force. As to your question 3, the Superintendent of the Children's Home has no right to accept any child not committed to the Home by a juvenile court, or to reject any child committed to such Home by an order of such court then in force, regardless of her judgment and interpretation of the facts and the law, but if such order of court was made improperly, as explained above, the Superintendent should be able successfully to have it set aside.

Very truly yours,

EDWARD H. MILLER,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

PROSECUTING ATTORNEYS: SHERIFFS: When said officers may be appointed to act as Probation Officer.

August 4, 1937.

8/6

Mrs. W. W. Henderson,
Executive Director,
State Children's Bureau,
Carrollton, Missouri.



Dear Mrs. Henderson:

This department wishes to acknowledge your request for an opinion wherein you state as follows:

"A duty assigned to the State Social Security Commission by the 59th General Assembly is that of 'the supervision of juvenile probation under the direction of but not in derogation of the orders of Juvenile Courts.' See C.S.S.B. 125, Sec. 4, paragraph 4, setting out the duties of the State Commission as they apply to children's laws.

"This was formerly performed under the Board of Charities and Corrections Sec. 14172, R.S. 1929.

"A report has today been received by the Children's Bureau which functions under the Eleemosynary Board and carried this duty since they were transferred in 1933.

"The report received is from Robert L. Gideon, Judge of the 31st Judicial Circuit and accompanied by a certified copy of an order which reads as follows: Addressed to the State Board of Charities and Corrections, Jefferson City.

August 4, 1937.

'CERTIFIED COPY OF ORDER

State of Missouri)
County of Taney) ss May ADJOURNED Term,
1937 Court of said County,
on the 18th day of May 1937 the following among
other proceedings, were had, viz:

WHEREAS, according to Section 14,171
Revised Statutes of Missouri, 1929, it is the
duty of the Circuit Court to appoint a suitable
person to serve as Probation Officer for the
County.

AND WHEREAS, There is at this time no one
appointed to serve as said Probation Officer;

AND WHEREAS, Many cases come before the
Juvenile Court for hearing and in such cases
a Probation Officer is needed to investigate
and make the proper reports.

IT IS THEREFORE ORDERED by this Court that
Douglas Mahnkey, the Prosecuting Attorney of
Taney County, be and is hereby appointed to
serve for the years of 1937 and 1938 as
Probation Officer of Taney County, Missouri,
and that he be paid for such service out of
the County Revenue the sum of Three Hundred
Dollars per year for such services as provided
by aforesaid Section 14,171.

Robert L. Gideon, Judge 31st
Judicial Circuit.'

"Presumably this appointment was made under
the impression that Section 14171 gave the
Circuit Judge the right to appoint the
Prosecuting Attorney under the clause which
reads, 'The Circuit Judge shall designate or
appoint an officer of the county, or some
other person to serve as Probation Officer.'

"We are asking an opinion as to the legality
of this appointment under all points of the
law covering duties of Prosecuting Attorneys,
salaries and fees of Prosecuting Attorneys,
Probation Officer's duty as a representative
of the child in a hearing before the court,
Probation Officer's duty as a peace officer,
etc.

August 4, 1937.

"The following information is desired as it applies (1) to counties over 50,000 (2) counties under 50,000.

Question 1. Can a Prosecuting Attorney be designated by the Circuit Judge as Probation Officer (1) in counties 50,000 or over (Sec. 14136-14158) (2) counties under 50,000 (Sec. 14159-14181).

Question 2. Can a Sheriff or any other elected officer be appointed and serve as Probation Officer?

"These questions apply to the Juvenile Courts of Missouri under Article 8, and Article 9, R. 3. 1929.

"Section 14144 specifies that the Probation Officer 'shall be present at court in order to represent the interests of the child when the case is heard.'

"The same section also specifies 'Probation Officers are hereby vested with all the power and authority of sheriffs to make arrests and perform other duties pertaining to their office.

"It is highly important that an opinion be rendered as early as possible on these points as a guide in the organization of a Juvenile Department under the Social Security Commission."

I. (a)

In an opinion rendered by this department to Mr. Percy W. Gullie, Prosecuting Attorney of Oregon County, under date of June 15, 1937, a copy of which is enclosed, we held that it would be proper for the same person to hold the office of Prosecuting Attorney and the office of Probation Officer in counties of less than 50,000 inhabitants, and further that said person would be entitled to the compensation of both offices.

August 4, 1937.

(b)

It is to be noted, however, that we pointed out in the above opinion that were it not for Section 14171, R. S. Mo. 1929, which specifically provides that the Circuit Judge may designate "an officer of the county," which necessarily includes the Prosecuting Attorney, the latter office might be said to be incompatible with the office of Probation Officer inasmuch as Section 14175, R. S. Mo. 1929, makes it the duty of every county officer to render the Probation Officer every assistance possible.

Section 14144, R. S. Mo. 1929, provides for the appointment of a Probation Officer in counties of 50,000 or more inhabitants, in part, as follows:

"The circuit court or the criminal court where constituted as a juvenile court under this article shall appoint a discreet person of good character, not under the age of twenty-five years, to serve as probation officer during the pleasure of the court."

In the statutes relating to counties of 50,000 or more inhabitants we find no provision which authorizes the Circuit Judge to appoint "an officer of the county." We do find, however, a provision in Section 14149, R. S. Mo. 1929, making it the duty of the Prosecuting Attorney to render such aid to the Probation Officer "as may be consistent with the duties" of his office, as follows:

"It shall be the duty of all circuit, prosecuting and city attorneys, representing the state or any city in any court held in the counties aforesaid, to give to the probation officer such aid in the performance of his duties as may be consistent with the duties of the office of such attorneys. It shall be the duty of any police officer, constable, sheriff or other authorized person making an arrest of a child under the age of seventeen (17) years, in the counties aforesaid, to give information of that fact at once to the probation officer,

or one of his deputies, and also to furnish such probation officer with all the facts in his possession pertaining to said child, its parents, guardian or other person interested in such child, and also of the nature of the charge upon which such arrest has been made."

In the case of State ex rel. v. Bus, 135 Mo. 1. c. 338, cited in the above opinion, the court in holding that where one officer has some supervision over the other, or is required to deal with, control or assist him, the offices would be incompatible, said:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

The very fact that the Prosecuting Attorney may only render such aid "as may be consistent with the duties" of his office, is evidence of the fact that the Legislature considered that there were some duties attached to the office of Prosecuting Attorney that were inconsistent with the duties of a Probation Officer.

This is evident when one considers the language of Section 14144, R. S. Mo. 1929, which declares that the Probation Officer shall be present in court in order to represent the interests of the child, as follows:

"It shall be the duty of the probation officer to make such investigation of

the child as may be required by the court, to be present in court in order to represent the interests of the child when the case is heard, and to furnish to the court such information and assistance as the judge may require, and to take charge of any child before and after trial, as may be directed by the court."

Whereas, in Section 14149, supra, the Prosecuting Attorney is in court "representing the state."

In the case of State ex rel. v. Dunn, 277 Mo. 38, 1. c. 44, the court in holding that one may not hold two offices the duties of which are incompatible, said:

"It is elementary law that one may not hold two offices the duties of which are incompatible."

In the case of State ex rel. v. Sword, 196 N. W. 467, the Minnesota Supreme Court in pointing out when public offices are incompatible, said:

"Public offices are incompatible when their functions are inconsistent, their performance resulting in antagonism and a conflict of duty, so that the incumbent of one can not discharge with fidelity and propriety the duties of both."

From the foregoing we are of the opinion that a person who holds the office of Prosecuting Attorney may not hold the office of Probation Officer in counties of 50,000 or more inhabitants.

II.

Section 10 of Article 9 of the Missouri Constitution provides for the election of a Sheriff by the qualified voters of each county, in part, as follows:

August 4, 1937.

"There shall be elected by the qualified voters in each county on the first Tuesday next following the first Monday in November, A. D. 1908, and thereafter every four years, a sheriff * * *."

The above provision leaves no doubt that the Sheriff is a county officer, and following the reasoning of the enclosed opinion, we are of the opinion that a Sheriff may hold his office and the office of Probation Officer in counties of less than 50,000 inhabitants, and further that said person would be entitled to the compensation of both offices.

III.

It is true that Section 14149, supra, makes it the duty of a Sheriff in making an arrest of a child to give information of that fact at once to the Probation Officer, and to furnish the latter with all the facts in his possession pertaining to the child, but such duty would not make his office incompatible with that of the office of Probation Officer inasmuch as Section 14144, R. S. Mo. 1929, vests the latter with the same power and authority to make arrests as in the case of a Sheriff, thus:

"Probation officers are hereby vested with all the power and authority of sheriffs to make arrests and perform other duties incident to their office."

We have examined the duties of a Sheriff and a Probation Officer and do not find that same are in conflict, and we are therefore of the opinion that a person who holds the office of Sheriff may also hold the office of Probation Officer in counties of 50,000 or more inhabitants.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

Nine Questions regarding primary and general election laws of Missouri.

225
January 11, 1937

Honorable Alexander Holtzoff
Special Assistant to
the Attorney General
Washington, D. C.



Dear Sir:

Your letter of December 31, 1936, addressed to the Attorney General of the State of Missouri, has been handed to me for reply.

As your questions refer mainly to matters which affect primary and general elections we shall undertake to answer them in numerical order.

I.

Q. Does your State permit absentees to vote by mail at general elections?

A. In 1935, the Legislature of Missouri repealed and re-enacted Section 10182, Laws of Missouri 1935, page 264:

"Any elector as defined in the foregoing section expecting to be absent from the county of his residence on the day of such election may, not more than thirty nor less than five days prior to the date of such election, make application in person, or by mail, to the county clerk or, where existing, to the board of election commissioners, or other officer or officers charged with the duty of furnishing ballots for such election in his voting precinct, for an official ballot

for said precinct to be voted at such election."

The original absentee ballot law, Laws of Missouri 1933, page 219 et seq. contains the procedure for voting absentee ballot. The Constitution of Missouri only permits absentee ballots to be cast some place within the confines of the State.

II.

- Q. Does your State permit absentees to vote by mail at primary elections?

A. Under Section 10181, Laws of Missouri 1933 page 219, an elector is permitted to vote his absentee ballot at any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected, for any congressional, state, district, county, town, city, village, precinct, or judicial offices or at which questions of public policy are submitted.

III.

- Q. If either question I or II is answered in the affirmative, please outline the procedure required to obtain absentee ballots.

A. We are enclosing a condensed instruction to absentee ballot voters which was prepared by this department prior to the general election of November 3, 1936.

IV.

- Q. If your State has an absentee voters' law, does such law apply to Government employees living in the District of Columbia, but maintaining a voting residence in your State?

January 11, 1937

A. It is our opinion Government employees who maintain a voting residence in the State of Missouri cannot vote by absentee ballot except within the confines of the State, on election day, owing to the provisions of Article VIII, Section 9, of the Constitution of the State of Missouri, which is as follows:

"Qualified electors absent from the state on military or naval service shall, and qualified electors absent from their counties but within the state may, be enabled by law to vote at general or special elections."

V.

- Q. Does your State require personal registration or enrollment for (a) general elections or (b) primary elections? If so, what opportunities are accorded for such registration? (cite statutes)

The election laws of Missouri are divided so that different articles are applicable to different cities or counties according to their population. Before setting forth the requirements it may be well to list the cities and counties in the State of Missouri to which the following articles apply. Those laws which refer to cities of over 100,000 are applicable to the cities of St. Louis and Kansas City only. The sections that deal with counties of more than 200,000 and less than 400,000, refer only to St. Louis County. Those sections that are enacted for counties of 150,000 refer to Jackson County. Those election laws which deal with cities of the first class refer to St. Joseph only. The other articles apply to the various cities whose population fall within the designated section.

All provisions for registration provide that such registration must be made in person. The time and opportunities so accorded vary with the different cities and counties. In cities of over 100,000, that is St. Louis and Kansas City, under Section 10586, R. S. Mo. 1929, provides that there shall be four days of registration, six weeks prior to the presidential election. Such days should be Monday, Tuesday, Wednesday and

January 11, 1937

Thursday. Section 10594 R. S. Mo. 1929, provides that invalids and persons who are absent at a distance of more than 15 miles on all of the days appointed for registration, may file his application in the office of the election commissioners to have his name registered in the precinct in which he resides. Such application as stated in the provision must be filed fourteen days preceeding the election. However, in State ex rel Ellis v. Brown, 326 Mo. 627, 33 S. W. 2d 104, it was held that this provision was only directory and that invalids and absentees could be registered at any time, even on the day of election. Under Section 10597 the name may be placed upon the registration books by court order after a hearing which the court decides that such person is rightfully entitled to be placed thereon. It is the usual procedure in Missouri in order to get ones name on the registration book on the day of election to apply to the Circuit Court for such an order. In counties of 200,000 to 400,000, St. Louis County being the only county which falls within this classification, under Section 10, page 234, Laws of Missouri 1935, it provides that on Tuesday five weeks before the next presidential election i. e. 1936 there shall be a general registration, the second day of registration shall be on Wednesday immediately following, and the third day shall be on Saturday thereafter, under Section 29, page 248, Laws of Missouri 1935, any person legally entitled to vote who has not previously been registered in any precenct of such county, or who after an absence from such county of more than two years, returns and reestablishes their residence in said county, or whose registration has been suspended on the registration record on account of failure to vote for any general, county or municipal election, including primary, during the last two years may register at the office of the board of election commissioners, who must meet at least three days of each week for this purpose. This section provides that applications for reinstatement may be made through the mail if done so within 20 days of notice, and provides further that requests for transfer of registration may be made through the mail. No registration of new voters is allowed later than five weeks before an election, nor transfer; and reinstatement later than eight days before. Under Sections 8 and 34, this article does not apply to election of public officers determined otherwise than by ballot, or to township or village elections or municipal elections in cities of 10,000 inhabitants or to public school elections or to elections for county superintendent of schools. Said act onl applies to cities of 10,000 to 100,000 inhabitants.

Counties of over 150,000 or more are provided for in Article 15, Chapter 61, and refers only to Jackson County, exclusive of Kansas City which is provided for under laws applicable to cities of over 100,000. Section 10512 R. S. Mo. 1929 provides that general registration shall be held every year in which a presidential election occurs, said registration being four weeks before such election and upon Tuesday and Saturday and upon the following Tuesday three weeks before the election. It further provides that the board of election commissioners shall constitute a continuing and continuous board of registry with full power to register any qualified voter at the office of said board which shall hold regular and special sessions for the purpose of such intermediate registration. Section 10524 allows intermediate registration at any time when the board of election commissioners deem proper. Section 10523 provides that those absent or ill during the period of registration can three weeks before the general election apply for registration. The right of appeal to the Circuit Court by one who has been wrongfully stricken or wrongfully prevented from registering is given.

In cities of the first class in which St. Joseph is the only city, any one entitled to vote can register in the registration books and there are no provisions providing for renewing this registration. The same procedure is followed in cities of 30,000 to 80,000, Laws of Missouri 1931, page 214 and Laws 1933, page 230, and cities of 10,000 to 30,000, Laws of 1933, page 239. In cities of from 30,000 to 80,000 a person may register any day ten days prior to the election. In cities from 10,000 to 30,000 registration closes at 5 P. M. on Wednesday of the second week preceding the election and no voter should be thereafter registered prior to said election except by order of the Circuit Court, Laws of Missouri 1933, page 245, Section 14.

VI.

4. If question 5 is answered in the affirmative, please state how frequently such personal registration must be renewed? (cite statutes)

A. In St. Louis, Kansas City and Jackson County

January 11, 1937

there is a general registration every four years under Sections 10586 and 50512 R. S. Mo. 1929. All other cities have permanent registration which does not have to be renewed from year to year.

VII.

- c. What steps, if any, must the voter take to keep his registration and enrolment effective from year to year for (a) general elections, and (b) primary elections? (cite statutes) (If, for example, the payment of a poll tax is required, please state so.)
- A. A person whose residence is in St. Louis, Kansas City or Jackson County and is properly registered at each general registration, does not have to do anything further to keep his registration in effect.

Section 10599 provides that:

"At every election, and at every primary election for state and county officers held in such city after this article becomes effective and between general registrations, the last general registration shall be continued in force and used, * * * *."

However, under Section 10292, a canvass is to be taken prior to the primary in St. Louis and Kansas City and those not found are served with notice to appear and show cause why their names should not be stricken. Therefore, those absent from the city but who maintain their residence there will fall victim of this procedure but they can always be registered under the procedure described in paragraph V. above.

VIII.

- d. Are there special provisions for the registration or enrolment of absentee

January 11, 1937

voters by mail or otherwise for
(a) general elections, and (b)
primary elections? If so, what
are they? (cite statutes)

A. All registration in the State of Missouri
must be in person and there are no provisions for the registration
by mail.

IX.

Q. If your State now has or at any
time has had an absentee voters'
law or a special law for regis-
tration of absentee voters, has
the constitutionality of such laws,
been passed upon by the courts? If
so, please summarize the decision
and give the citation of the case or
cases.

A. Those statutes dealing with absentee voting have
never been questioned as to the constitutionality since such
voting is allowed by Section 9, Article 8 of the Constitution,
which reads as follows:

"qualified electors absent from
the state on military or naval
service shall, and qualified
electors absent from their count-
ies but within the state may, be
enabled by law to vote at general
or special elections."

Respectfully submitted,

HURLEY R. HAMMETT, Jr.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TAXATION: Collection of taxes under House Bill 26.

June 9, 1937

6-10



Honorable W. A. Holloway
Chief Clerk
State Auditor's Office
Jefferson City, Missouri

Dear Sir:

We have your request of May 25, 1937, for an opinion reading as follows:

"We have been requested to obtain an opinion concerning certain questions that have arisen since House Bill 26 was signed by the Governor on May 8th.

This bill effects the method of tax collections in the County Collector's Office of Jackson County. The questions involved at the present time are, first: When will the Collector of Jackson County apply the provisions of this bill in making his collections. Should he complete his collections for this years tax under the old law, or on the date when the bill would finally become a law must he at that time change his basis of collections? Second, If the law becomes effective August 8th, would the Collector have to accept on the six per cent basis in August; and also would he be expected to accept payments on the four per cent basis in September?

A ruling on these questions at your earliest convenience will be very much appreciated as under the present law, payments on the 1937 tax will soon be due."

June 9, 1937.

Under the existing law (Laws 1934, Extra Session, page 153), taxes were due June 1, 1937. In a previous opinion of this office written by Harry G. Waltner, Jr., and dated May 11, 1934, it was held that the six per cent rebate for payment of taxes applied to all payments made in June and July. Under the present law no rebates are permitted after July 31st.

Under the new law, House Bill No. 26 becomes effective September 6, 1937, provides for rebates of four per cent for September 1937, and cannot operate until the effective date of the bill, from and after September 6, 1937.

It therefore appears that rebates on taxes paid during June and July 1937 will be covered by the now existing law; that rebates for September subsequent to the effective date of the law will be covered by the provisions of House Bill No. 26. It is to be noticed that this discount is computed upon the time of three months, the beginning of which period antedates the passing and effective date of the bill. At first it might be thought that the Statute, House Bill No. 26, is retroactive because it begins the computation of time prior to the effective date of the bill. It is only necessary to point out that a statute is not retroactive merely because part of the requisites for its action is drawn from time antecedent to its passing. *State vs. General American Life Insurance Company*, 85 S.W. (2) 68. House Bill No. 26 provides that the "due date" of taxes is July 1, and even though this date is taken for the purpose of computing the rebates allowable after the effective date of the bill, such is permissible under the last named case.

It is therefore the opinion of this office that rebates on taxes may be made under the existing law for the months of June and July; that the rebates which are permissible for the month of September 1937 under House Bill No. 26 may be made in September of 1937 for taxes paid in September on and after the 6th of the month; that no rebates are permissible under the existing law or under House Bill 26 between August 1 and September 6, 1937.

Respectfully submitted,

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General

FRANKLIN E. REAGAN,
Assistant Attorney General

FER:MM

COSTS - PROBATE COURTS - Collectibility of costs assessed against estates containing insufficient assets for their payment.

July 29, 1937.

Hon. W. A. Holloway,
Chief Clerk, Office of the State Auditor,
Jefferson City, Missouri.



Dear Sir:

A request for an opinion has been received from you under date of April 21, 1937, such request being in the following terms:

"In making the examination of the office of one of the Probate Judges, we find that the Probate Judge has presented to the County Court and been paid from county revenue a considerable amount of fees covering the costs in what the Probate Judge classifies as insolvent estates.

"In supporting this claim for the collection of these fees and costs from the County, the Judge cites us to Section 1940, R. S. Missouri, 1929. We would like for your office to advise us if Section 1940 should be construed to cover such claims."

We assume that your inquiry is confined to costs formally assessed against executors or other fiduciaries in charge of estates under the jurisdiction of this probate court, and we shall consider costs assessed by the court against such fiduciaries in adversary proceedings between such fiduciaries on the one hand and other persons interested in the estate on the other in which the fiduciaries were unsuccessful, as well as probate proceedings of an ex parte nature, such as the filing of settlements or motions by the fiduciaries, in which the costs would be assessed against them whether they were successful or not.

I.

COSTS IN ADVERSARY PROCEEDINGS

As an illustration let us consider the case of an application by a legatee under a will for partial dis-

July 29, 1937.

tribution, which is resisted by the executor, where the court orders the distribution and assesses the costs in favor of the legatee and against the executor. In order to answer your question for a situation of this kind, it will be necessary to consider the meaning and consequences of this award of costs by the court.

"At the common law no costs were recoverable. (City of St. Louis v. Meintz, 107 Mo. 611.) Costs in Missouri being, therefore, purely creatures of the statute, enactments in relation thereto must be strictly construed. (State ex rel. v. Seibert, 130 Mo. 1.c. 217; St. Louis & Gulf Railway Co. v. Cape Girardeau, etc. Railway Co., 126 Mo.App. 272; Lucas v. Brown, 127 Mo.App. 645.)"

Ex parte Nelson, 253 Mo. 627, 628,
162 S.W. 167 (1913).

The way in which court costs were handled at common law is explained in the case of State ex rel Dale v. Ashbrook, 40 Mo.App. 64, 66 (1890) as follows:

"At common law litigation was not conducted on the credit system, as with us, but the plaintiff purchased his writ, and each party paid his costs step by step as the services were procured and as the cause proceeded. At the end of the litigation the successful party recovered his costs - that is, the costs which he had paid out. The idea of requiring the plaintiff to give security for costs seems to have been to indemnify the defendant against the costs to which he might be put by the litigation, in case it should turn out to be unfounded. Accordingly, the language of such a rule frequently was that the plaintiff be required to give security for the defendant's costs. Roberts v. Roberts, 6 Dowl. 556; Anon., 1 Wils. 130.

"But with us the costs are not ordinarily paid step by step, as each party demands of the proper officer of the court the rendition of some particular service; but they generally accumulate until the litigation is finally ended, and then they are recovered * * *."

July 29, 1937.

The Missouri statute relating to the award of costs in the probate court, which abrogates the common law rule, is R. S. Mo. 1929, Section 204, which provides as follows:

"In all suits and other proceedings in said court, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law. In all cases in which costs shall be given against executors and administrators, the estate shall pay the costs: Provided, that parties presenting demands against estates may, for the same causes and in the same manner, be ruled to give security for costs, as is now provided in practice in civil cases."

A comparison of the language of this section with R. S. Mo. 1929, Section 1242, which governs the awarding of costs in civil cases, shows that the essential language is identical, so that in adversary proceedings in the probate court, decisions involving costs in civil cases will be controlling.

"It will thus be seen that the only judgment for costs authorized by these statutes is in favor of one of the parties to the suit. No provision is made by law for any such judgment in favor of any clerk or other officer of the court, or any of the witnesses attending thereon. The remedy provided for the collection of their fees is a fee bill. They have therefore no right to intermeddle with the parties in their control of the suit.

"This court, in the case of Beedle v. Mead, 81 Mo. 306, in treating of this subject, said: 'He (the circuit clerk) was under a misapprehension, too, of the law, if he supposed he could, sua sponte, issue this execution merely to collect fees due the court officers. For such fees the remedy of the officers is by fee bill, as provided in Wagner's Statutes, section 1, page 618; Revised Statutes, section 5595 (now section 4980, Revised Statutes, 1889). The judgment of

July 29, 1937.

costs is in favor of the litigant to reimburse him for what he has paid out and expended, and he is entitled to have execution therefor. Over that judgment the party in whose favor it is rendered has absolute control. It is his property. He may enforce or forgive it at his pleasure. * * *

Hoover v. The Mo. Pac. Ry. Co.,
115 Mo. 77, 83, 12 S.W. 1076
(1893).

Nor does it make any difference whether the party in whose favor costs are adjudged has paid the costs or not, as will be seen from the case of Cranor v. School District No. 2, 151 Mo. 119, 52 S.W. 232 (1899), in which it was held that in a suit on a judgment for costs obtained in another county, it was no defense to show that the costs had not been paid by the plaintiff.

From the foregoing it will be seen that in an adversary proceeding in the probate court such as the example above given, where costs are awarded against the executor, the person in whose favor these costs are awarded controls them entirely, and the officer of the court whose fees are represented by these costs is confined to the remedy of a fee bill against the fiduciary. The county has nothing to do with the case, is not a party to the administration proceedings, and the only connection of the county with the litigation is that the litigation is being conducted in a court sitting in that county, and, therefore, in the absence of statutory authorization, the county could not properly be liable for or pay these costs.

II.

COSTS IN EX PARTE PROCEEDINGS

Suppose an executor files a motion for authority to sell personal property. Whether it is granted or denied, the court would assess the costs against the executor. This situation differs from the situation considered above in that although the award of costs in both situations is against the executor, here it is not in favor of any party to the litigation. It is plain from Section 204 that if there is money in the estate, it should be used for the payment of these costs, but your inquiry presupposes that there is no money in the

July 29, 1937.

estate. The statutes are silent as to what shall be done in such a case and there are no adjudicated cases on the point. The closest analogy which we have found is a criminal case where the defendant has been acquitted and the question arises as to the payment of fees. This situation arose in the case of *State ex rel Howser v. Oliver*, 116 Mo. 188, 22 S.W. 637 (1893), involving disputed witness fees which were treated by the court as in the same category as the fees of court officers, as the case was decided on the authority of *Hoover v. The Mo. Pac. Ry Co.*, supra, which involved officers' fees. The court said:

"No witness has a right, independent of the statute, to enforce a claim against the state for fees for attendance upon the trial of a criminal case. The question of justice or injustice to the witness is not a matter for consideration. If he is given no right to look to the state, for compensation, then he has no right except it be against the party at whose instance he attended."

113 Mo. 195.

The court also explained the difference between fees and costs in adversary civil proceedings and in other cases where they might be payable out of public funds, as follows:

"In civil actions the parties to the suit are present, at every step in the proceeding, watching its progress and guarding against unnecessary cost and expense, not knowing upon whom it may fall. A plaintiff may be required to give security for the payment of costs, or, if unable to do so, may be allowed, in the discretion of the court, to prosecute his suit 'without fees, tax or charge.' Sec. 2918. It is manifest that these provisions under which litigants are able to protect themselves against improper and unjust allowance of cost would afford no safeguard against extravagance, impositions and frauds in case the costs should be payable out of the public treasury.

116 Mo. 192.

If, as the court says in this case, a witness cannot collect his fees from the public treasury in the absence of a statute,

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and if witness fees are on a parity with officers' fees, how then can an officer of court collect his fees from the public treasury when the party against whom they are assessed proves to be not good for them, and in the absence of a statute which would authorize this payment from public funds and provide adequate safeguards against excessive fees?

One more case shows the attitude of strict construction of the Supreme Court in connection with costs statutes. In the case of *Ex parte Nelson*, 253 Mo. 627, 162 S.W. 167 (1913), the point involved was the payment of costs in a successful habeas corpus proceeding. The Supreme Court set aside an order taxing the costs against the petitioner, and said:

"There being a casus omissus in this State in regard to the taxation of costs in habeas corpus proceedings, this court cannot, except by the usurpation of power, tax the costs herein against the petitioner or make any order in regard thereto. In the absence of such power we cannot and should not concern ourselves with payments of costs heretofore made by the parties to this proceeding or recognize any agreements entered into by them in regard to same."

253 Mo. 629.

III.

SCOPE AND EFFECT OF REVISED STATUTES OF MISSOURI, 1929, SECTION 1940

R. S. Mo. 1929, Section 1940, provides as follows:

"All expenditures accruing in the circuit courts, county courts and probate courts shall be paid out of the treasury of the county in which the court is held, in the same manner as other demands."

We believe that the choice of the word "expenditures" in this section is the key to its meaning. We have only found one case construing this section, this being the case of *State ex rel Hensick v. Smith*, 5 Mo.App. 427 (1878). Apparently, in 1878, the statute which is now Section 1940 was in the

July 29, 1937.

same form as at present, and the court held that the expense of furnishing meals to jurors who were kept together during the progress of criminal trials must be audited under this section, and that this section furnishes the authority to our courts to make the expenditure necessary to their proper functioning as courts. R.S. Mo. 1929, Section 2057, providing that the office of the probate court shall be furnished at the expense of the county is, in our opinion, related to Section 1940, and we believe that it is expenditures of this type for the general maintenance and functioning of the courts, as distinguished from costs assessed in cases pending in such courts, which are not strictly or even loosely "expenditures" of such courts, which are properly contemplated in and referred to by Section 1940. Expenditures accruing in a court are not, in our opinion, the same thing as court costs assessed in that court.

In conclusion, it is our opinion that R. S. Mo. 1929, Section 1940, does not authorize the payment out of county revenue of costs assessed in the probate court of that county which are not collectible out of the estate because of insufficient assets in the estate.

Very truly yours,

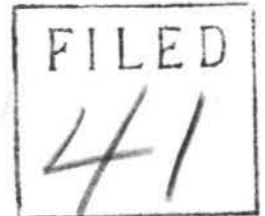
EDWARD H. MILLER,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

OFFICERS: County Officers not entitled to salary increase during the official term pursuant to the new legislation purporting to increase salaries.

November 1, 1937.



Honorable Maurice Hoffman
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

We acknowledge your request for an opinion dated September 28, 1937, reading as follows:

"The recent session of the Missouri Legislature provided for an increase in salary of the County Auditor and County Clerk of Buchanan County.

"The County Court desires to know whether it is legal to pay such increased salaries effective at once or whether such increases take effect only after the beginning of the next terms in said offices.

"I respectfully request an opinion from your office with respect to the immediate payment of such salary increases."

On September 27, 1937, Wm Orr Sawyers, Assistant Attorney General rendered to S. J. Shepherd an unofficial opinion which omitted to take into consideration the constitutionality of an Act of the Legislature increasing salaries during the term of a public office.

Laws of Missouri, 1937, p. 421, Section 12295, provide:

"The county auditor shall be paid a salary of thirty-six hundred dollars per annum, payable monthly out of the general revenue fund of the county, by warrants drawn upon the county treasurer therefor."

Nov. 1 -
October 27, 1937.

Article XIV, Section 8 of the Missouri Constitution provides:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

In the case of *Folk v. City of St. Louis*, 157 S. W. 71, 250 Mo. 116, 134, the Legislature had raised the salary of the Circuit Attorney of St. Louis, and the incumbent was claiming the salary increase. The Court, after calling attention to the Constitution as above quoted, then said:

"The object of section 9, article 14, Constitution of Missouri, prohibiting an increase of compensation or fees of certain officers during their terms, is apparent. When any popular individual is elected to a public office his influence with the legislative department of the State is likely to be very great, and, consequently, the General Assembly may be easily persuaded that the compensation of the aforesaid popular individual is too small, and at his suggestion, increase his salary or other compensation to an unreasonable extent. This is particularly true where the popular individual is elected to an office which enables him to reward his friends with official patronage or other official favors.

"It was to prevent persons while possessed of the prestige and influence of official power from using that power for their own advantage

November 1, 1937.

that the framers of our organic law ordained that salaries of public officers should not be increased during the terms of the persons holding such offices."

This case is identical with the first problem presented in your request.

We call your attention to the law in force at the passage of the 1937 County Auditor Act, which is found in Section 12205, R. S. Mo. 1929, and provides a \$2400.00 annual salary to the County Auditor.

Buchanan County, at the last census, had a population of 98,633 persons.

Laws of Missouri, 1937, p. 441, Section 11811, provide in part:

"The clerks of the county courts of this State and their deputies and assistants shall receive for their services annually, to be paid out of the county treasury in monthly installments at the end of each month by warrant drawn by the county court upon the county treasury, the following sums: * * * * in counties having a population of 90,000 and less than 200,000 persons the sum of \$3,600.00 for themselves* * * *."

We call your attention to the general State law in force at the passage of the 1937 County Clerk's Act, which is found in Laws of 1933, p. 370 Section 11811. The law in force at the passage of the 1937 County Clerk Act did not provide for payment of such salary out of the county treasury, as does the 1937 Act, and further we note that under the prior law the County Clerk's salary was fixed and limited, not to exceed a retainer of collected fees, for his official services, in the amount of \$3,000.00 annually, Buchanan County falling in the

classification of counties having a population of 70,000, and less than 200,000 persons.

In the 1937 County Clerk Law, supra, there has been a legislative transition whereby the Clerk of the County Court of Buchanan County now purports to serve under a general State law under which the fixed salary for official services is set at \$3,600 annually, Buchanan County falling within a classification of counties having a population of 90,000 and less than 200,000 persons. This 1937 general classification of counties for fixing salaries in Buchanan County is entirely a new law, said classification not being present in the 1933 law.

The question arises, where, prior to the beginning of the term of office of a county clerk the Statute fixes the salary at a certain annual sum, if serving in counties of a certain population, and then during the clerk's term of office the Legislature passes a new and different law abolishing the old classification and setting up a new classification for fixing salaries, which change in the law creates a legislative transition of counties so that county clerks serving in counties of a greater population than under the former classification having fixed annual salaries at a certain larger sum than that fixed for such counties under the old law, thereby increasing the annual salary of the county clerk \$600.00, under such circumstances is the legislative increase in salary in violation of Article XIV, Section 8 of the Missouri Constitution?

In the case of State v. Hamilton, 260 S. W. 466, 303 Mo. 302, 315, the Court laid down the rule in those cases where a county passes from one classification to another, by reason of a growth in population:

"The mere fact that a county passed from one class to the other does not deprive the holder of the office of the salary fixed by law, and fixed, too, at a time long prior to relator's election. It is our judgment Section 8 of Article 14 of the Constitution does not preclude a recovery by relator. This is because his salary was fixed by law before his election, and no law since enacted has changed it, except as we may hereafter note."

Hon. M. Hoffman

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November 1, 1937.

This department is of the opinion that the County Court of Buchanan County should abide by the constitutional limitations in computing and paying salaries of County officers, and we are of the further opinion that under the facts stated in your request, any construction of Section 12205, supra, or 11811, supra, by the County Court, while computing and issuing salary warrants against the County Treasury to the County Auditor, or the County Clerk, to the effect that during their present terms of office either is to be considered by them as entitled to the purported salary increase shown by the 1937 Legislation, supra, would be illegal and unwarranted construction of the statutes in the light of the constitutional prohibition relating to increasing salary during a term of office.

This department is of the opinion that the County Auditor and County Clerk of Buchanan County are not entitled to any salary increase during their present term of office, pursuant to the 1937 legislation above quoted.

Respectfully submitted

AUBREY R. HAMMETT, Jr.
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

ARH:H

COUNTY BUDGET ACT:

The question as to who is the person keeping the principal financial records of the county and who is to be deemed the "Accounting officer" is a question of fact. the officer appointed "accounting officer" is not entitled to any additional compensation.

December 11, 1937.

Honorable Maurice Hoffman
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri



Dear Sir:

This Office acknowledges receipt of your letter of November 29th, wherein you make the following inquiry relative to the County Budget Act:

"The County Budget Act, Laws of 1933, pages 340 to 351, prescribes certain duties to be discharged by an "accounting officer."

"Section 21, of that act provides that, 'wherever the term 'accounting officer' shall appear (in the act) it shall be deemed to mean the county clerk, auditor, accountant, or other officer or employe keeping the principal financial records of the county.'

"I desire your official opinion as to whether the auditor or the clerk is to be deemed to be the one 'keeping the principal financial records of the county', so as to be ex-officio the 'accounting officer', then may the county court appoint and employ some one in its opinion suitable for that office to be the 'accounting officer', and determine the amount of his salary.

"At the present time no one is discharging the functions of that office, and no one has been designated by the County Court to be the 'accounting officer', and no accountant or other person has been employed to keep the 'principal financial records' of this County."

The County Budget Act, Laws of Missouri, 1933, page 341 et seq., is in reality composed of separate sections applying to counties of fifty thousand population or less, and to counties of more than fifty thousand population. Buchanan County being more than fifty thousand population we must determine your answer from Sections 9 to 22, inclusive.

By the terms of Section 9 the County Court may designate the county clerk as budget officer and it is very definitely stated that the budget officer shall receive no extra compensation for his duties under the Act.

Referring to Section 21, page 351, we find that when the term "budget officer" is used in the Act, it shall be deemed to mean the presiding judge of the county court, unless the county court shall have by order designated the county clerk as budget officer. Referring to the term "accounting officer," the section states that "it shall be deemed to mean the county clerk, auditor, accountant, or other officer or employe keeping the principal financial records of the county.

Under Section 11, page 347, it appears that the principal duty of the accounting officer is to prepare the estimates of revenues classifying the same so as to show the receipts by funds, organization units and sources, while the duties of the budget officer appear to be to deal mainly with the estimates of the expenditures of the various departments, offices, institutions and commissions.

The accounting officer is again mentioned in Section 15, page 349. In referring to appropriations, we find the following:

"* * * and until the county court shall act, the accounting officer shall authorize expenditures and draw warrants in payment thereof, * * *"

Referring again to Section 21, it will be noted that it is possible for the county clerk to be both budget officer and accounting officer.

Considering one of the actual questions contained in your letter, to the effect: Who is keeping the principal financial records of the county, the auditor or the clerk? This appears to be a question of fact. You would be in a better position than this Department to answer same, knowing all of the officers, and no doubt having a cursory knowledge of their general duties.

We call your attention to Section 12218, Laws of Missouri, 1933, page 352, the pertinent part of said section being:

"The Auditor shall prescribe with the approval of the County Court, the accounting system of the County. He shall keep an inventory of all County property under the control and management of the various officers and departments and shall annually take an inventory of such property showing the amount, location and estimated value thereof. He shall keep accounts of all appropriations and expenditures made by the County Court, and no warrant shall be drawn or obligation incurred without his certification that an unincumbered balance, sufficient to pay the same, remain in the appropriation account or in the anticipated revenue fund against which such warrant or obligation is to be charged. He shall audit the accounts of all officers of the County annually or upon their retirement from office. The auditor shall audit, examine and adjust all accounts, demands, and claims of every kind and character presented for payment against said county, and shall in his discretion approve to the county court of said county all lawful, true, just and legal accounts, demands and claims of every kind and character payable out of the county revenue or out of any county funds before the same shall be allowed and a warrant issued therefor by said court; * * * * *

Dec. 11, 1937

It would appear that if your county has the office of county auditor that he would be more familiar with the principal financial records of the county than any other officer, but, as mentioned heretofore, the matter is mainly a question of fact which this Department is unable to pass upon.

Referring to the additional question: "Then may the county court appoint and employ some one in its opinion suitable for that office to be the 'accounting officer,' and determine the amount of his salary?", we are of the opinion that the county court could not appoint some person to carry out the duties of the accounting officer; that the accounting officer must perform the duties by virtue of the fact that he "keeps the principal financial records of the county" and it must be that person. As to additional compensation, it is a well recognized principle of law that no officer can draw salary unless the statute clearly empowers him to do so. The statutes contain no such provision. We are further fortified in this conclusion by the fact that the statute expressly prohibits the budget officer from receiving any extra compensation.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

COUNTY JUDGES: COMPENSATION - Duty to repay money received
as compensation in excess of that authorized by
law.

April 3, 1937.

Hon. Shelt T. Horn,
Presiding Judge,

Hon. Bert Cleveland,
Associate Judge,

Hon. J. L. Blunt,
Associate Judge,

Judges of the County Court,
St. Francois County,
Farmington, Mo.

Gentlemen:

A request for an opinion has been received
from you under date of March 6, 1937, such request
being in the following terms:

"The County Examiners' report that will
be filed in the State Auditor's office
will show that there has been a discrepancy
in the amount charged by the Court for
days attending County Board of Equalization
and Appeals.

"This discrepancy arises from the fact that
charge was made for days attendance for
County Court and Board of Equalization and
Appeals. We are not attorneys but laymen,
who upon coming into office followed the pre-
cedent that had been set by our predecessors.

"Inasmuch as the County Court records will
show that court was held upon the same days
that we had Board of Equalization and
Appeals, and vice versa the Board of Equal-
ization and Appeals record will correspond
with that of the County Court, we do not
feel that it is altogether fair for us to
return the money which has been received
by us for those services. We had no in-
tention of being dishonest or taking any-
thing that we did not feel was due us.
For that reason we would like to know if
it is compulsory by law that we return
this excess money drawn, the amount of
which is some \$140 each.



April 3, 1937.

"There is nothing set out by statute that limits the earning of a County Court per annum. To serve as a member of the County Court is as you know a hard place to fill and the remuneration is small at best. For us to return this money at this time will work a hardship upon us and we do not believe it is altogether fair since this has been a custom of the County Courts always.

"Your prompt consideration and reply will be greatly appreciated."

As we understand your letter, you are asking us whether you must return to the County money drawn by you as compensation which was admittedly in excess of the amount authorized by law, but which was drawn without any intention to violate the law, and because of an honest mistake due to following the practice of your predecessors in office.

In the case of State ex rel Linn County v. Adams, 172 Mo. 1, 72 S. W. 655 (1902), also involving a case where a county official had drawn, under a warrant approved by the county court, compensation claimed to be in excess of that allowed by law, the Supreme Court stated the facts as follows:

"This is a suit by Linn county against George W. Adams, clerk of the county court of said county, and the sureties on his official bond, to recover the sum of \$167.32 which it is alleged he received as fees of his office in excess of the amount which he is, by law, allowed to retain, and which he refuses to account for. The judgment was for the plaintiff, and the defendants appeal." 172 Mo. 1, l.c. 5.

The court, after analyzing the statutes and deciding that the defendant was not entitled to all of the money claimed by him as compensation, affirmed the judgment of the lower court and held that the county could recover the excess from the defendant and the sureties on his official bond.

We realize that this ruling sometimes would work a hardship on officials who have acted in entire good faith and have, over a period of time, drawn substantial amounts as compensation, and who then find that they have been acting

April 3, 1937.

under a mistake of law and are obliged to return the money to the public treasury. However, the serious consequences of the contrary rule have doubtless been responsible for the prevailing rule. If a public official could draw large sums from the public funds which were not authorized by law, and then in a suit to recover these funds could avoid repaying them by pleading that he did not know that he was not entitled to them, and had acted under an honest mistake of law, there would be a serious temptation offered to persons in positions of public trust having any control over the disbursement of public funds. Doubtless it is situations of this kind which were responsible for the origin of the rule that every man is presumed to know the law and must take the consequences of not knowing it, harsh as this rule may seem in certain cases.

In conclusion, it is our opinion that where a county judge has received compensation in excess of that authorized by law, he is under a duty to refund it to the county.

Very truly yours,

EDWARD H. MILLER,
Assistant attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

TITLE: Jurisdiction of Police Judge of city of third class, acting as ex-officio justice of the peace, as to crimes and misdemeanors is over only such offenses as may be committed within the city limites.

August 27, 1937.

Mr. Bryan Howe,
Deputy Clerk,
Sedalia, Mo.

Dear Mr. Howe:

This office is in receipt of your request for an opinion as follows:

"We have been requested by a Justice of the Peace to write for your opinion in regard to the following question:

"Would a Police Judge, sitting as ex-officio Justice of the Peace, have jurisdiction of a crime which was committed outside the city limits of the City of Sedalia?"

Sedalia is a city of the third class. The jurisdiction of a Police Judge in such city is set out in Section 6766 R. S. Mo. 1929, which is as follows:

"The police judge shall be ex-officio a justice of the peace within the limits of the city, with jurisdiction as to crimes and misdemeanors, but shall have no jurisdiction to hear or determine civil matters. The marshal, or in his absence the assistant marshal or any regular policeman, shall be ex-officio a constable to wait upon the police judge when acting as a justice of the peace."

The proceedings in indictable cases for a Police Judge in such city is set out in Section 6767 R. S. Mo. 1929, which is as follows:



"If, in the progress of any trial before the police judge, it shall appear that the accused ought to be put upon his trial for an offense against the criminal laws of the state and not cognizable before him as police judge, he shall immediately stop all further proceedings before him as police judge, and shall cause the complaint to be made before himself as a justice of the peace, or before some other justice of the peace, and the accused shall thereupon be proceeded against in the manner provided by general law. The police judge and marshal, when acting as justice of the peace and constable respectively, shall be entitled to receive therefor the same fees allowed by law for such services."

We are unable to find a decision construing the above statutes, but an interpretation of said Section 6766 shows it is plain and unambiguous.

In the case of State ex. rel Cobb v. Thompson, 5 S. W. (2d) 1. c. 59, in giving a rule on this question, the court said:

"A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself. * * *

A standard text states the rule as follows:

If the words (of the statute) are free from ambiguity and doubt and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need

Mr. Bryan Howe.

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August 27, 1937.

need of interpretation. The statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail without resorting to other means of aiding in the construction. * * *

CONCLUSION

It is, therefore, the opinion of this department that the Police Judge of a city of the third class, sitting as "ex-officio a justice of the peace within the limits of the city, with jurisdiction as to crimes and misdemeanors" would have jurisdiction over only such offenses as may be committed within the city limits.

Respectfully submitted,

S. V. MEDLING.

Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

SVM:LB

PRISON BOARD: Wrecking of buildings housing prison industries in order that new ones may be erected by the State Building Commission does not violate statutes relating to operation of prison industries.

June 3, 1937.

6-8

Hon. Stephen B. Hunter, Director,
Department of Penal Institutions,
Jefferson City, Missouri.



Dear Mr. Hunter:

We wish to acknowledge your request for an opinion wherein you state as follows:

"Enclosed I am handing you a copy of a letter that was addressed to me by Mr. R. L. Chapman, Superintendent of Industries, on March 5, and Feb. 18th, 1936. The Bi-Partisan Advisory Board was furnished with the information contained in this letter.

"We have recently been informed that the Bi-Partisan Advisory Board desires to destroy or wreck some of the buildings referred to in Mr. Chapman's letter, which are included in the Capital investment of the Revolving Fund.

"In view of the fact that the Revolving Fund was set up by the Legislature, and it being the responsibility of the Penal Board to keep it intact, it will be necessary that we be informed as to what our procedure shall be when a part of the Capital investment is being destroyed. You can readily understand the Penal Board does not wish to accept this responsibility without advice from you.

"It has been stated to us that this is merely a matter of bookkeeping, but I am of the opinion that there is more than

June 3, 1937.

bookkeeping involved, and when the Capital investment is to be changed without getting value received, we must have some authority to do this that will protect us."

For the purpose of setting out the views of the Superintendent of Prison Industries, we quote herein a copy of his letter to you as Director under date of March 5, 1936:

"With further reference to our conversation relative to the contemplated wrecking, both partial and complete of Industrial buildings by the Bi-Partisan Advisory Board, please be advised that the net value of such buildings, after deductions for depreciation, etc., have been made at the close of the year 1935 are as follows, and the capital stock of the Industries, of which these buildings and this equipment are a part, will be affected in these amounts:

Building No. 16, Storage Warehouse -	\$12,384.98
Garage Building, Adjacent to Bldg. #16	200.74
No. 2 Warehouse, - - - - -	14,919.78
Building No. 22, - - - - -	22,560.20
Building No. 4, - - - - -	5,214.40
Building No. 6, - - - - -	3,488.85
Building No. 21, - - - - -	2,966.67
Total Value - - - - -	\$61,735.62

This grand total of \$61,735.62 constitutes a part of the Industrial capital stock, and to my belief cannot be destroyed other than by an act of Legislation, due to the fact that the State Legislature set up the amount of capital stock for the Industries."

In the Session Acts of 1903, page 25, we find the Legislature created a Revolving Fund, which fund was to be used for the purpose of purchasing raw material and carrying on the business of manufacturing, handling and marketing binder twine. Section 5 of said Act reads:

"There is hereby appropriated out of any funds in the state treasury not otherwise appropriated the sum of one hundred and twenty-five thousand dollars (\$125,000), which shall be known as the 'Revolving Fund,' which fund, or so much thereof as may be necessary, shall be used only for the purpose of purchasing raw material required in the manufacture of twine and for the purpose of carrying on the business of manufacturing, handling and marketing the said twine until disposed of according to the provisions of this act; and the money in said 'Revolving Fund' shall be paid by the treasurer of the state upon warrants issued by the auditor of the state upon verified vouchers of the said warden."

Section 6 of said Act reads:

"All moneys derived from the sale of twine shall be collected by the said warden and paid into the treasury of the state to the credit of the 'revolving Fund' created by section 5 hereof; and it is hereby made the duty of the treasurer of the state to carry as a separate account upon the books of his office the said 'Revolving Fund,' which fund shall not be used, in whole or in part, for any purpose or purposes other than those named in section 5 hereof."

For a time this was the only prison industry operated by the State, but in the 1917 Session Acts we find provision made by the Legislature for additional prison industries and for the continuance and maintenance of the foregoing Revolving Fund.

The Legislature has at divers times made appropriations out of the general revenue for the prison industries, chargeable to the Revolving Fund, and this fund has been set up by the Prison Board as their capital structure.

The prison industries have apparently been managed and operated successfully for during the past years no moneys have been appropriated out of the general revenue fund by the State for the operation of the prison industries. Thus in such legislative sessions as 1931, 1933 and 1935 it has only been necessary to reappropriate funds out of the Revolving Fund when same had been collected and deposited to the credit of said Revolving Fund.

In the 1935 Session Acts, page 73, we find the following reference to funds for the prison industries:

"For the MISSOURI PENITENTIARY, chargeable to the MISSOURI PENITENTIARY REVOLVING Fund. -- For the purchase of raw materials, machinery or other equipment, or in the erection of buildings or in making other improvements in plants in connection with the industries carried on or to be carried on in said penitentiary or on the farms or land under the supervision of the State Prison Board, and in the manufacturing, handling and marketing of articles so produced, until disposed of in accordance with the provisions of Article 5, Chapter 44, of the Revised Statutes of Missouri, 1929, the sum of Eight Million Dollars (\$8,000,000.00) or so much thereof as may be necessary during the period beginning January first, 1935, and ending on the thirty-first day of December 1936; when the same shall have been collected and deposited to the credit of such said revolving fund."

By virtue of the above provision the Prison Board may spend up to \$8,000,000.00, which funds are to be derived from the sale of manufactured articles. The same, however, can be spent only when it has been collected and deposited by the Board from the sale of manufactured articles.

The prison industries are thus operated at a profit on funds appropriated to them by previous Legislatures out of the general revenue of the State.

The following statutes set out the scheme of operation of our present prison industries:

Section 8340, R. S. Mo. 1929, provides that the Prison Board may establish prison industries, in part, as follows:

"Said board shall, as soon as practicable, proceed to purchase, lease or otherwise provide suitable plants, machinery and equipment, and to purchase material, for the employment of all able-bodied persons in the Missouri state penitentiary, * * * for such industries as in the opinion of the board will best occupy such persons, with the view of manufacturing, so far as may be practicable, such articles agreed upon by said board * * *. Said board may purchase or lease upon reasonable terms such machinery as may be necessary for the manufacture and production of any other articles or products at a profit to the state, including shoes, clothing, floor mats, mops, rugs, carpets and other articles of furniture, such as beds and bedding of all kinds; also desks, chairs, tables, farm implements, fertilizer, brick or any other articles agreed upon by the board."

Section 8400, R. S. Mo. 1929, provides that the Board shall keep books and show, among other things, the profits or losses of each branch of manufacturers:

"The board shall attend to the financial concerns of the penitentiary and shall pay into the state treasury all moneys received by them on account of the institution, and shall keep in suitable books regular and complete accounts of all moneys received, and from what source, and shall have vouchers for all money disbursed. The books shall exhibit the profits or losses of each branch of manufacturers."

Section 8452, R. S. Mo. 1929, provides that the Board shall make such rules and regulations as it deems best for the operation of the factories:

"Said board shall purchase such raw material as may be required for manufacture of any article in any industry now or hereafter carried on by said board in the penitentiary, on any lands of the state or elsewhere, and shall employ such outside help as may be necessary, and shall be in charge of all articles manufactured by the state, and shall act as distributing agent for the manufacturing enterprises carried on in the institution, with authority to appoint agents or salesmen. It shall have charge of the factories and make such rules and regulations in the operation of the same as it deems best. The superintendent of industries, subject to the rules and regulations of the board, shall be the executive officer of the board, in charge of all industries now or hereafter created or operated by the board, * * *."

Section 8453, R. S. Mo. 1929, provides for a Revolving Fund for the purchase of raw materials, machinery or other equipment, in part, as follows:

"The account or fund heretofore provided for by law, and known as the 'revolving fund,' shall continue to be maintained and known as the 'revolving fund,' which fund, or so much thereof as may be necessary, shall be used only for the purpose of purchasing raw material, machinery or other equipment or in the erection of buildings or making other improvements in plants in connection with the industries carried on or to be carried on in said penitentiary or on the farm or lands mentioned in section 8339 hereof or elsewhere; and in the manufacturing, handling and marketing of article so produced, until disposed of, according to the provisions of this article; and the money in said 'revolving fund' shall

June 3, 1937.

be paid by the treasurer of the state upon warrants issued by the auditor of the state upon verified vouchers of said board."

Section 8454, R. S. Mo. 1929, provides how the moneys derived from sales of articles manufactured in the industries may be disbursed:

"All moneys derived from the sales or any articles manufactured in any of said industries in this article referred to, shall be collected by said board and paid into the treasury of the state to the credit of the following funds: Said board shall ascertain and determine on the first of each month from the books, records and accounts kept showing the business operations of the penitentiary, the amount of money received each month due to the purchase of raw material for use and manufacture, and said sum when so determined shall be deposited in the revolving fund and said board shall further determine what part of said receipts are due to labor and other profits in the operation of said penitentiary, and said amount shall be deposited in the 'earning fund;' and it is hereby made the duty of the treasurer of the state to carry on the books of his office as separate accounts the said 'revolving fund' and said 'earning fund.' Said 'revolving fund' shall not be used in whole or in part for any purpose or purposes other than those named in sections 8451, 8452, and 8453. The money deposited in the 'earning fund' shall be used by the prison board for the use of, support and maintenance of said prison, and such expenses as come under section 8408, and the treasurer shall pay same upon the warrant of the state auditor which shall be drawn on the requisition of the board."

The Prison Board, as pointed out in the above statutes, is charged with the duty of establishing prison industries, with the view of keeping all able-bodied inmates employed in the penitentiary, and is further charged with the duty of keeping books showing the profits or losses of each branch of manufacturers.

Funds for the operation of such prison industries are obtained from a Revolving Fund set up by the Legislature, to which fund the latter has from time to time appropriated moneys out of the general revenue, although not within recent years because of the profitable operation of the prison industries. Further, Section 8454, supra, provides that each month that portion of the receipts derived from the sale of the manufactured article which represents raw material is paid back into the Revolving Fund, while that portion of the article which represents labor and other profits is deposited in the Earning Fund.

The argument is advanced that the Revolving Fund was set up by the Legislature, and that it is the responsibility of the Board to keep it intact, and further that if the buildings housing the prison industries which were built out of funds taken from the Revolving Fund are destroyed by the State Building Commission, the Revolving Fund can no longer be said to be intact, as contemplated by the Legislature, even though additional buildings will be erected by the Commission of even greater value than those destroyed.

The Revolving Fund can not and was not intended to remain intact in a strict sense of the word, as witness the language of Section 8454, supra, which provides that only that portion of the receipts derived from the sale of the manufactured article which represents raw material is paid back into the Revolving Fund. Not a word is said as to the latter fund receiving any profits. That portion of the article goes into the Earning Fund. The Prison Board, we understand, is only permitting surplus profits to go into the Earning Fund; otherwise it is evident that unless the Legislature made regular appropriations for the prison industries the Revolving Fund would eventually be spent and the Board be without funds to operate.

Article IV, Section 44d, of the Missouri Constitution necessarily authorizes the wrecking, in whole or in part, of such penal buildings as have outworn their purpose, and the erection of new ones if necessary, thus:

"Those institutions of the State of Missouri to which any of the proceeds of the sale of said bonds may be devoted are those eleemosynary and penal institutions whose buildings are in need of repair or remodeling or in need of being rebuilt or in need of additions or additional buildings."

On the basis of the foregoing constitutional provision, the Legislature created a State Building Commission

" * * * for the purpose of repairing, remodeling or rebuilding, or repairing, remodeling and rebuilding all or any of the eleemosynary or penal institutions of this State, for building additions thereto and additional buildings wherever necessary, * * *." (Laws of Missouri, 1933-1934, Extra Session, pp. 107-114.)

The buildings housing the prison industries are as much state buildings as any other building on the premises of the penitentiary, and the only essential difference is in the use the Legislature intended them to be put to.

We are therefore of the opinion that the Prison Board is charged only with spending the money appropriated for the use of the prison industries in the manner specified, and to operate these industries in as profitable a manner as possible, and further that the destruction of certain buildings housing prison industries so that new ones may be erected will not in any manner violate any statute relating to the operation of prison industries or to the expenditure of funds authorized for such purposes.

We are further of the opinion that the procedure to be followed by the Prison Board is merely a matter of bookkeeping and that the amount occasioned by the wrecking

Hon. Stephen B. Hunter

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June 3, 1937.

of the buildings may be written off as a loss, and further that upon the erection of the new buildings same may be treated as an addition to the Revolving Fund or so designated capital structure of the prison industries.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

SALES TAX:
TAXATION:
COLLEGES AND EXEMPTIONS:

Educational institutions, principally supported by religious organizations, or by gifts or charities, are exempt from provisions of the 2% Sales Tax Act of 1937.

August 6, 1937



Mr. J. F. Hughes, Treasurer
Rockhurst College
Rockhurst Road and Troost Avenue
Kansas City, Missouri

Dear Sir:

This office is in receipt of your letter of July 29, 1937, requesting an opinion as to whether or not Rockhurst College is within the exempted class of taxpayers, as set out in Section 46 of the 2% Sales Tax Act, which letter is as follows:

"Will you please advise us whether or not Rockhurst College is exempt from the Missouri State Sales Tax.

"We note that section #46 provides exemption for all sales made by or to religious, charitable, eleemosynary institutions, etc., as well as institutions operated by religious organizations in the conduct of the regular religious, charitable, eleemosynary, penal or educational functions and activities.

"Rockhurst College is incorporated as an eleemosynary institution in the State of Missouri, is conducted by the Jesuit Order of Priests of the Catholic Church and is engaged exclusively in religious and educational functions and activities.

"Your interpretation and definite authorization of exemption for Rockhurst College, if we are so exempt, will be greatly appreciated."

If that institution is exempt from the provisions of this Act, it is by virtue of the provisions of the Act as set out in Section 46, which are as follows:

Mr. J. F. Hughes

"In addition to the exemption under Section 3 of this Act there shall also be exempted from the provisions of this Act all sales made by or to religious, charitable, eleemosynary institutions, penal institutions and industries operated by the Department of Penal Institutions or educational institutions supported by public funds or by religious organizations, in the conduct of the regular religious, charitable, eleemosynary, penal or educational functions and activities, and all sales made by or to a State Relief Agency in the exercise of relief functions and activities."

If Rockhurst College is within the class exempted in the above sections, it will have to fall within one or more of the following classifications of said section, to-wit, a charitable institution, eleemosynary institution, or educational institution supported by religious organization.

In order to determine this question, it has been necessary for an examination of the Certificate and Articles of Incorporation of Rockhurst College to be made, and upon such examination we find:

"The object and purpose of said corporation shall be for the encouragement of education, science and literature, and the educating and training of youth, in all kinds of knowledge, and it shall have power to take and hold all kinds of property, real, personal and mixed, which it may acquire, purchase, demise, by donation or otherwise, necessary to accomplish the purpose of this corporation, and may dispose of and convey same at pleasure; and shall have power to confer such academic, collegiate and University decrees and honors as are usually conferred by colleges and universities of the United States."

(Certificate and Articles of Incorporation of Rockhurst College on file in Secretary of State's Office, Corporation Department)

From a study of the aforesaid Articles of Incorporation, we find that Rockhurst College does not limit its student body to any particular class, and it is organized for the benefit of youth, generally, and it may be classed as "public" to that extent.

Mr. J. F. Hughes

Assuming that this college is an endowed institution, and receives gifts from individuals, and particularly religious organizations, which gifts are termed as "public charities," the institution to which they go may be termed as a "public charity" in the eyes of the Tax Law.

It is generally known that college institutions exist primarily upon gifts and the earnings from their endowment fund (which endowment fund may be termed a "public charity fund").

A college or university may be a public charity although maintained in part by tuition fees paid by students. (11 C.J. page 975, Sec. I.)

"An incorporated college, whose charter provides that persons of every religious denominations shall be eligible as trustees, that no person shall be refused admission into its faculty or classes, or denied participation in any of its privileges or advantages on account of religious belief, and that it shall be subject to visitation by the state, is a public institution in a broader sense of the word. Such an institution, if founded, endowed and substantially maintained by charity, is purely a public charity and as such within the protection of the Act of 1874, granting exemption from taxation, notwithstanding that a small portion of its annual expense may be paid by fees received from its students." (Northampton Co. v. Lafayette College, 128 Pa. 132)

By the foregoing reasoning, it appears that Rockhurst College, or any other educational institution which receives a substantial portion of its income from gifts and endowment fund, would be within that class of institutions exempted from the provision of the 2% Sales Tax Act in Section 46 thereof, and classed as charitable, eleemosynary and/or educational institutions supported by religious organizations.

CONCLUSION

This office is, therefore, of the opinion that Rockhurst College falls within the classification of an eleemosynary, educational institution supported by public charities and/or supported by a religious organization, and is within the class of charitable eleemosynary and/or educational institutions supported by religious organizations that are exempted from the provisions of the Sales Tax Act by Section 46 thereof, and that in the conduct of the regular religious, charitable or educational functions and activities of said

Mr. J. F. Hughes

college, all sales, as defined in said Act, made by or to said college for the aforesaid purposes, are exempted from the sales tax.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

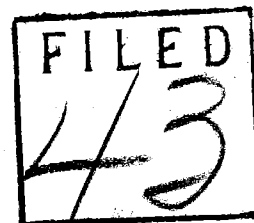
J. E. TAYLOR
(Acting) Attorney General

COUNTY COURTS

- (1) When erroneous distribution of funds from road bonds made by the township board may be ratified and confirmed by the county court.
- (2) Proceeds of road bond issue may be legally expended for purchase of suitable equipment.

August 24, 1937.

Mr. Glen W. Huddleston,
Prosecuting Attorney,
Carrollton, Missouri.



Dear Sir:

This will acknowledge receipt of your inquiry which is as follows:

"Several of the townships in Carroll County are contemplating issuing road improvement bonds and two of them have already sold bonds under the terms and provisions of Sections 7960-7963, Revised Statutes of Missouri, 1929, and I would appreciate the opinion of your department in regard to the proper manner of expending the funds obtained by virtue of said bond issue.

"Under the provisions of Section 7963 it appears that the funds arising from the sale of said bonds issued pursuant to the sections above mentioned are to be paid over to the treasurer of the township and by him expended upon the order of the County Court of Carroll County, Missouri. In one of the townships which have already sold their bonds no point has been made in regard to this matter and the township board are taking steps to expend the funds so obtained from their bond issue in the same manner in which other township funds are expended, that is, by order of the township board and without the County Court asserting any jurisdiction over said funds. The attorney for another township which has just sold their bonds maintains that all the funds so derived should only be dis-

bursed by the township treasurer upon the order of the County Court and that there is serious doubt as to the township treasurer having any right to pay warrants drawn upon said funds by order of the township board alone as is usually done in most cases under the provisions of Section 12291, Revised Statutes of Missouri, 1929, said statute last referred to being the general statute dealing with the expenditure of township funds. In this regard I wish to call your attention to the case of State ex rel. Wammack and Welborn vs. Affolder, 257 S.W. 493, which holds that the township treasurer shall pay out said funds on the order of the County Court, but does not necessarily say that said manner is the only way in which said funds may be expended although it does appear that such might be inferred.

"The County Court does not desire to control said funds for the various townships unless it is necessary that they do so, because even if they did so they would probably desire that the bills presented to the court for allowance and order of expenditure, if such procedure be necessary, were subject to the approval and sanction of the township board or officials who would more naturally be more closely in connection with said work and expenditures than the county court might be, but I feel that the township treasurer should be fully protected in the matter.

"If it is your opinion that said funds can only be expended upon the order of the County Court alone but some of said funds have already been disbursed upon the order of the township board alone, said expenditures having been made in good faith and otherwise proper, would the error in making said prior expenditures by the board be cured at this time by the County Court ratifying and confirming the same and assuming future control of said funds by proper order?

"In anticipation of selling their bonds and with the view of avoiding the payment of interest on their bonds until necessary, one of the township boards have already expending considerable funds from their general revenue on their proposed gravel road projects with the intention of reimbursing their general revenue as soon as said bond issue was sold; this having been done in perfectly good faith and naturally with some saving to the taxpayers in interest at the present time. Can it now be ordered that general revenue be reimbursed to the extent of the funds spent on the particular projects to be graveled or improved with the funds arising from the bond issue, in order that other roads not covered by said projects need not be neglected and the general work of the township not neglected for the balance of this year? It might be added in this regards that the ballots used in voting or the petition for said bond election did not call for any particular roads, but merely for improving, grading and otherwise improving the roads in the township, including bridges and culverts, but when said proposition was submitted to the voters it was generally understood that the funds obtained would be used on certain proposed roads in said township.

"A majority of the townships anticipate the use of a part of the funds obtained in purchasing suitable equipment for carrying out this work, which of course may also be used later in other parts of the township. I presume that this type of expenditure is proper."

I.

You state that several of the townships in your county are contemplating issuing road improvement bonds and that two of them have already sold bonds under the terms and provisions of Sections 7960-7963, R. S. Mo. 1929.

Section 7960, R. S. Mo. 1929, provides when county courts may issue road bonds on behalf of townships in their respective counties, in part, as follows:

" * * * county courts of the several counties, on behalf of any township in their respective counties, are hereby authorized to issue road bonds to an amount, including existing indebtedness, not exceeding five per centum of the assessed valuation of such * * * township, * * * to be ascertained by the assessment next before the last assessment for state and county purposes. Such bonds shall be issued in denominations of one hundred dollars or some multiple thereof, to bear interest at not exceeding six per centum per annum, payable semi-annually, and to become due and payable at such times as the * * * county courts shall determine by order of record, not exceeding twenty (20) years from date of issue."

Section 7961, R. S. Mo. 1929, makes it the duty of the county court to order an election in the township upon the question of issuing road bonds upon the filing with the clerk of the court of a petition asking for such bonds:

"* * * whenever twenty legal voters of any township shall file with the clerk of the county court wherein the township is located a petition in writing asking that bonds for road purposes be issued for and on behalf of such township, it shall be the duty of the court to order an election to be held in such township upon the question of issuing bonds. The notice of election, in either case, shall state the amount of bonds to be issued and the polling place or places at which the election is to be held, and shall be published once each week for three consecutive weeks in some newspaper published in the county wherein is located the township * * *; the first publication to be at least twenty-one days prior to the date of the election,

computed as is provided in section 655, R. S. 1929, * * *. The county court, on behalf of the township, * * * shall appoint the judges and clerks of election, and the returns of the election shall be filed with the clerk of the county court * * *, and be canvassed by the county court * * * and the result ascertained by, and entered upon the records of, such court * * *: Provided, that no person shall be permitted to vote at such election who would not be qualified to vote at a general election were a general election held on that day. If it shall appear that two-thirds of the voters voting at such election on said question shall have voted in favor of the issuance of said bonds, * * * the county court * * * shall order and direct the execution of the bonds for and on behalf of such * * * township, and shall provide for the levy and collection of a direct annual tax upon all the taxable property in said * * * township sufficient to provide for the payment of the principal and interest of the bonds so authorized as they respectively become due. * * * At the time the county court is required to determine and levy the rate of taxation for state, county, school and other taxes, to determine, order and levy such a rate of taxation upon the taxable property in any township in such county as may have outstanding bonds issued under this section as will be sufficient to pay interest and principal falling due during the next succeeding year. It shall be the duty of the clerk of the court to extend upon the tax books of the county such rate of taxation upon and against all of the taxable property in such township, and when so extended the same shall be collected by the collector of the revenue at the time, in the manner, and by the means that state, county, school and other taxes are collected. All of the laws, rights and remedies of the state of Missouri for the collection of state, county, school and other taxes, shall be applicable to the collection of taxes herein authorized to be collected."

August 24, 1937.

Section 7962, R. S. Mo. 1929, provides the form of the ballot to be used at the election held upon the question of issuing township road bonds.

Section 7963, R. S. Mo. 1929, provides when and how the bonds are to be sold, in part, as follows:

" * * * the county court on behalf of the townships, shall sell said bonds to the best advantage and the proceeds shall be paid over to the treasurer of the * * * township * * * and be by him disbursed, on the order of the * * * county court, in payment of the cost of holding said election and in paying the cost of constructing or improving roads in such districts or townships, including bridges and culverts."

The above section is clear and unambiguous, providing that when the county court has sold the bonds, the proceeds are to be turned over to the township treasurer, and to be disbursed by him on the order of the county court.

You point out that one of the township boards is taking steps to expend the funds obtained from its bond issue in the manner in which township funds are expended, viz., by order of the township board and without the county court asserting any jurisdiction over the funds.

Such procedure would clearly be unauthorized and contrary to Section 7963, supra, as witness the following language of the court in the case of State ex rel. v. Affolder, 257 S. W. (Mo. A.) 493, 1. c. 494:

"Does section 13204, R. S. 1919, prohibit defendant from paying the warrant? This section reads:

"The township trustee and ex officio treasurer shall not pay out any moneys belonging to the township for any purpose whatever, except upon the order of the township board, * * * and attested by the township clerk."

August 24, 1937.

"This section was enacted in 1879 (Laws 1879, p. 225), when the Township Organization Act was passed, and has come down without substantial change. Section 10750, R. S. 1919, was passed in 1917 (Laws 1917, p. 473), and provides among other things as stated, supra, that the proceeds of the bonds shall be paid over to the township treasurer and by him disbursed on the order of the county court, etc. In State ex inf. Major v. Amick, 247 Mo. loc. cit. 292, 152 S. W. loc. cit. 597, the court said:

"Where there are two acts and the provisions of one apply specially to a particular subject, which clearly includes the matter in question, and the other general in its terms, and such that if standing alone it would include the same matter, and thus conflict with each other, then the former act must be taken as constituting an exception to the latter or general act."

"This rule of construction has been invoked many times, and is applicable here. Since section 10750 is a much later statute than is section 13204, and since section 10750 applies to a particular subject, and since section 13204 is general in its application, we hold that section 10750, on the point in question, should be construed as an exception to the general and prior section 13204."

The question now arises whether the funds which were disbursed erroneously by the township board, but in good faith, can now be cured by the county court ratifying and confirming such expenditures, and assuming future control of the funds.

15 C. J., Section 117, page 465, with reference to ratification by a county of expenditures it had the authority to make, states that:

August 24, 1937.

" * * * if the county board has authority to order expenditures or the performance of services on behalf of the county, it may cure informalities or irregularities in the procedure for ordering the making of such expenditures or the performance of such services, by a subsequent ratification of the acts done in pursuance of the order and in recognition of its liability therefor. On the other hand, a ratification will not be inferred from mere passive acquiescence, and the board has no power to ratify what it could not have authorized in the first instance."

From the foregoing, we are of the opinion that when the county court has sold the road bonds the proceeds are to be turned over to the township treasurer, and to be disbursed by him on the order of the county court.

We are further of the opinion that the county court, having authority to order such expenditure of funds, may by order made of record ratify and confirm the disbursement of funds erroneously made by the township board, and assume future control of the funds.

II.

In anticipation of the bonds being sold, and with the view of avoiding payment of interest on the bonds until necessary, you state that the township boards have in good faith already expended considerable funds from their general revenue for road improvements which were contemplated under the bond issue. The question then is asked whether, under such circumstances, the funds thus expended can be reimbursed by the county court to the township.

Under Section 7963, supra, the county court is given the express power to order the township treasurer to disburse the proceeds from the sale of the road bonds for the purpose of paying "the cost of constructing or improving roads in such * * * townships," but clearly if the bonds had not been

sold, the county court could not order an expenditure of the funds, there being none as yet in existence to be ordered disbursed.

The county court having no original authority to order the incurring of expenditures for road purposes until the bonds were sold and the proceeds paid over to the treasurer of the township, we are of the opinion that the county court may not subsequently upon the sale of the bonds ratify and confirm the acts of the township board and reimburse them for expenditures on the roads.

III.

Your third question is whether funds obtained from the bond issue may be used in purchasing suitable equipment for road improvements.

Section 7946, R. S. Mo. 1929, specifically gives the county court authority to make such an expenditure, in part, as follows:

"Whenever any public money, whether arising from taxation or from bonds heretofore or hereafter issued, is to be expended in the construction, reconstruction or other improvement of any road, or bridge or culvert, the county court, township board or road district commissioners, as the case may be, shall have full power and authority to construct, reconstruct or otherwise improve any road, and to construct any bridge or culvert in such county or other political subdivision of the state, and to that end may contract for such work, or may purchase machinery, employ operators and purchase needed materials and employ necessary help and do such work by day labor."

From the foregoing, we are of the opinion that a portion of the proceeds of the bond issue may be legally expended by the county court for the purchase of suitable equipment to be used in carrying out the purposes of the road bond issue.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

PARDON AND PAROLE: Present board may investigate and make recommendations on each application for clemency, now pending before them, irrespective of release date, if done before new act is effective.

August 30, 1937

8-30

Honorable Stephen B. Hunter
Department of Penal Institutions
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your letter of August 24, 1937, in which you request an opinion as follows:

"I have before me a number of 'Commutation Paroles', which have been recommended by Mr. Sanders, the Warden, and approved by the three Board members.

After recommendation by the Warden, and approval by the three Board members, a form communication was addressed to the Governor, in which was set forth the facts in each particular case, giving the date of release of a convict under the seven-twelfths merit system. In this particular case, the date of release is on September 7. On September 6, a new Parole Board should be organized, and the present Parole Board ceases to function.

When the above-mentioned papers were presented to me, I questioned the advisability of my signing them as a commissioner of the Department of Penal Institutions, and whether I should sign such papers as show the date of release after September 6. There are thirteen of these 'Commutation Paroles' which show the release date on the 7th, 8th and 9th of September.

August 30, 1937

Please advise me, at your earliest convenience, if it is proper for one of the present Commissioners of the Department of Penal Institutions to sign this communication addressed to the Governor."

The power and authority to grant pardons is lodged exclusively in the Governor of the State of Missouri, after a person has been delivered to the Warden of the penitentiary, by Article 5, Section 8 of the Constitution of Missouri, which is in part, as follows:

"The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons."

Section 3798, R. S. Missouri, 1929, is as follows:

"In all cases in which the governor is authorized by the constitution to grant pardons, he may grant the same, with such conditions and under such restrictions as he may think proper."

In *State v. Asher*, 246 S.W. 911, the Supreme Court of Missouri had before it, for determination, the question of what powers were included in the power of pardon, given to the Governor by Article V, Section 8 of Missouri Constitution and Section 4144, R. S. Missouri, 1919, now Section 3798, R. S. Missouri, 1929. The court said at l.c. 913:

"It must follow from the foregoing that a parole is a conditional pardon, and that a 'parole' given by the Governor is but an exercise of the power vested

August 30, 1937

in him by the constitution and statute with respect to the issuance of conditional pardons."

Section 8515, R. S. Missouri, 1929, is as follows:

"The state prison board shall investigate fully the merits of all applications for executive clemency properly coming before the governor, and all applications for such clemency shall be heard and investigated without unnecessary delay. In each and every case said board shall, for the information of the governor, make a written report of its finding of the facts in such case, together with their recommendation thereon."

From the foregoing, it is clear that the Board of Pardons and Paroles has only the duty to investigate and make recommendations to the Governor on each application that is made for clemency. The power of granting the parole is vested solely in the chief executive of the state. The Board of Pardons and Paroles acts in only an advisory capacity, their recommendations are binding upon no one and may be completely disregarded by the Governor if he should so choose to do.

The legislature in Laws of 1937, page 400, made a revision of Chapter 44, Article VIII, Revised Statutes 1929, and by said revision removed the duty of investigating and making recommendations on application for clemency, from the State Prison Board, who constitute the present Board of Pardons and Paroles and placed these duties in the newly created Board of Probation and Paroles. This act, however, does not become effective until September 6, 1937.

The new act not being effective until September 6, 1937, the present Board of Pardons and Paroles continues to have the duties and authority that is now vested in them until that date, and must continue to perform these duties.

August 30, 1937

It will be noticed that in Section 8515, R. S. Missouri, 1929, the legislature provided that the board should act upon each application for clemency "without unnecessary delay".

It is, therefore, the opinion of this department that the present Board of Pardons and Paroles should continue to investigate and make recommendations to the Governor upon any application for clemency now pending before said board, so that each applicant for clemency, irrespective of his release date under the merit system, may have a hearing upon his application without unnecessary delay, provided said investigation and the written report and recommendation is made and reported to the Governor before the date the new enactment, above mentioned, becomes effective.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

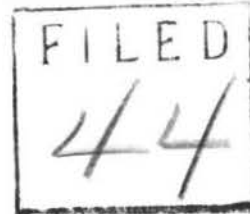
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB MR

SCHOOL: Eligibility of applicants - Missouri School for
the Deaf.

September 2, 1937. 9/2



Honorable Truman L. Ingle
Superintendent
Missouri School for the Deaf
Fulton, Missouri

Dear Sir:

This will acknowledge receipt of your request
for an official opinion, which reads as follows:

"The writer of the enclosed letter
has given me considerable concern in
regard to the eligibility of his son
as a pupil here in the Missouri
School for the Deaf.

"The parents have actually been out
of the state for more than a year.
The father claims residence in
Missouri because of having register-
ed in St. Louis. My understanding
is that he must not only be regis-
tered but must have voted and lived
in the state, to be classed as a
legal citizen of the state of Missouri.

"I have just received this letter, and
had previous to its arrival planned
not to allow this boy to return. He
was in school last year with us.

"May I ask that you give me an opinion
as to whether or not I should readmit
the boy this year under the present
circumstances."

In addition to the above information you advised the writer over the telephone today that the parents of this student were residents of this State, having lived in St. Louis, Missouri, and have been out of the State for about one and one-half years; also, that the father registered in St. Louis, Missouri, last year, with full expectations of returning to St. Louis to live. This is further confirmed by the attached letter of the father, stating that he expects to sell out and return to St. Louis by the 6th of September, and purchase a hotel in St. Louis, Missouri.

Section 9696, R. S. Mo. 1929, reads in part:

"All blind and deaf persons under twenty-one (21) years of age, of suitable mental and physical capacity, who are residents of this state, shall be entitled to admission to the school for the blind and the school for the deaf, respectively. * * *"

The above provision requires the applicant for admittance to the School for the Deaf to be a resident of this State, amongst other prerequisites for admittance to said school.

Section 9696, supra, further provides:

"All admissions and discharges, and the length of the period of instruction of each pupil, shall be determined by the board of managers."

In defining "residence" the determining factor is the intention of the party and the facts connected with such party in the establishment of a residence.

In *Trigg v. Trigg*, 226 Mo. App. 284, l. c. 296, the court said:

"Residence involves a question of fact controlled mainly by intention."

In discussing the word "residence" in the case of *In re Ozias' Estate*, 29 S. W. (2d) 240, l. c. 243, the court

had the following to say:

"The ruling herein depends upon the proper construction of the word domicile. Our Supreme Court held in *Re Estate of Lankford*, 272 Mo. 1, 197 S. W. 147, that residence is largely a matter of intention, to be deduced from the acts of a person.

"Residence and domicile are used interchangeably, and in so far as they apply to the situation here presented are synonymous.

"Domicil. That place where a man has his true, fixed and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning."

"Bouv. Law Dict., Vol. 1, page 915. Proof of domicile, or legal residence, does not depend upon any particular fact, but upon whether all the facts and circumstances taken together tend to establish the fact. Engaging in business and voting at a particular place are evidence of domicile there, though not conclusive. *Hayes v. Hayes*, 74 Ill. 312; *Inhabitants of East Livermore v. Inhabitants of Farmington*, 74 Me. 154. To constitute a change of domicile three things are essential: (1) Residence in another place; (2) an intention to abandon the old domicile, and (3) an intention of acquiring a new one. *Berry v. Wilcox*, 44 Neb. 82, 62 N. W. 249, 48 Am. St. Rep. 706. It has been held a wife's removal into another state for the benefit of her husband's health and a residence there for twelve years will not change the original domicile. *In re Reed's Will*, 48 Or. 500, 87 P. 763; *Ensor v. Graff*, 43 Md. 291.

"A person can have but one domicile, which, when once established, continues until he renounces it and takes up another in its stead. It is not lost by temporary absence. The question is one of fact which is often difficult to determine."

In view of the foregoing authorities and the fact this applicant was a student in your school last year and the parents of said student lived in the City of St. Louis, Missouri, until a year and a half ago, also that the father registered in St. Louis, Missouri, last year and further states that he now expects to return to St. Louis to establish himself in business, indicates that it was never his intention to discontinue his residence in this State.

Therefore, it is the opinion of this Department that if said applicant qualifies in all other respects he may also qualify under Section 9696, supra, as a resident of the State of Missouri.

Yours very truly,

AUBREY R. HAMMETT, Jr.,
Assistant Attorney-General

APPROVED:

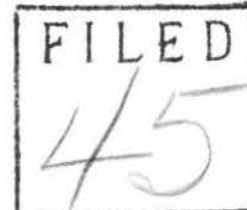
J. E. TAYLOR
(Acting) Attorney-General

ARH:EG

INSANE PERSONS: It is necessary to the validity of the court order committing an insane person to an asylum that said order show notice and that the same recite the alleged insane person appeared in person or by attorney.

January 28, 1937

1-29



Honorable W. Ed Jameson
Chairman, Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

You recently submitted to this Department the form of the order of a county court committing indigent patients to state hospitals for the insane. There is also inclosed letters from Honorable J. R. Baker, Judge Berryman Henwood and Honorable James W. Davis. This Department concurs in the views as expressed in the individual letters. The question of notice to an insane person was discussed on December 12, 1936, in an opinion to Honorable G. Logan Marr, Prosecuting Attorney, Morgan County, Versailles, Missouri; we are inclosing a copy of the same. We believe that the conclusion reached with reference to notice co-incides with that of Mr. Baker and others.

As stated above, in our opinion, the inclosed form meets the requirements of the statute. However, we make the following suggestions: On page 2 of the form under the certification of the county clerk, we think instead of using the phrase "by our county court," it would be better form to use "by the county court of _____ County, Missouri;" the second main paragraph of the form contains the expression, "and that said alleged insane person is represented in this court at this time by a regular practicing attorney of the State of Missouri;" ordinarily, in a civil action it is not necessary or essential to the validity of the judgment of a court that a person be represented by an attorney or that he need to appear at the hearing, the essential feature being the service of the notice or summons.

As stated in 12 Corpus Juris, 1211, section 987,

"Where given notice and an
opportunity for a hearing

Honorable W. Ed Jameson

-2-

January 28, 1937

have been given, the presence
of the alleged insane person
at the hearing is not essential
to due process."

We think it unnecessary to due process of law
for the defendant to appear in person or by attorney
providing he receives proper notice or summons. But
in the event that the alleged insane person does appear
by attorney or in person the order should contain this
allegation. The facts in the individual cases would
govern the contents of the order with reference to the
presence of the alleged insane person or his attorney.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

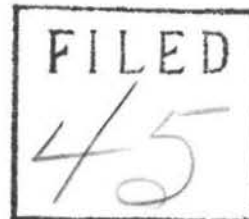
J. E. TAYLOR
(Acting) Attorney General

OWN:LC

Inclosure

FEES: The Sheriff or Constable, serving warrant of commitment is entitled to the \$1.00 fee for committing a prisoner to jail.

February 11, 1937.



Mr. O. B. Jennings
Circuit Clerk
Howell County
West Plains, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated January 26, 1937, which reads as follows:

"In regard to the fees of a Sheriff and Constable for committing a prisoner to Jail.

"We have the following Case:

"The Constable arrested a man for a misdemeanor and he fails to make bond, a commitment is issued and he is taken to the Jail (which is the Sheriff of our county). Both parties claim that they are each allowed \$1.00 for committing this man to Jail.

"A few days later this man is tried in Justice Court and is sentenced to jail. A commitment is again issued and the Constable again delivers the prisoner to the Jail, who again places the prisoner in Jail and each claim \$1.00 for this commitment. Making a total of \$4.00 on this one prisoner in the same case.

"How many commitments are allowed in one case, and who is allowed the fees for the commitment?"

The Legislature has provided for a warrant of commitment to issue after arrest and continuance, and before trial on all misdemeanors, under the provisions of Section 3426, R. S. Mo. 1929, which reads as follows:

"If the defendant shall fail or refuse to enter into recognizance, the justice shall commit him to the common jail of the county, or to the calaboose or other prison of the city where the trial is pending, there to remain until the day fixed for the trial of the charge alleged against him."

The Legislature has provided generally when the warrant of commitment is to issue, and its form, under Section 3443, R. S. Mo. 1929, which reads as follows:

"When judgment of imprisonment shall be given against a defendant, or he shall be committed for nonpayment of any fine or costs, the warrant of commitment may be as follows:

"The state of Missouri to the sheriff (or any constable) of _____ county, greeting:
Whereas, upon a trial had by a jury on the _____ day of _____ 19____, upon an information filed before O. K. justice of the peace of _____ county, by E. F., charging A. B. with an assault and battery (here state the offense), the defendant A. B. was by the jury found guilty, and his punishment assessed at a fine of _____ dollars and _____ days' imprisonment in the county jail, and it was thereupon adjudged by the justice that the state of Missouri should recover of and from the said A. B. the said sum of _____ dollars, the amount of the fine assessed against him, together with the costs, taxed at _____ dollars, and that he be imprisoned in the county jail of said county for _____ days and until said

said fine and costs were paid, and the said A. B. having failed to pay said fine and costs, you are hereby commanded that you take the body of the said A. B., and him forthwith commit to the custody of the jailer of the county of _____, who is hereby required the body of the said A. B. to receive and imprison in the county jail of said county for the space of _____ days, and until said fine and costs be paid, or he be otherwise discharged by due course of law. Given under my hand, this _____ day of _____, 19____."

Under Section 8527 R. S. Mo., 1929, the sheriff must receive prisoners committed to jail, and under Section 3716, R. S. Mo. 1929, the sheriff is to receive a certified copy of any judgment and sentence of prisoners committed to jail, which is his authority to execute sentence.

The fee payable to an officer for serving a warrant of commitment in a criminal cause is \$1.00, as per the provisions of section 11791, R. S. Mo. 1929.

In the case of Thomas v. County, 61, Mo. 547, 1. c. 548, the Supreme Court said:

"The words 'committing any person to jail,' relate to the execution by the sheriff of an order or warrant of commitment made or issued by some officer exercising judicial functions."

Section 732, R. S. Mo. 1929, provides the method of serving commitments and reads as follows:

"Every officer to whom any writ shall be delivered to be executed shall make return thereof in writing of the time, place and manner of service of such writ, and shall sign his name to such return."

Mr. O. B. Jennings

-4-

February 11, 1937.

CONCLUSION.

From Sections 3426 and 3443, supra, we see that the warrant of commitment for a person charged or convicted of a misdemeanor is a criminal process which is directed to either a sheriff or a constable. We see that two warrants of commitment may be allowed in any one case, the first one to issue and be served on arrest after continuance, and the second to issue and be served after trial and conviction.

The service of a warrant of commitment in a criminal cause is by the same method as service of any criminal process, and the officer serving and returning same must sign his name to the writ. See Section 732, supra.

This department is of the opinion that the officer who receives the warrant of commitment from the Justice of the Peace and delivers the prisoner to the jail is entitled to make the return on the warrant of commitment and receive the \$1.00 fee provided by the Legislature "for committing any person to jail." The Justice of the Peace in allowing the fee bill should know whether the constable or sheriff performed the official service of executing the warrant. Both officers could not be entitled to this fee for serving a warrant of commitment.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

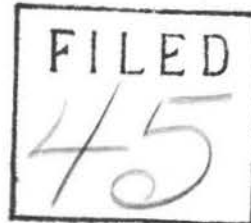
J. E. TAYLOR
(Acting) Attorney General.

WOS:H

ELEEMOSYNARY BOARD: Person committed to insane institutions by the Judge of the Circuit Court under Section 8657, R.S. 1929, relating to insanity as a defense under a criminal charge, may be discharged by the Superintendent of the Hospital in the manner as provided in Section 8629, R.S. 1929.

March 31, 1937

Honorable W. Ed Jameson
President Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri



Dear Sir:

This Department is in receipt of your letter of March 26, wherein you make the following inquiry:

"Please note the enclosed file re case of Robert P. Doneghy, who was committed to State Hospital No. 2, St. Joseph, on November 18, 1936, by order of the Adair County Court, at the regular November term thereof.

"The attached is a full statement of the case as it came to me from Dr. Orr Mullinax, Superintendent of said Hospital. Will you kindly advise at your early convenience, and officially, whether or not there are any steps State Hospital No. 2 can take looking to securing a court order that said patient may be legally released from this institution. Or if such order is not necessary, will you advise what can be done to properly handle the matter, as it is very clear that said Mr. Doneghy is not now insane.

"Thanking you for such early attention and official opinion in this case, with return of these enclosures, I am."

March 31, 1937

The attached correspondence contains additional facts with reference to your question.

We have considered the copy of the Order of the Circuit Court with reference to Robert P. Doneghy. It will appear that Doneghy was acquitted in the Circuit Court of Adair County of the charge of murder, on the grounds that he was insane at the time of the commission of the crime.

There are special statutes relating to this form of defense. In this connection you are respectfully referred to Section 3660, Revised Statutes Missouri 1929, which is as follows:

"When a person tried upon indictment for any crime or misdemeanor shall be acquitted on the sole ground that he was insane at the time of the commission of the offense charged, the fact shall be found by the jury in their verdict, and by their verdict the jury shall further find whether such person has or has not entirely and permanently recovered from such insanity; and in case the jury shall find in their verdict that such person has so recovered from such insanity, he shall be discharged from custody; but in case the jury shall find such person has not entirely and permanently recovered from such insanity, the prisoner shall be dealt with as provided in the two preceding sections."

We assume that the jury found that the defendant was not guilty by reason of being insane at the time of the commission of the offense charged, and that Doneghy had not entirely and permanently recovered from such insanity. The two preceding sections referred to in Section 3660, namely; 3658 and 3659, throw no special light on the question as they refer to defendant's becoming

insane after the commission of the crime. The court evidently followed the procedure, after the verdict of the jury, as contained in Sections 8656 and 8657. Section 8655 is identical with Section 3660 except as to the following words:

"the prisoner shall be dealt with as provided in the two following sections."

Section 8656 is as follows:

"If the prisoner is not a poor person, and the court is satisfied, from the nature of the offense or otherwise, that it would be unsafe to permit the prisoner to go at large, an order shall be entered of record that he be sent to a state hospital, designating it, and further requiring the sheriff or other ministerial officer of the court, with such assistance as may be specified in the order, to convey such prisoner to the hospital, after first ascertaining from the superintendent that such prisoner will be received into the hospital, and until the receipt of such information, to keep such prisoner in the county jail, poorhouse or other safe custody; and further, that the cost which may accrue in carrying into effect this order, and all expenses for the support and maintenance of such person whilst in the care and custody of the officer and at the hospital, shall be paid out of the proceeds of the estate of such person. And the court shall have power, at

each succeeding term, to tax up, so long as it may be necessary, such cost and expenses as may have accrued since the preceding term, and cause the same to be levied and collected by execution; and the officer collecting the same shall pay to the treasurer of the hospital, and to such other persons as may be entitled thereto, their respective amounts due. The clerk of the court shall furnish a copy of the order of the court, under his official seal, to be lodged with the superintendent, upon the admission of the prisoner into the hospital, and issue a warrant upon said order to the officer named in said order as near as may be of the form specified in section 8649."

Section 8657 is as follows:

"If the prisoner be a poor person, the court shall make an order remanding him to the custody of the sheriff or other officer of court, requiring him to hold the prisoner in safe custody, at the expense of the proper county, until the county court shall cause him to be removed to a state hospital, as in the cases of insane poor persons: Provided, no examination into the insanity of the prisoner shall take place before the county court, as provided in sections 8643, 8644, 8646 and 8647; but the county court and clerk thereof shall proceed, and the prisoner be dealt with in like manner as other insane poor persons

are required to be, after examination had by the county court. It shall be the duty of the clerk of the court trying the prisoner to make out a copy, under his official seal, of the judgment of acquittal of the prisoner, and the order required by the first part of this section, to be delivered to the officer having custody of the prisoner for his authority for such custody."

The circuit court order recites

"That said Robert P. Doneghy has not estate sufficient to support him in State Hospital No. 2 and that he is now a resident of the County of Adair and State of Missouri."

Therefore, the order was made in compliance with Section 8657, quoted supra.

Bearing the above sections in mind, the question resolves itself into the following:

"The Circuit Court having issued its order in compliance with Section 8657 and Doneghy being placed in State Hospital No. 2, in compliance with said order, and he now being restored to reason or no longer insane, in the judgment and opinion of the authorities in charge of the Hospital, what is the procedure necessary for his release?"

The County of Adair is liable for his maintenance

the same as any other person without an estate, or the indigent insane. This question is discussed, as to the effect of the court's order under Section 8657, in the case of State ex rel. Yarnell v. The Cole County Circuit Court 80 Mo. 1. c. 83, as follows:

"The fact that McGirk, then a citizen of Cole county, was placed in the lunatic asylum in July, 1880, as a pay patient, is not controvertible, and in no way dependent on the question whether his sanity at the inquest of lunacy was tried by six or twelve jurors. While such a question might affect the regularity of the action of the probate court in appointing a guardian, it cannot affect the fact that he was confined in the asylum as a pay patient, nor the fact that he was subsequently, by the order of the county court, made a county patient. We will, therefore, in the disposition of the case, consider the order as being sufficiently efficacious to make said McGirk a county patient of Cole County from the time it was made.

"The question which this record presents is: Was it, under the facts above stated, the duty of the county court of Cole county to make an order for the removal of said McGirk to the lunatic asylum at Fulton, as in case of insane poor persons? This question, we think, is answered in the affirmative by sections 4153, 4143 and 4145, Revised Statutes. It is provided in section 4153 that 'every patient in the asylum shall be deemed to be the county patient of the county first sending him, till one year after his regular

discharge from the asylum'. Section 4143 provides 'that when a person tried upon indictment for any crime or misdemeanor shall be acquitted on the sole ground that he was insane, the fact shall be found by the jury in their verdict, and the prisoner shall be dealt with as provided in the following sections.' One of these sections, 4145, provides 'that if the prisoner be a poor person, the court shall make an order remanding him to the custody of the sheriff, or other officer of court, requiring him to hold the prisoner in safe custody at the expense of the proper county, until the county court shall cause him to be removed to the asylum, as in the case of insane poor persons.'

"We think it apparent from the above statutory provisions and the general law regulating asylums, (2 R.S., p. 818,) that it was the intention of the legislature to cast the burden of supporting the insane poor upon each county where such insane poor have acquired a residence or settlement, and that where an insane poor person is sent from a county and is discharged from the asylum, he shall be deemed to be the county patient of such county for the period of twelve months after such discharge, the language of the statute being that every patient in the asylum shall be deemed to be the county patient of the county first sending him till one year after his regular discharge."

We are of the opinion that Section 8657 is a special statute relating to a person who has been tried on a criminal charge and acquitted solely on the ground

that he was insane at the time of the commission of the crime, and the trial of the person before a jury eliminates the necessity of a hearing before the county court as essential to the committing of a person to an insane asylum, as contained in Sections 8643, 8644, 8645, 8646 and 8647. After the institution has received the person committed by the county court, then, in our opinion, the circuit court loses jurisdiction over the person. The Judge of the Circuit Court does not make the order to the county court committing such person to the state insane asylum as a matter of punishment; it is not a commitment for any definite time or period as in the case of a defendant sentenced to jail or to the penitentiary.

Section 8629, Revised Statutes Missouri 1929, contains the power of the Superintendent to parole or release a patient, and is as follows:

"Persons afflicted with any form of insanity shall be admitted into the hospital for the care and treatment of the insane, and any patient may be discharged by the superintendent whenever, in his opinion, the reason of such person is fully restored: Provided, that nothing herein shall be so construed to prevent any superintendent from paroling any patient whenever he deems it best for such person confined in the hospital; and provided further, that county courts are hereby prohibited from removing from the hospital any indigent insane persons, except as herein provided."

Commenting on the effect of Section 8629, the power and authority of the Superintendent to release patients, the Supreme Court of Missouri, in the case of *Ex parte Higgins v. Hector*, 332 Mo. 1. c. 1039, states:

"However, such an order for temporary restraint, as made by the probate court here, is not binding upon the superintendent of a State Hospital to keep the person confined until an order is made in that court for release. It is in no sense like a commitment in a criminal case for a definite term in jail or in the penitentiary. The person may lawfully be either discharged or paroled and set at liberty by the superintendent of his own motion at any time. (Sec. 8629, R. S. 1929.) The hospital is a State institution. (Chap. 46, Arts. 1 and 2, R. S. 1929.) The superintendent is one skilled in the treatment of mental diseases. (Sec. 8578, R. S. 1929.) He is better qualified to determine a person's mental condition and the necessity for his confinement than the probate judge. He is a public officer and improper action on his part will not be presumed. If the person confined desires counsel or to attend the hearing of which he has notice, he has that constitutional right and it would be the duty of the superintendent to allow it, even with the precaution of an attendant if he thought that necessary."

CONCLUSION

The only condition contained in the copy of the order committing Doneghy to State Hospital No. 2 was:

"To be confined until he has been restored to reason."

March 31, 1937

There is no statutory authority or procedure for the circuit court to determine whether or not he has been restored to reason. In fact, we do not think that the same is necessary or essential because, as stated above, the court has lost jurisdiction of the person; it no longer devolves upon the court to determine whether he has been restored to reason or not; the statute has placed this burden upon the authorities in charge of the hospital. The county court, which has the authority to commit poor persons to state hospitals, has no power to determine whether a person has been restored to reason or not. By the same logic the circuit court would have no greater power. If a person is committed by the Judge of the Probate Court when such person has an estate and it is necessary to appoint a guardian to take charge of such person, then such person could exercise his rights under sections 493 and 494 of the Revised Statutes of Missouri 1929, but, in the instant case, Doneghy is committed as a poor person and the procedure as contained in such statutes does not apply.

We are, therefore, of the opinion that under the authority as contained in Section 8629, quoted supra, Doneghy may be discharged by the Superintendent whenever, in his opinion, his reason is fully restored, or may parole him under the conditions as contained in said section.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

ROADS AND BRIDGES: Commissioners of Special Road Districts can not act as road overseers or employ themselves and receive compensation for the same in the Special Road District.

May 3, 1937

Filed: #45

Mr. C. E. Jeffries
Clerk of the County Court
Newton County
Neosho, Missouri



Dear Sir:

This Department is in receipt of your letter of April 21, 1937, wherein you make the following inquiry:

"A road question has arisen in a Special Road District in this County on which we would like very much to have your opinion.

"Is it legal for any one who has been appointed road commissioner to receive a salary as a maintenance operator?"

On June 18, 1935, this Department rendered an opinion to Honorable G. Logan Marr, Prosecuting Attorney of Morgan County, in which this question is discussed and a conclusion reached to the effect that it is illegal for road commissioners to receive a salary for labor in the district, or, as stated in your letter, as maintenance operators.

Since the rendition of the inclosed opinion we have concluded that commissioners employing themselves is illegal for the further reason that it violates or is contrary to public policy. All of the authorities to this effect are discussed in State ex rel. v. Bowman, 184 Mo. App. 1. c. 559:

"We are not without abundant authority for this ruling. The case of Meglemery v. Weis-singer, (Ky.) 131 S.W. 40, 31 L.R. A. (N.S.) 575, is a leading case on this subject. The editorial note to that case says: 'The adjudged cases upon the validity of appointment to office made from the membership of the appointing body hold uniformly that such appointments are illegal and to be generally discountenanced. 'In that case it was held that the fiscal court of a county, empowered to appoint a bridge commissioner, a salaried officer, could not appoint one of their own number. No specific statute or constitutional provision is cited as prohibiting such action. The court held the appointment void as against public policy, and said: 'Nor does the fact that his term expired within a few days after his appointment, or the fact that his duties would be prescribed and his compensation allowed by a body of which he was not a member, or the fact that he was not present with the court when his appointment was made, have the effect of changing this salutary rule. The fact that the power to fix and regulate the duties and compensation of the appointee is lodged in the body of which he is a member is one, but not the only, reason why it

May 3, 1937

is against public policy to permit such a body charged with the performance of public duties to appoint one of its members to an office or place of trust and responsibility. It is of the highest importance that municipal and other bodies of public servants should be free from every kind of personal influence in making appointments that carry with them services to which the public are entitled and compensation that the public must pay. And this freedom cannot in its full and fair sense be secured when the appointee is a member of the body and has the close opportunity his association and relations afford to place the other members under obligations that they may feel obliged to repay.' Other cases to the same effect will be found, giving the same and other reasons for so holding. (Smith v. City of Albany, 61 N. Y. 444; Gaw et al. v. Ashley et al., (Mass.) 80 N.E. 790; The People v. Thomas, 33 Barbour's Repts. 287; Ohio ex rel. v. Taylor, 12 Ohio St. 130; Kinyon v. Duchene, 21 Mich. 497.)."

Therefore, in addition to the reasons assigned in the opinion to Mr. Marr, we are of the opinion that Road Commissioners employing themselves constitutes a direct violation of the public policy of the State, and, accordingly, so hold.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

COUNTY BUDGET ACT:Sec.2,page 341,Laws of Mo.1933,not applica...
to St.Louis County. County Budget Act takes precedence over
all statutes when there is a conflict. County Court has power
to transfer within the same fund any unencumbered appropria-
tion balance. Second paragraph of Section 14 is unconstitu-
tional.

May 14, 1937



Honorable Owen G. Jackson
Chairman
Board of Election Commissioners
St. Louis County
Clayton, Missouri

Dear Sir:

This Department is in receipt of your recent letter relative to the payment of certain obligations incurred by the Board of Election Commissioners in carrying out its duties. Your letter outlining the history of the facts surrounding the questions which you propound at the close of your letter, is as follows:

"As you know, the Board of Election Commissioners is operating under the provisions of Senate Bill Number 22 passed in 1935. (Laws 1935 p. 229).

"On April 25th, 1935, your Office gave an opinion addressed to Honorable C. Arthur Anderson, Prosecuting-Attorney of Saint Louis County, and reference is made to that opinion for consideration in connection with this letter.

"On January 3rd, 1936, the Presiding Judge of the county court, as Budget Officer under the provisions of the County Budget Law (Laws 1933, p. 340) after public hearings, prepared his annual budget, and in that budget an appropriation was allowed to the Board of Election Commissioners

in the sum of \$150,000 for the year 1936, i. e., an appropriation was made of that sum out of estimated revenue, a large part of which was not collected and a large part of which was used to pay unpaid legal obligations of a prior year out of the revenues of the budget year. In accordance with the provisions of Section 14 of the County Budget Law, making such obligations a first charge in the budget against the revenues of the budget year.

"During the year 1936, the cost of elections, including the cost of installing the permanent registration set-up, incurred by the Board of Election Commissioners was a total sum of \$132,996.30. Of this sum warrants were issued and paid by the County Treasurer in the sum of \$38,170.54, leaving a balance of unpaid claims in the sum of \$94,825.76.

"On October 14th, 1936, before all of the above expenses had been incurred, the county court entered an order as follows:

" 'In the matter of General)
Revenue Fund Warrants.)

At the request of E. O. Harper, Accounting Officer, it is ordered by the court that the Clerk of the Circuit Court, and the Election Commissioners respectively, be and they are hereby directed to issue no further warrants drawn on the General Revenue fund for

May 14, 1937

protest by the County Treasurer,
as warrants have already been
issued up to the amount of the
Anticipated Revenue of said fund.

(signed) THOMAS H. THATCHER,
Presiding Judge.'

"At the time of the receipt of this order the Election Commissioners had issued warrants as aforesaid in the sum of \$38,170.54, and therefore had the sum of \$111,829.46 remaining of the sum allocated by appropriation to it in the budget, but which was not on hand by reason of the fact that all of the revenue as estimated was not collected, and for the further reason that unpaid legal obligations of a prior year were paid out of the revenues of the budget year in accordance with Section 14 of the County Budget Law, which made such obligations a first charge on the revenues of the budget year.

"The opinion given by your office on April 25th, 1935, indicated that it is the duty of the Election Commissioners to issue warrants for proper accounts."

We shall undertake to answer your questions in numerical order.

I

"First: Is the classification of expenditures and priority of payment under Section 2 of the County Budget Law applicable to Saint Louis County and to the Board of Election Commissioners?"

The County Budget Act, Laws of Missouri 1933, page 340 et seq., contains two methods for counties, each based on a population basis, for preparing the budget.

Section 1, page 340, contains the following sentence:

"All counties now or hereafter having a population of 50,000 inhabitants or less, according to the last federal decennial census, shall be governed by Sections 1 to 8, inclusive, of this act."

Section 9 contains the following sentence:

"The budget officer shall receive no extra compensation for his duties under this Act, and Sections 9 to 20, inclusive, of this Act shall apply to such counties."

Knowing the population of St. Louis County to be more than 50,000 inhabitants, and, by virtue of the above two quoted provisions, we are of the opinion that the provisions of Section 2, page 341, are in no way applicable to counties of the population of St. Louis County.

II

"Second: Does the order of the County Court under date of October 14th, as aforesaid, prevail over the statutory obligation of the Election Commissioners with respect to the issuance of warrants for proper accounts when warrants have already been issued up to the amount of the anticipated revenue? "

The purpose of the County Budget Act was to promote efficiency and economy in county government. The term 'budget' itself is to be used in its ordinary sense. It was evidently the intention of the Legislature to enable the various county courts to have a complete financial picture of the counties' financial condition before them at all times. The Budget Act did not repeal and over-turn the former financial structure of counties, but by Section 22, page 351, Laws of Missouri 1933, the same being as follows:

"All laws or parts of laws and expressly sections 9874, 9985 and 9986 in so far as they conflict are hereby repealed,"

the Budget Act will take precedence over all statutes when the same are in conflict; the county court, evidently desiring to prevent warrants being issued in excess of the anticipated revenue, entered the above order signed by Judge Thatcher. Warrants issued in excess of anticipated revenue have been ruled on several occasions by our Supreme Court to be invalid. Your particular attention is directed to the decision in the case of State ex rel. v. Wabash Railway, 169 Mo. 1. c. 574, wherein various prior decisions are reviewed:

"The leading case in this State upon the power of a county court under the present Constitution to contract a debt for any purpose in excess of its revenue for the current year, is Book v. Earl, 87 Mo. 246, in which it was said: 'The evident purpose of the framers of the Constitution and of the people who adopted it, was to abolish, in the administration of county and municipal government, the credit system and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year. Section 12, supra, is clear and explicit on this

point. Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it.

"That case was subsequently followed in State ex rel. v. Payne, 151 Mo. 663, and in Railroad v. Thornton, 152 Mo. 570.

"In Prince v. Quincy, 128 Ill. 443, it was said that the inhibition contained in the Constitution of Illinois 'was intended to embrace indebtedness of every description, nature, and kind, and in every sense of the term, whatever the character or form by which it was evidenced, when made or issued after the limit should be reached. This leaves no possible ground for the supposed distinction between an indebtedness for current expenses and other accounts, or between one payable out of a specific fund and one chargeable against the city generally.'

"In Buchanan v. Litchfield, 102 U. S. 278, the Supreme Court of the United States, said: 'The first and most important of the certified questions involves the construction of the twelfth section of the ninth article of the Constitution of Illinois. The words employed are too explicit to leave any doubt as to the object of the constitutional restriction upon municipal indebtedness; the purpose of its framers, beyond all question, was to withhold from the legislative department the power to confer upon municipal corporations authority to incur indebtedness in excess of a prescribed amount.

The authority, therefore, conferred by the act of April 15, 1873, to incur indebtedness in the construction and maintenance of a system of waterworks, could have been lawfully exercised by a city, incorporated town or village, only when its liabilities, increased by any proposed new indebtedness, would be within the constitutional limit. No legislation could confer upon a municipal corporation authority to contract indebtedness which the Constitution expressly declared it should not be allowed to incur.' "

When warrants are valid and issued within the anticipated revenue the method of paying the same is very succinctly stated in the case of *State ex rel. v. Johnson*, 162 Mo. 621:

"A county warrant valid when issued is not rendered invalid because the revenue provided to pay it is not collected during the year in which it was issued, or is misappropriated by the officers of the county for whose act the holder of the warrant is not responsible. On the contrary, the surplus county revenue remaining after the payment of all current expenses of every kind for the year for which such revenue was levied and collected, may be used in the payment of outstanding valid unpaid county warrants for previous years."

Therefore, we are of the opinion that the county court's order of October 14, 1936, was a valid and proper order. The fact that the statutes confer certain obligations on the election commissioners creates conflict with the Budget Act would not alter the situation. As stated in Section 22, quoted supra, the Budget Act repeals or takes precedence over all statutes when there is a conflict.

III

"Can the county court, after making an appropriation and allocation by virtue of its announced budget, thereafter lawfully decrease the amount of warrants which may be drawn on the appropriation, either because of insufficient revenue or for the purpose of re-allocating the funds allowed by appropriation to the Election Commissioners to other accounts.? "

Bearing in mind our answer to your second question we would naturally conclude that the county court could lawfully decrease the amount of warrants which may be drawn on the appropriation because of insufficient revenue. We conclude that this is true if the insufficient revenue referred to means the decreasing of the number of warrants due to the fact that warrants have already been issued to the amount of the anticipated revenue. But if the revenue is simply insufficient and yet warrants have not been issued in excess of the anticipated revenue we think the warrants are valid and could be paid in the manner as set forth in the Johnson decision, quoted supra. As to that portion of question III relating to the 're-allocating the funds allowed by appropriation to the Election Commissioners to other accounts' we think the same is determined by Section 16, page 349, said section being as follows:

"The county court shall have power to authorize the transfer within the same fund of any unencumbered appropriation balance or any portion thereof from one spending agency under its jurisdiction to another; provided that such action shall be taken only on the recommendation of the budget officer and only during the last two months of the fiscal year, except that transfers from the emergency fund may be made at any time in the manner hereinbefore provided."

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Analyzing the section, the county court has the power to transfer within the same fund any unencumbered appropriation balance. There is no provision in the Budget Act permitting the county court to change or alter the budget after it has been finally accepted and filed. Section 14 empowers the county court to revise, alter, decrease or increase the items, eliminate or add new items, but such changes must be made before the time for filing the budget. Therefore, if the appropriation is encumbered, that is, the funds are allocated for a definite purpose, and the purpose for which said funds were allocated has not been consummated or expired the county court would have no authority to take away or transfer the funds from one spending agency to another. In addition, the proviso in said Section 16 further restricts an unencumbered appropriation to the recommendation of the budget officer and only during the last two months of the year. Of course, transfer of the emergency fund, as provided in the next to last paragraph of Section 11, may be done by the county court under the conditions as therein imposed.

IV

"If this latter question be answered in the affirmative may such reallocation or reappropriation be made so as to prejudice the rights of persons whose contracts had been let, performed, and payment due before the reallocation?"

Having answered your question III in the negative, it will be needless to give consideration to Question IV.

V and VI

"Can the Board of Election Commissioners lawfully issue warrants against revenues of 1937 to pay claims incurred for the holding of elections in 1936, if there are already warrants issued and out-

standing over and above the amount actually collected of the anticipated revenue for 1936?

"Does that part of Section 14 of the County Budget Law, providing that unpaid legal obligations of a prior year shall be a first charge against the revenues of the budget year, directly conflict with the provisions of Section 12, Article 10 of the Missouri Constitution providing that 'No county * * * shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year, the income and revenue provided for such year, without the consent of two-thirds of the voters * * ' when in the case of Saint Louis County the payment of such legal obligations of a prior year under Section 14 will take so much of the anticipated revenue of the budget year as to make the payment of estimated expenditures of the budget year impossible because of the fact that such expenditures will then exceed the estimated revenue for the budget year? "

Questions V and VI are closely related.

The second paragraph of Section 14, page 349, is as follows:

"Any cash surplus at the end of any fiscal year shall be carried forward and merged with the revenues of the succeeding year. Payment of any legal unpaid obligations of any prior year, however, shall be a first charge in the budget against the revenues of the budget year: provided

that any deficit existing at the end of the year preceding that in which this act takes effect may be paid over a term of years, or in such other manner as the county court may determine."

Your questions thrust upon this department the duty to declare the above portion of the section to be constitutional or unconstitutional. It has always been the policy of this department to accept the laws as passed by our Legislature and assume the constitutionality of the same, believing that so serious and grave a duty can only be determined by the Supreme Court. However, the constitutionality of the above paragraph has been assailed several times. We shall undertake to give you our conclusions regarding the constitutionality thereof. Evidently, the section undertakes to mortgage the future for the past; to do that which the framers of the Constitution evidently had in mind to avoid. In substance, it places a lien on the ensuing year's revenue for the past fiscal year's indebtedness. It was the intention of the framers of the Constitution, and we refer to Section 12 of Article X, to compel each county to conduct its affairs on a cash basis, that is, not to spend more in a current year than the amount of its receipts can reasonably be anticipated. If a county is permitted to charge the revenue of future years for past indebtedness it is not a far-fetched conclusion that in a given number of years St. Louis County would be using all of its current revenue for past indebtedness.

We think the decision as rendered by the court in *Trask v. Livingston County*, 210 Mo. 582, 1. c. 592, enunciates the principles of law which are applicable to the paragraph referred to in Section 14 and determines its constitutionality or unconstitutionality:

"The constitutional provision found in section 12 of article 10 of that instrument has often been construed by this court. In *Book v. Earl*, 87 Mo. 1. c. 252, it was well said: 'The evident purpose of the framers of the Constitution and the people who adopted it was to abolish, in the administration of county and municipal government,

the credit system and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year. Section 12, supra, is clear and explicit on this point. Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it. "

And further, at l. c. 594:

"In Mountain Grove Bank v. Douglas County, 146 Mo. 42, it was expressly held that the mere issuance of the warrants did not create an indebtedness. Hence, the indebtedness for these bridges was created, if at all, by a compliance with the law governing the letting and contracting for bridges already noted. When the county became indebted on these bridge contracts must be determined by the 'income and revenue provided for such year,' which under the Constitution must be looked to for the payment of such indebtedness and it was the 'income and revenue provided' for the year 1889, which the county court was authorized to appropriate for that purpose, and not the revenue for the year 1890, which at the date of the contract for the building of said bridges had never been assessed, levied or collected. The language of the Constitution is, 'No county . . . shall be allowed to become indebted in any

manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year.' It has been uniformly construed that this provision of the Constitution permits the anticipation of the current revenues to the extent of the year's income in which the debt is contracted or created and prohibits the anticipation of the revenues of any future year. Any other construction would render section 12 of article 10 nugatory, for if the county court of Livingston county in September, 1889, could anticipate the revenue of 1890, it could also anticipate the revenues of 1891 and 1892, and would have the power of the county with reference to indebtedness what it was before the Constitution of 1875 was adopted. In Gray's Limitation of Taxing Power and Public Indebtedness, section 2162, the author expresses the view that 'the time when the debt actually comes into existence as a binding obligation on the municipality, is the time as to which all calculations as to its validity should be made.' "

And further, at l. c. 596:

"It has been very recently considered, in its application to the subject in hand, by the Court In Banc, and the conclusion was announced that such an obligation to pay an agreed sum, year by year, for the furnishing of certain necessary supplies during a term of twenty years, was not an immediate indebtedness for the entire amount that might ultimately become due by installments during that term.' (Saleno v. Neosho, 127 Mo. 627.) It will, we think, be seen upon close examination of Saleno v. Neosho and the Lamar cases that the great question was whether there was an aggregate indebtedness

created in the beginning which would exceed the debt-making power of the corporation or whether the indebtedness should be treated only as an obligation which would arise from year to year as the water contracted for was furnished, and in order to ascertain whether the municipal corporation was transgressing the constitutional limit regard was had only to the amount which might fall due within a certain year and if the revenue for that year was sufficient over and above the payment of other expenses, then there was no debt incurred within the constitutional prohibition. In other words it was practically decided that although the contract was for twenty years it was considered by the court from the debt-creating point of view as if it had been twenty separate contracts, one covering each year. And the authorities all agree that if the amount to be paid in any year under such a contract exceeds the income and revenues for such year against which it is a charge, it would be invalid, at least to the extent of such excess. There are many considerations which in our opinion sustain the decisions in those cases, but they afford no authority for holding that the county court in this State under the Bridge Act can contract for a supply of bridges covering a period of years, one bridge to be built each designated year and to be paid for out of the revenue for the year in which it shall be built. All the provisions of the Bridge Act are inconsistent with any such power in the county court."

And further, at l. c. 599:

"But confining ourselves to the facts in evidence and the statute governing

the building of bridges, as already said the statute required the county court to make an appropriation before the Road and Bridge Commissioner let the contract. The record shows that the county court on the 5th day of September, 1889, made an appropriation to pay for the building of the bridges. Now, out of what revenue was it authorized to make this appropriation, that of 1889 or that of 1890? We think the Constitution answers this question: they could only make it out of the revenue of 1889, and in this particular case this conclusion is reinforced by the fact that the bridges contracted for were to be completed in the year 1889, and as the obligation was incurred in 1889 and the bridges were to be built in that year and the appropriation was made in that year, we think there can be no escape from the conclusion that the indebtedness thereby created was a charge against the revenues provided for the year 1889, and not the revenues of 1890. Clearly the county court was not authorized to appropriate revenues which were to be derived from taxation in the year 1890, when such taxes had never been assessed, levied or collected. While the county court may in any one year draw warrants, after the revenue has been provided and the taxes levied within the scope of the levy and income for such year, it is too plain for argument that the Constitution forbids the anticipation of the revenues of any subsequent years; if not, all that has been said in regard to the force and effect of section 12 of article 10 of the Constitution to the effect that its purpose was to put counties upon a cash system instead of the old credit plan, has been in vain."

The above quoted decision is further quoted from approvingly in the cases of *Hawkins v. Cox*, 334 Mo. 1. c.

648, and Sager v. City of Stanberry, 336 Mo. 213.

We are therefore of the opinion that that portion of Section 14 which attempts to make the legal unpaid obligations of a prior year a first charge in the budget against the revenues of the budget year, is violative of Section 12 of Article X of the Constitution of Missouri. Another argument which fortifies this conclusion is that of decisions by our Supreme Court, and especially State ex rel. v. Johnson, 162 Mo. 621, to the effect that when legal unpaid obligations which have been incurred in any year within the anticipated revenue of the county remain unpaid such legal unpaid obligations can only be paid out of the surplus remaining in any year in the future, or by delinquent taxes which are paid into the treasury for the year in which said unpaid obligations were incurred.

VII

"Is there a direct conflict between the provisions of Section 12139 Revised Statutes of Missouri, 1929, and Section 14 of the County Budget Law, when the payment of unpaid legal obligations for prior year will prevent the payment of 'services that are usual, and for all expenses necessary to maintain the county organization for any year' as provided by Section 12139 Revised Statutes of Missouri, 1929?"

This question relates closely to your Questions V and VI, and, having come to the conclusion that a portion of Section 14 of the County Budget Act is unconstitutional, it would naturally follow that the provisions of Section 12139, as follows:

"He shall procure and keep a well-bound book, in which he shall make an entry of all warrants presented to him, for payment, which shall have been

May 14, 1937

legally drawn for money by the county court of the county of which he is the treasurer stating correctly the date, amount, number, in whose favor drawn, by whom presented, and the date the same was presented; and all warrants so presented shall be paid out of the funds mentioned in such warrants, and in the order in which they shall be presented for payment: Provided, however, that no warrant issued on account of any debt incurred by any county other than those issued on account of the ordinary and usual expenses of the county, shall be paid until all warrants issued for money due from the county on account of services that are usual, and for all expenses necessary to maintain the county organization for any one year, shall have been fully paid and liquidated,"

would remain potent and in full force and effect.

But conceding there is a conflict between the provisions of Section 12139 and Section 14, and conceding that the paragraph referred to in Section 14 is constitutional, we think the Budget Act would take precedence over Section 12139 for the reason that, as mentioned supra, Section 22 repeals all inconsistent statutes and all conflicting statutes in so far as the same are inconsistent or in conflict with the County Budget Act.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

DEPOSITORIES:) Depositories must be selected in the statutory
ELEMOSYNARY BOARD:) manner, notwithstanding no interest payable
after August 23, 1937, under Federal law and
regulations. *

June 10, 1937.

6-11



Honorable W. Ed. Jameson
President Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jameson:

This is to acknowledge your letter of June 4, 1937, relative to the selection of depositories for the funds of the Eleemosynary Board. Your letter is as follows:

"I think you will find under the Missouri law the Eleemosynary Board is required to advertise every two years for the deposit of our funds in the banks in the towns in which the institutions are located.

"I am also advised that the 1936 Federal Banking Law prohibits the banks from paying any interest on daily balances.

"I had sent out notices yesterday to be published for the deposit of these funds, but I have recalled notice today until I can get an opinion from your office in regard to same. It does not seem wise to me for the state to pay out \$75.00 or \$100.00 to advertise for the depository for these funds when the banks are prohibited, by the federal law, from paying out any interest.

"Will you kindly furnish me with an opinion as to what I should do under these circumstances."

Under the provisions of Section 8676, R. S. Mo. 1929, it is the duty of all boards of managers * * * who have the management of any state institutions, having the custody of any funds, on or before the first Monday of July of each odd-numbered year to receive sealed proposals from banking corporations, associations, trust companies or individual bankers in any city, town or county in which any such institutions may be located which may desire to be selected as depositories of the moneys and funds of such institution, and it is further provided that "notice that such bids will be received shall be published by the secretary of the board at least twenty days before the meeting at which such depository is to be selected in some newspaper published in said city, town or county at least once in each week."

The succeeding sections, namely, 8677, 8678, 8679, 8680 and 8681 provide the method and manner of the selection of such depositories, the rate of interest, the bond to be filed with the secretary of the board by the depository, and all of the machinery necessary in the selection of said depository is set out in the above sections. These sections of the statute are in force and effect and they stand necessarily as the law at the present time, and it is our opinion that you are without authority to proceed in any other manner than as provided by these sections of the statute.

It is true that after August 23, 1937, all member banks of the Federal Reserve System will be prohibited from paying interest upon deposits of money, public or private, payable on demand; and also, under regulations of the Federal Deposit Insurance Corporation, insured banks or trust companies will then be prohibited from paying interest on such funds. So, there is nothing at this time to prevent such banks from paying interest until said date.

The 59th General Assembly which adjourned June 8, 1937, by Senate Bill No. 97, which has been approved by the Governor, added a new section to Article 2, Chapter 34, relating to banks, numbered 5388a, and by Senate Bill No. 123 added a new section to Article 3, Chapter 34, R. S. Mo. 1929, relating to trust companies, to be known as Section 5459a, forbidding

June 10, 1937

all state banks and trust companies paying interest upon deposits of moneys, public or private, payable on demand, at a rate in excess of the then current rate of interest authorized by the laws of the United States of America or by regulations issued under authority of such laws, to be paid on such deposits by member banks of the Federal Reserve System or by banks whose deposits are insured by the Federal Deposit Insurance Corporation.

These new statutes will preclude the payment of interest by all banks and trust companies on public funds, payable on demand, so long as the member banks of the Federal Reserve System are prohibited by Federal law from paying interest, and banks and trust companies, whose deposits are insured by the Federal Deposit Insurance Company, are prohibited from paying interest by regulations under authority of the Federal law.

Senate Bill No. 124, providing for the manner of securing deposits of the various state and political subdivisions and boards and institutions having control of public funds, has materially changed the law relative to the securing of public funds by pledging certain designated securities, but this law, as well as Senate Bills Nos. 97 and 98, does not become effective until ninety days after the adjournment of the Legislature, namely, September 6th, 1937.

It is, therefore, our opinion that in the selection of the depositories for the public funds under the jurisdiction of your board, that you should proceed in the statutory manner and we are unable to advise you not to proceed in the manner as provided by the statutes in the selection of said depositories.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

GOVERNOR :
BILL :

The Governor must return Bill presented to him where Legislature finally adjourns within ten days after such presentation.

6-11

June 11, 1937



Honorable J. D. James
Secretary to Governor
Lloyd C. Stark
Jefferson City, Missouri

Dear Mr. James:

Your oral request for an opinion, as we understand it, is as follows:

"Is it necessary that the Governor return bills presented to him by the General Assembly within ten (10) days, where the General Assembly finally adjourns before the expiration of said ten (10) days."

Section 12 of Article V of the Constitution of Missouri is decisive of this question, and reads as follows:

"The Governor shall consider all bills and joint resolutions, which, having been passed by both houses of the General Assembly, shall be presented to him, he shall, within ten days after the same shall have been presented to him, return to the house in which they respectively originated, all such bills and joint resolutions, with his approval indorsed thereon, or accompanied by his objections: Provided, That if

June 11, 1937

the General Assembly shall finally adjourn within ten days after such presentation, the Governor may, within thirty days thereafter, return such bills and resolutions to the office of the Secretary of State, with his approval or reasons for disapproval."

It is a fundamental principle of constitutional construction, so well known as to require no citation of authority, that where a constitutional provision is plain and unambiguous there is no room for construction.

The above section clearly provides that if the General Assembly finally adjourns within ten days after a bill has been presented to the Governor that the Governor may, within thirty days thereafter, return such bill to the office of the Secretary of State with his approval or reasons for disapproval.

It is, therefore, the opinion of this Department that where the General Assembly finally adjourns within ten days after a bill or bills have been presented to the Governor, that the Governor has thirty days after final adjournment to return said bill or bills to the office of Secretary of State with his approval or reasons for disapproval.

Respectfully yours,

J. E. TAYLOR
(Acting) Attorney General

JET:LC

PURCHASING AGENT: STATE: May acquire land in the name of State of Missouri to the use and benefit of the Board of Managers of the Eleemosynary Institutions.

August 23, 1937. 9-1

Hon. W. Ed Jameson, President,
Board of Managers,
State Eleemosynary Institutions,
Jefferson City, Missouri.



Dear Mr. Jameson:

We wish to acknowledge your request for an opinion wherein you state as follows:

"State Hospital #2, St. Joseph, owns 150 acres of land. There is a tract of ten acres that would just square up our property there and is so situated that it would be a great advantage to the hospital to own it.

"Section 2 of the Purchasing Agent Act, Laws of 1933, page 411, it seems would provide for the purchase of land by the Purchasing Agent. For a long time previous Boards have tried to buy this land, and heretofore it has been priced at \$10,000.

"I have had the Purchasing Agent look into this land and if he has authority to buy it we would like to make an offer of not less than \$4000.00 or more than \$5000.00 for it, which would be a great bargain to the institution.

"Will you, therefore, furnish me with your opinion as to the authority of the Purchasing Agent to buy this land."

August 23, 1937

Section 2 of the Purchasing Agent Act, Laws of Missouri, 1933, page 411, provides as follows:

"The Purchasing Agent shall purchase all supplies except printing, binding and paper, as provided for in Chap. 115, R. S. 1929, for all departments of the State, except as in this Act otherwise provided. He shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the State."

Section 8574, R. S. Mo. 1929, provides in part as follows:

"The board of managers of the eleemosynary institutions shall have the care and control of the property, real and personal, owned by the state and used in connection with the several institutions, and the title to all real estate or personal property now owned by said eleemosynary institutions or by the state for their use or that may hereafter be purchased by, or donated to such institution, shall be vested in the board of managers for the use and benefit of said institution."

We find no provision in the Constitution of the State of Missouri authorizing the Board of Managers of the State Eleemosynary Institutions to acquire land. This power has by statute been delegated to the State Purchasing Agent.

We are therefore of the opinion that if there are funds available for the purchase of the land hereinabove described, the State Purchasing Agent may acquire same in the name of the State of Missouri to the use and benefit of the Board of Managers of State Hospital No. 2.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

EASEMENTS: Board of Managers of Eleemosynary Institutions cannot convey an easement without an act of the General Assembly authorizing same. X

August 31, 1937. 9-1

Hon. W. Ed Jameson, President,
Board of Managers,
State Eleemosynary Institutions,
Jefferson City, Missouri.



Dear Mr. Jameson:

We wish to acknowledge your letter of August 18th, together with enclosure, wherein you state as follows:

"I enclose you herewith letter from M. L. Austin, Industrial Agent for the Frisco Lines, having to do with their side track to the State Sanatorium at Mt. Vernon, in Lawrence County. This side track is maintained for the exclusive use and purposes of that institution.

"It seems that they are asking an easement before agreeing to continuing to keep it in good repair. We get all our coal for that institution over this track.

"I presume this is purely a technical matter about which there will never be any objection and if you can cite me as to how to proceed in the matter I will greatly appreciate it."

Your enclosure reads as follows:

"Your people at Mt. Vernon have been negotiating with us in regard to our taking over the cost of maintaining the

August 31, 1937

industry's track serving the sanitarium at that point. Our Management is agreeable to assuming this expense but to avoid conflict with the rules of the Interstate Commerce Commission we should acquire title to right of way on which the track lays, also ownership of the material in the track.

"The object of this letter is to inquire whether or not you can arrange to convey to us by easement or some other document the ownership of this track.

"Will be pleased to hear from you at your convenience."

Section 8574, R. S. Mo. 1929, provides as follows:

"The board of managers of the eleemosynary institutions shall have the care and control of the property, real and personal, owned by the state and used in connection with the several institutions, and the title to all real estate or personal property now owned by said eleemosynary institutions or by the state for their use or that may hereafter be purchased by, or donated to such institution, shall be vested in the board of managers for the use and benefit of said institution; or in the event of a gift or donation to the use and benefit to either of said institutions as may be designated by the donor. The Board of managers of said institutions shall not sell or in any manner dispose of any real estate belonging to either of said institutions without an act of the general assembly authorizing such sale or disposal of such real estate."

In the case of Kuhlman v. Stewart, 282 Mo. 108, 221 S. W. 31, 1. c. 33, the court in holding that an easement was an interest in land, said:

"An easement, being an interest in land, can be created only by grant
* * *."

In the case of Jackson v. Parker, 9 Cowen (N. Y.) 73, 1. c. 81, the court in holding that real estate was an interest in land, said:

"The term estate is very comprehensive, and signifies the quantity of interest which a person has, from absolute ownership down to naked possession. It is the possession of lands which renders them valuable, and the quantity of interest is determined by the duration and extent of the right of possession. Real estate, therefore, includes every possible interest in lands, except, a mere chattel interest."

In the case of Hoyt v. Hart, 87 Pac. (Calif.) 569, 1. c. 572, the court in holding that an easement was real estate, said:

"An easement is real estate; and its possession or title is involved in an action seeking damages for past trespasses upon such easement, where the defendant puts in issue the existence of the easement."

We direct your attention to the Laws of Missouri, Extra Session, 1933-1934, page 151, where the Board of Managers of the Eleemosynary Institutions of the State of Missouri was authorized to convey an easement to the City of Fulton for sewer purposes:

"The Board of Managers of the Eleemosynary Institutions of the State of Missouri is hereby authorized to convey to the City of Fulton an easement for sewer purposes, for the establishment and construction of a sewage disposal

August 31, 1937.

plant and the necessary connection or connections therewith, to be owned by said City, on and over land of the State, title to which has been vested by Section 8574, Revised Statutes of Missouri for 1929, in said Board of Managers of the Eleemosynary Institutions for the use and benefit of State Hospital No. 1. * * *

From the foregoing, we are of the opinion that an easement is real estate within the meaning of Section 8574, R. S. Mo. 1929, supra, and therefore that the Board of Managers of the State of Missouri may not convey an easement without an act of the General Assembly.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

INSANE PERSONS: Procedure and action under Sections 8644 to 8648, Laws of Mo. 1937, p. 510, are to be strictly construed. Procedure outlined. X

October 13, 1937.

10-18



Honorable W. Ed. Jameson
President Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jameson:

This Department acknowledges receipt of your letter enclosing a memorandum concerning the interpretation of the Laws of Missouri, 1937, page 509 to 512, inclusive, same relating to proceedings for admission of county patients to State Hospitals. You desire our instructions or criticisms of the same.

Before reviewing the sections as you have them numbered, we must consider in the first instance the decision in *Ex Parte McLaughlin*, 105 S. W. (2d) 1020. This decision construed Sections 8643, 8644, 8645, 8646 and 8648 of Article 2, Chapter 46, R. S. Mo. 1929, which the Legislature repealed and reenacted in 1937. The decision is important, however, for the reason that it offers two principles of law governing these statutes. First, page 1022:

"There is another reason for holding the judgment void. The proceeding against petitioner was in vitum and if the statutes regulating the proceeding were not followed strictly, the judgment is void. *Ruckert v. Moore*, 317 Mo. 228."

And second,

"The county court is a court of limited jurisdiction, and jurisdiction to render the judgment here involved 'must affirmatively appear on the face of the proceedings.' *Doddridge v. Patterson*, 222 Mo. 146."

We, therefore, conclude that the new statutes are mandatory in their terms and must be followed strictly, otherwise the judgment must be void.

We think that the memorandum sets out the correct procedure and is in substance correct. However, we offer the following suggestions:

FIRST: Under Section 8643, supra, the memorandum states that it should follow the form of affidavit substantially.

We suggest that it be followed verbatim et literatim et punctuatim, as the section sets forth the form of the affidavit and there is no reason why the same should not be followed literally.

FIFTH: We suggest that the following be added to this instruction:

The county clerk shall issue subpoenas for the persons named in the affidavit as witnesses and to such other persons as he may think proper or persons who may be competent to testify as to the sanity of the accused person, and subpoenas should be issued in behalf of the alleged insane person at his request or at the request of his attorney.

SIXTH: The memorandum contains the statement that "The hearing must be before the court without a jury." While it is true that the hearing must be before the court, the question of whether or not a jury is to be used is entirely within the discretion of the court. If the alleged insane person demands a hearing before a jury, the same should be granted. If a jury trial is not demanded by the alleged insane person the record should show that the jury was waived by him.

SEVENTH: The memorandum should set forth all of the elements of the court order, which are:

(a) That a citizen (naming him) residing within the same county as the alleged insane person has filed with the clerk of the county court a verified statement in writing as the form of affidavit sets forth in Section 8643, Laws of Missouri, 1937, p. 510.

(b) That the clerk has caused the alleged insane person to be served with written notice of the proceedings, and that the notice stated the nature of the proceeding, time and place when the proceedings will be heard by the court, and that the alleged insane person is entitled to be present and to be assisted by counsel.

(c) That the notice be served on the alleged insane person a reasonable time before the date set for such hearing.

(d) That if the affidavit contains the allegation that the alleged insane person is so deranged as to endanger himself or others or would be dangerous to the safety of the community, or the alleged insane person be at large, that the clerk would forthwith transmit the affidavit and complaint filed to one of the judges of the county court (naming him); that the judge of the county court issue a warrant authorizing the sheriff to apprehend the alleged insane person and confine him or her until the determination of the mental condition of the alleged insane person.

(e) That the clerk issued subpoenas for the persons named as witnesses in the affidavit and for other witnesses including witnesses for the alleged insane person.

(f) That after service with notice on the alleged insane person had been made known to the county clerk by the return of the sheriff, the clerk forthwith convened the county court for the purpose of passing upon the sanity or insanity of the alleged insane person.

(g) That on the day of the trial or hearing the cause proceeded to trial before the court with or without a jury.

(h) That the alleged insane person appeared by attorney or any attorney was appointed to represent him.

(i) That the court caused the witnesses to be examined and the trial or hearing was had.

(j) The verdict of the jury or the decision of the court.

(k) That the alleged insane person is a fit subject to be sent to the State Hospital (mention the name of the Hospital) to undergo treatment therein.

(l) That the medical witness or witnesses forthwith make out such a detailed history of the case as is required by Section 8640, R. S. Mo. 1929.

(m) That the cost of the examination is to be paid out of the treasury of the county.

(n) That the clerk of the county court forthwith forward a certified copy of the order of the court to the superintendent of the particular hospital.

(o) That the clerk make a request for the admission of the person found to be insane to the hospital (naming the hospital), and that such request accompany the order of the court.

ELEVENTH: We suggest that the county clerk issue a warrant in accordance with Section 8649, R. S. Mo. 1929, to the sheriff of his county or any other suitable person.

Under Section 8650, R. S. Mo. 1929, the relatives of the insane person have the right if they choose to convey the person to the hospital. In such event, the warrant shall be directed to the relative.

Oct. 13, 1937.

If the above suggestions, alterations and changes are included in the memorandum, we are of the opinion that the instructions contained therein are a proper and correct interpretation of the new and old sections of the statutes relating to the admission of county patients in the State Hospitals of Missouri.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

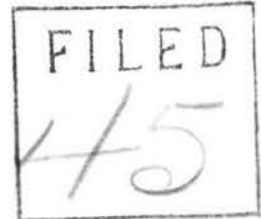
(Acting) J. E. TAYLOR
Attorney-General

OWN:EG

ELEEMOSYNARY INSTITUTIONS) Transfer of funds at end of biennium in
FUNDS) accordance with the Laws of Missouri 1933, X
Section 1, page 415.

December 1, 1937

12-15



Hon. W. Ed. Jameson
President, Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jameson:

We wish to acknowledge your request for an opinion wherein
you state as follows:

"It has recently come to my attention that
your department has made a ruling that
affects our institutions to the extent that
your department has ruled money on hand
January first should be turned back to the
general fund. Apparently your department did
not take into consideration the source of
these moneys or did not take into consideration
the fact that the money was placed in our hands
for a specific purpose.

May I call your attention to a case that was
decided by the Supreme Court.

'In the case of State ex rel. vs. Regents, 305
Mo. 57 the Supreme Court clearly points out
that money of this kind is not public funds
within the contemplation of the constitutional
requirements, such requirements Article 10,
Section 15. Nor is it money such as would
revert to the general revenue fund at the end
of the biennium. This money was paid under the
provisions of Section 8629, 8668 and 8669, R.S.
Mo. 1929, to a specific institution for a
specific purpose, either by counties or indi-
viduals for private patients. For the State of

Missouri to divert it to another purpose would not only violate the constitution of the State of Missouri but the constitution of the United States. It would be confiscation, without due process of law, of money and would be not only illegal but unconscionable."

In an opinion rendered by this Department to the State Treasurer under date of November 17, 1937, we held that the biennium of 1935, 1936 having ended, and assuming all warrants on same had been discharged, the unexpended balance remaining in the following funds should be transferred and placed to the credit of the ordinary revenue fund of the State by the State Treasurer:

State Hospital No. 1

State Hospital No. 2

State Hospital No. 3

State Hospital No. 4

Missouri State School

Missouri State Sanatorium.

Section 8666 R. S. Mo. 1929, establishes and creates the above funds and provides in part that:

"Whenever any moneys are paid into the state treasury under the provisions of this article, they shall be receipted for by the state treasurer and placed to the credit of the fund to which they respectively belong, so that money derived from each institution may be placed to the credit of the fund herein provided for that institution."

You cite us to the case of State ex rel. vs. Regents, 305 Mo. 57, 264 S. W. 698, and ask that we reconsider our ruling.

The "Regents" case, supra, was an original proceeding by mandamus brought by the State Treasurer to compel the Board of Regents of the N.E. Missouri State Teachers College to pay certain moneys into the State Treasury. The board had insured its property against loss and damage by fire, making itself beneficiary, and paying the premiums out of unappropriated money in its hands derived from students' fees.

The State Treasurer relied chiefly upon the following constitutional provisions:

Section 43, Article IV of the Missouri Constitution provides in part that:

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law."

Section 15, Article X of the Missouri Constitution provides in part that:

"All moneys now, or at any time hereafter, in the State treasury, belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong,* * *."

And upon the following statutory provisions which are applicable to the case at bar:

Section 8666 R. S. Missouri 1929 supra.

Section 8667 R. S. Missouri 1929, which provides how the funds are to be appropriated:

"Any moneys in the state treasury to the credit of any of the funds in this article created, paid therein under the provisions of this article, or so much thereof as may be necessary, shall be appropriated by the general assembly for the support or improvement of the institution to which the fund belongs."

The Court in the "Regents" case in commenting on Section 43, Article IV of the Missouri Constitution, supra (l. c. 64) states that:

"This provision, it will be seen from its terms, which are wisely chosen as a limitation upon power, is restricted to 'revenue collected and money received by the State from any source whatsoever.' By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the State from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources as our numerous statutes attest, but no matter from what source derived, if required to be paid into the Treasury, it becomes revenue or state money; its classification as such being dependent upon specific legislative enactment or, as aptly put by the respondent, state money means money the state, in its sovereign capacity, is authorized to receive--the source of its authority being the Legislature." (Italics Ours)

The Court points out that during more than fifty years of the College's operation no General Assembly had sought to either regulate the collection or disposition of student's fees, and that such funds had been retained and expended by the college. The Court in its opinion states (l. c. 67) that:

"In the foregoing discussion of the constitutional provision invoked by relator, we have stated generally that no statute required the payment into the State Treasury of the money here in controversy; and, that a statutory enactment was a prerequisite to such payment and its receipt and deposit by the Treasurer to entitle it, under the Constitution, to be classified as state money." (Italics Ours).

It must be borne in mind that in the above case "no statute required the payment into the State Treasury of the money", and that such was necessary "to entitle it under the Constitution to be classified as state money."

Section 8608 R. S. Mo. 1929 sets up a revolving fund and provides that when it exceeds a certain sum it is to be paid into the State Treasury as follows:

"Upon a request from the board, the state auditor is hereby authorized and directed to draw a warrant payable to the steward of each of the institutions herein named, in an amount to be specified by the board, not to exceed, however, the sum of five thousand dollars, and the sum so specified shall be placed in the hands of the steward as a revolving fund to be used in the payment of the incidental expenses of the institution for which he has been appointed; and all moneys arising from the sale of live stock, produce, or other commodities produced by such institution shall be paid into said revolving fund, and whenever the amount thereof exceeds the sum of five thousand dollars, then such surplus shall be paid into the state treasury to the credit of the fund for the support of eleemosynary institutions. The steward shall keep a true and accurate account of all moneys received and of all moneys paid out of said fund and shall take and preserve vouchers for all expenditures therefrom. Whenever said fund shall fall

below the amount necessary to have on hand for the payment of incidental expenses, and within the limits of the maximum herein prescribed, the state auditor shall, upon request of the board, make additional allowances to said fund by drawing his warrant upon the state treasurer for the amount necessary to replenish said fund."

Section 8609 R. S. Missouri 1929, specifically provides that moneys received by any institution for support of patients, regardless of the source, be paid into the State treasury as follows:

"All moneys received by any institution for the support of patients therein, from whatever source received, shall be paid into the state treasury, and shall be placed to the credit of the fund for the support of the eleemosynary institutions."

Section 8668 R. S. Missouri 1929, provides for certain moneys to be paid into the treasury of the respective institutions:

"Hereafter, whenever, under any law of this state, or any rule or regulation made under the authority of any law of this state, any county, municipality, guardian, trustee or person is required to pay any sum or sums of money for the support of any person confined in any penal institution, or in any state hospital, reform, industrial or other eleemosynary institution belonging to this state, or established or maintained by this state, or is required to pay any sum for the maintenance, use or benefit of any such institution, the same shall be paid, as may be now or hereafter provided by law, into the treasury of the institution entitled thereto."

But Section 8669 R. S. Missouri 1929, provides that the above moneys must be transmitted by the treasurers of the institutions to the State treasury as follows:

"Whenever any sum or sums of money shall be paid into the treasury of any such institution under the provisions of the preceding section, or any law of this state, and all moneys which may be received into the treasury, or by any officer or officers of any such institution, derived from the employment of the inmates thereof, or from the use or disposition of any property belonging to such institution, and all moneys coming into the treasury, or into the hands of any officer or officers of any such institution from any other source whatever for the support or improvement of such institution, shall be forthwith entered on the books kept by the treasurer or other financial officer of such institution, so as to show the source from whence derived and from whom and upon what account it was received, and the same shall then be forthwith transmitted by such treasurer or other financial officer to the state treasury, and the state treasurer shall give his receipt therefor."

It is at once apparent that the instant case is readily distinguishable from the "Regents" case in that here we find a specific statute that the moneys received be transmitted to "the State treasury and the State Treasurer shall give his receipt therefor."

The above statutes are however broadened by a subsequent statutory enactment by the Legislature, found in the Laws of Missouri 1933, Section 1, page 415, as follows:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized

to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State, shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision thereof, shall be deemed guilty of a misdemeanor; provided, that in the case of state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; appropriations, gifts or grants from the Federal Government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the Governor and biennially to the General Assembly."

The moneys, fees and funds received by the Board are placed in the State treasury to the credit of the particular purpose or fund for which collected and are subject to appropriation by the General Assembly for the particular purpose or fund collected. This is in accord with the above constitutional provisions. The Legislature

December 1, 1937.

has further directed that the unexpended balance at the end of the biennium and after all warrants on same have been discharged be transferred and placed to the credit of the ordinary revenue fund of the State by the State Treasurer.

From the foregoing we are of the opinion that the funds of the State Hospitals, Missouri State Sanatorium and Missouri Training School (Marshall) being derived from sources required by the statute to be paid into the state treasury are state moneys, and subject to the provisions of the Laws of Missouri 1933, Section 1, page 415 supra.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:MM

SCHOOLS: May not enact rules compelling the attendance
of students at religious exercises.

March 16, 1937



Mr. Eugene L. Johnson
Professor of English
School of Mines and Metallurgy
Rolla, Missouri

Dear Sir:

This department is in receipt of your request for
an opinion under date of March 15th, wherein you state
as follows:

"The faculty of the School of Mines
on March second enacted the following
regulation:

Insofar as the Baccalaureate
exercises of Commencement Week
are by custom firmly established
as a part of the Commencement
exercises, and the candidates
for a degree are now by faculty
rule required to be present at
the Commencement exercises, un-
less especially excused by due
authority, it is ordered that all
candidates for degrees be inform-
ed by letter, in ample time be-
fore Commencement, that their
presence will be required at the
Baccalaureate exercises as well
as at Commencement proper.

Some of the members of the faculty
doubt the extent to which this regula-
tion can be enforced, i.e., to what

extent the faculty can require attendance on a sermon, which is a religious exercise. We do not doubt the extent to which we can excuse attendance, especially upon conscientious grounds. Requiring, however, may be a different matter.

I am writing to you because the School of Mines has no regularly paid attorney, and also because the question may have come up in high schools or elsewhere and the answer is easily ascertainable by your department.

I shall thank you both professionally and personally for whatever attention you can give this matter."

Article II, of Section 6, of the Missouri Constitution provides that no person shall be compelled to attend any place or system of worship, thus:

"That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same."

Article II, of Section 7, of the Missouri Constitution provides that no money shall ever be taken from the public treasury in aid of any denomination:

"That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church,

sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

In the case of Knowlton vs. Baumhover, 166 N. W. (Iowa) 202 I.c. 212, the court in holding that public schools could have nothing to do with religion in any respect whatever said:

"The school is a secular and civil institution in which all have an equal interest, and none may lawfully make use of it as an instrument, or take advantage of its administration, as an opportunity for the promotion of his peculiar religious views.

'As the state can have nothing to do with religion except to protect every one in the enjoyment of his own, so the common schools can have nothing to do with religion in any respect whatever. They are as completely secular as any of the other institutions of the state, in which all the people alike have equal rights and privileges.' Orton, J., in State v. Board, supra."

We take note of your statement to the effect that the baccalaureate exercises consist of "a sermon, which is a religious exercise" and inasmuch as the School of Mines and Metallurgy is a public school, supported by public funds, we are of the opinion that to compel the attendance of students at such exercises by any rule, regulation or otherwise would be contrary to Sections 6 and 7, of Article II of the

Mr. Eugene L. Johnson

-4-

March 16, 1937

Missouri Constitution, supra.

Respectfully submitted,

WM. ORR SAWYERS

APPROVED:

J. H. TAYLOR
(Acting) Attorney General

WOS:RT

COUNTY TREASURER: County Court may pay for surety bond if Treasurer elects to give same and Court consents thereto.
BONDS: Treasurer must give separate bonds for school moneys and county funds in statutory amounts.

October 5, 1937



Honorable Alvin H. Juergensmeyer
Prosecuting Attorney
Warren County
Warrenton, Missouri

Dear Sir:

This is to acknowledge your letter of September 29, 1937, in which you request the opinion of this Department on the questions therein. Your letter is as follows:

"Under the 1937 law is the County Court required to pay the premium on the bond for the County Treasurer?

What would be considered a just reason for the Court refusing to pay the premium on the bond,

Missouri law requires that the Treasurer shall give a bond for twice the amount of the school funds on hand, and the amount set for the County Treasurer bond is not less than \$20,000. For illustration, the County has \$40,000 in its school fund and \$50,000 in the county fund. Would it be necessary for the Treasurer to give an \$80,000 school bond and a \$50,000 county bond or could the Treasurer give a \$30,000 school bond and \$30,000 county treasurer bond, the two bonds totalling \$60,000 and being in excess of the amount of either the school fund or the county fund?"

October 5, 1937

I.

In the first paragraph of your letter you desire to know whether or not, in our opinion, the county court is required to pay the premium on the bond for the county treasurer.

You, no doubt, refer to the bond of the county treasurer for the treasurers recently appointed by the Governor in counties under 40,000 inhabitants and not under township organization, and in counties having a population of 75,000 inhabitants and not more than 90,000 inhabitants, under the provisions of the statutes enacted by the 59th General Assembly, and found at pages 424 et seq., Laws of Missouri, 1937. At the same session of the General Assembly, House Bill 125, found at page 190, Laws of Missouri, 1937, was enacted, which provides in part as follows:

"Whenever any officer of this state*** or any officer of any county of this state***shall be required by law of this state****to enter into any official bond, or other bond, he may elect, with the consent and approval of the governing body of such state, department, board, bureau, commission, official, county, *** or other political subdivision, to enter into a surety bond, or bonds, with a surety company or surety companies, authorized to do business in the State of Missouri and the cost of every such surety bond shall be paid by the public body protected thereby."

" All laws in conflict with the provisions of this act are hereby repealed, insofar as such laws are in conflict with the provisions of this act."

We think that under the provisions of the above statute that if a county treasurer or other officer mentioned in this statute elects to enter into a surety bond or bonds as permitted under the provisions of this section and same is with the consent and approval of the governing body, which in this case would be

October 5, 1937

the county court, then in that event the county court would be required to pay the premium on such surety bond. In other words, if the officer elects to give a surety bond he must have the consent of the governing body to give such bond, then it is incumbent on the governing body to pay the premium on same. Conversely, if the governing body does not consent to the officer giving a surety bond it is not required to pay the premium.

We are not unmindful of the provisions of Section 12133 R.S. Missouri 1937, page 426, but it is our opinion that the County Court may waive the provisions of this section requiring a personal bond, and permit the officer to give a surety bond.

II.

With reference to the question asked in the third paragraph of your letter, as to the amount of bond to be given by the county treasurer to safeguard and protect the county funds and the school funds in his hands, we refer to the applicable sections of the statutes.

Under the provisions of Section 12133, Laws of Missouri, 1937, page 426, which is a reenactment of a section of the same number, Laws of Missouri, 1929, it provides that the county treasurer shall within ten days after his election or appointment enter into a bond with the county in a sum not less than \$20,000.00 to be fixed by the county court, and with such sureties, resident landowners of the county, as shall be approved by such court, conditioned for the faithful performance of the duties of his office.

Section 12134 provides that the county court, at any semi-annual settlement with such treasurer, or at any other time, may, if his bond be deemed insufficient, order him to give a new bond or additional security.

By the provisions of Section 9266 R. S. Mo. 1929, the county treasurer in each county shall be the custodian of all moneys for school purposes belonging to the different districts, except in counties having a township organization, and said section requires, "he shall give a separate bond, with sufficient security, double the amount of school moneys that shall come into

October 5, 1937

his hands, payable to the State of Missouri, to be approved by the county court, conditioned for the faithful disbursement, according to law, of all such moneys as shall from time to time come into his hands;* * *

It will be noted that it is necessary for the county treasurer to give a separate bond as custodian for the school moneys in double the probable amount of school moneys that shall come into his hands. The county court in fixing the amount of bond required to be given by the county treasurer must follow the provisions of these two sections of the statute! In the first instance to secure the county funds a bond of not less than \$20,000.00; and to secure the school funds, a bond in not less than double the probable amount of school moneys coming into his hands. The county court is not permitted to follow the plan suggested in your letter and permit the treasurer to give a bond to secure the school funds for less than the amount required under the statutes and attempt to meet the statutory requirements by increasing the bond to secure the county funds. In other words, the county court is not permitted to lump the two required bonds together and average same up.

We think we have answered the questions asked in your letter.

Respectfully submitted,

COVELL R. HEWITT,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

CRH:MM

INSANE:

Prosecuting attorneys of the county containing a population of less than one hundred thousand cannot be appointed by the county court to represent insane persons in an insanity hearing.

December 28, 1937

Mr. Alvin H. Juergensmeyer,
Prosecuting Attorney,
Warren County,
Warrenton, Mo.



Dear Sir:

This will acknowledge receipt of your letter requesting an official opinion under date of December 22, 1937, which reads as follows:

"At the last session of the Legislature a law was passed requiring that the County Court, on insane hearings, appoint an attorney to represent the insane person at the hearing - provided they do not have an attorney.

Can the County Court appoint the prosecuting attorney to represent the presumed insane person at the hearing, and if so, would the prosecuting attorney be entitled to additional pay?"

Section 11364 R.S. Mo. 1929 provides as follows:

"The county courts of all counties in this state containing one hundred thousand inhabitants or more, according to the last decennial census of the United States, and of all such counties as may hereafter contain one hundred thousand inhabitants or more, may, in their discretion, appoint and commission as other officers are commissioned by the county court a county counselor, who shall be a person learned in the law, at least twenty-five years of age, and who shall hold his office for two years, and until his successor is appointed, commissioned and qualified: Provided, that in all counties containing

less than one hundred thousand inhabitants the office of county counselor is hereby abolished."

According to the last census, which was 1930, Warren County only had a population of eighty thousand eighty two and according to Section 11364, as set out above, could not have a county counselor.

Section 11318 R.S. Mo. 1929, in reference to the duties of a prosecuting attorney, provides as follows:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto: *****."

Under Section 8646 of the 1937 Session Laws of Missouri, page 511, this section provides:

"At the time appointed, unless the investigation shall be adjourned over to some other time, the court shall cause the witnesses in attendance to be examined before themselves, or a jury, if one be ordered for the purpose, duly chosen and impaneled, according to the practice of the court. At least one of the witnesses examined shall be a reputable physician. If no licensed attorney appears for the alleged insane person at such hearing, the court shall appoint an attorney to represent such person in such proceeding and shall allow a reasonable attorney fee for the services rendered, same to be taxed as costs in such proceeding."

According to Section 8646, if the county court should appoint the prosecuting attorney to defend the insane person, the prosecuting attorney would be representing conflicting interest. Under Section 11318 R.S. Mo. 1929, the prosecuting attorney must represent the county court in all of its proceedings and could not at the same time represent an insane

person which is a matter brought by the county court against the insane person.

According to Rule 35 of the Supreme Court, Sub-Division 2, as set out in paragraph 6, and which is related in Volume 339 Missouri, the Supreme Court states:

"Adverse Influences and Conflicting Interests.--It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interests of the client with respect to which confidence has been reported."

This rule was also confirmed in the case of In re: Conrad, 105 S.W. (2d) 1.

In State v. Holtkamp, 51 S.W. (2d) 13, paragraph 17, the court held as follows:

"***** Whether one side or the other is right is unimportant in this case. Both sides seek to have Thomasson adjudged insane and each seeks to prevent control of Thomasson by the others. No attorney for either side of that controversy could rightly represent him. Much less can such an attorney waive any of Thomasson's constitutional or statutory rights. Wurdeman appeared for Ella F. Bolles, informant, against

December 28, 1937

Thomasson in the first proceeding in St. Louis County, and by that act alone is disqualified to appear for him, or waive any of his rights in another like proceeding in the same court."

In the above case several of the relatives of the insane person had filed different proceedings in different probate courts asking that the party be declared insane. One of the attorneys in a former proceeding represented one of the relatives in the insanity hearing and later attempted to represent the insane person in another proceeding. The court in passing upon the case, refused to allow the attorney to even change from one interest to the other interest and stated that the attorney could not represent conflicting interest even after he had left the employe of the other party to the law suit. This holding was also held in State v. Mueller, 51 S.W. (2d) 8; 330 Mo. 641.

CONCLUSION

In conclusion it is the opinion of this office that the county court cannot appoint the prosecuting attorney of a county containing a population of less than one hundred thousand, to represent the insane person at a hearing called before the county court of such a county.

Respectfully submitted,

W. J. BURKE,
Assistant Attorney General

APPROVED:

J.E. TAYLOR
(Acting) Attorney General

WJB:DA

DRAINAGE DISTRICT: County and township ex-officio collectors' compensation for collecting current and delinquent taxes

August 23, 1937



Honorable George B. Kautz
Prosecuting Attorney
Harrison County
Bethany, Missouri

Dear Sir:

This department is in receipt of your letter of August 18, 1937, in which you request an opinion as follows:

"(1) Is the county treasurer and ex-officio collector merely an agent of the drainage district, Chapter 64 being a complete code of laws within itself, and entitled only to the two per cent as provided for in the above statutes, or is he entitled to an additional commission as treasurer and ex-officio collector to be collected from the tax-payer?"

(2) Does the secretary and ex-officio treasurer of the drainage district have any authority to accept the payment of delinquent drainage taxes when the 'back drainage tax book' has been certified and delivered to the county treasurer and ex-officio collector for collection of delinquent drainage taxes?"

You further state that:

"It has been the practice of former treasurers and ex-officio collectors to retain two per cent of the delinquent drainage taxes collected, and also to collect an additional two

per cent from the taxpayer as in the case of the collection of delinquent state and county taxes."

Section 10763, R.S. Missouri, 1929, relating to drainage taxes, is in part, as follows:

"The said collector shall retain for his services one per centum of the amount he collects on current taxes and two per centum of the amount he collects on delinquent taxes."

Section 10880, R. S. Missouri, 1929, is as follows:

"The county and township collectors for collecting current taxes for drainage and levee districts shall receive one per cent of all such taxes collected, and for the collection of delinquent taxes for such, they shall receive two per cent of all sums collected."

These two sections, and other related sections, fix the amount of compensation to which the collector is entitled and it will be noticed that it is provided that he "shall retain for his services" the amount so provided.

In Little River Drainage District v. Lassater, 29 S.W. (2d) Missouri 716, 719, the court said:

"It would seem that, in collecting taxes for drainage districts, even though such drainage district might include the entire territory of the county, county collectors would be performing no duties or functions

of their offices as county collectors. In performing these duties, they are agents and officers of and perform them for such districts."

At l.c. 718 of the Lassater case, supra, it is said by the court that:

"It is our conclusion that Sections 4398, 4426 and 4575 (now 10763, 10796 and 10880) can be read together and completely harmonized, and that the proper construction of the three sections, when so read together, is that township collectors are entitled to the same compensation for collecting drainage district taxes as county collectors, and that county collectors ordinarily are entitled to retain only one per cent for collecting current drainage district taxes, but that county courts may increase such compensation to an amount not exceeding an additional one per cent of the taxes collected, where such collectors incur excessive additional expenses in collecting such taxes."

Section 4575, R. S. Missouri 1919, was repealed in Laws 1927, page 180, and a new section was enacted which abolished, by excluding, that part of Section 4575 (now 10880) giving county courts authority to grant the collector one per cent additional compensation for collecting the current drainage taxes.

You state in your letter that Harrison County has adopted township organization and, of course, under township organization the county collector would collect no current drainage tax, because it would be collected by the township collector. The rule as laid down in the Lassater Case, supra, and the provisions of Section 10763 and 10880 apply to township collectors as to their compensation.

Section 10925, R. S. Missouri, 1929, is another section which sets out the compensation the collector is entitled to for collecting drainage tax and does so in the same manner and in the same amounts as Sections 10763 and 10880, R. S. Missouri, 1929.

In *St. Francis Levee District v. Dorroh*, 289 S.W. 925, 933, it is said that:

"In view of the language of Section 4619 (now 10925) that the collector shall retain for his services 'two per centum of the amount he collects on delinquent taxes' taken in connection with the language of other sections of the statute above quoted, it was the intention and purpose of the legislature that the levee district, rather than the land owner and taxpayer, shall compensate the collector for his services in collecting the tax and penalties thereon. The judgment is therefore erroneous in taxing the defendant (taxpayer) with the collector's commission."

It is therefore clear that the township collector is entitled to only one per centum of the current taxes collected, this to be paid by the drainage district and not by the taxpayer, and that the collector's commission is not to be included in the amount collected from the taxpayer. It is equally clear that on delinquent taxes which are collected by the county collector, the same rules that are applicable to the collection of current drainage tax apply.

The practice of former collectors in Harrison County is clearly wrong because under those methods the collector would be receiving four per cent for the collection of the delinquent drainage taxes while he is only entitled to a two per cent under the statute.

Section 10796, R. S. Missouri, 1929, is in part as follows:

"In counties when the provision of Chap. 86, R. S. Missouri, 1929, (township organization) are or may hereafter be in force, the secretary of the board of supervisors shall extend all drainage taxes * * * on separate tax books for the respective townships in which such lands are situate, and such tax books shall be certified to the township collect-

ors of such township at the same time and in the same manner as provided for county collectors. Such taxes shall be collected by such township collectors at the same time and in the same manner as state and county taxes are collected, * * * * * The delinquent drainage tax shall be certified by the secretary of the board of supervisors to the county treasurer as ex-officio collector of delinquent taxes, who shall collect such delinquent drainage tax at the same time and in the same manner as herein provided for the collection of the delinquent drainage tax in counties not under the provisions of Chapter 86, R. S. 1929 (township organization).

It will be noted that in this section no provision is made whereby the secretary of the board of supervisors may collect any of the taxes mentioned. He performs his duties when he certifies the current and delinquent taxes to the township collector and county collector for them to collect. However, in Section 10797, R. S. Missouri 1929, it is provided that the taxpayer has the privilege of paying the tax assessment to the treasurer of the board of supervisors at any time on or before a date fixed by the board. This section, however, does not contemplate the current or delinquent taxes paid each year, but contemplates the whole benefit assessed to a particular tract of land and provides that this may be paid in a lump sum instead of yearly in the installments, which constitute the current tax, plus interest levied each year.

Therefore, it is the opinion of this department that the township collector is entitled to receive, as compensation, one per cent of the current drainage tax collected by him, this amount to be paid by the drainage district, and neither charged as part of the tax nor collected from the taxpayer.

That the county treasurer as ex-officio collector is entitled to receive, as compensation, two per cent of the delinquent drainage taxes collected by him, this amount to be paid by the drainage district, and neither

Hon. George B. Kautz

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August 23, 1937

charged as part of the delinquent tax nor collected from the taxpayer.

That neither the treasurer or secretary of the board of supervisors of the drainage district has any right or authority to accept payment of current or delinquent drainage taxes, this being no part of the duties imposed on them by statute, it being wholly the duty of the township or county collector.

Respectfully submitted,

AUBREY R. HAMMETT Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

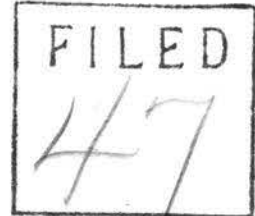
LLB MR

ROADS AND BRIDGES:

Special Road Districts organized under Article 9, Chapter 42, R. S. Missouri 1929, may purchase right-of-way and convey same to state for highway purposes.

September 8, 1937

9-9



Hon. O. A. Kamp
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

Dear Sir:

This department is in receipt of your letter of August 16, 1937, in which you request an opinion, as follows:

"The Road Commissioners of Mineola Special Road District, Montgomery County, Missouri, organized under Article 9 R. S. 1929, would like to know whether or not they have legal authority to use the funds of the district to pay for road right-of-way to be conveyed to the State for State Highway.

I refer you to Section 8047, R. S. 1929, and Section 8131, R. S. 1929, and would like to have your opinion as to whether they have a legal right to use the district funds for purchasing right-of-way."

Section 8047 of Chapter 42, Article 9, R. S. 1929, under which this special road district is organized, is as follows:

"The fund received from the poll and road tax of said district shall constitute a general district road fund, and shall be disbursed only as hereinbefore provided, and shall be used only for working, repairing and improving the public roads of such district as herein provided, and for no other purpose; and no

part thereof shall be used for paying damages and costs for opening new roads, but all such damages and costs for opening new roads paid by the county shall be paid out of the other county revenue, except as this article may otherwise provide."

It is nowhere provided in Article 9, Chapter 42, R. S. 1929, that special road districts in counties ^{not} under township organization, may use their funds to purchase right-of-way to be conveyed to the state for state highway purposes, but, to the contrary, it seems that Section 8047, above quoted, specifically prohibits this being done.

Section 8131 of Chapter 42, Article 12, R. S. 1929, relating to the State Highway Department and System is, in part, as follows:

"Any civil subdivision as defined in this article shall have the power, right and authority, through its proper officers, to contribute out of funds available for road purposes all or a part of the funds necessary for the purchase of right-of-way for state highways, and convey such rights-of-way, or any other land, to the state of Missouri to be placed under the supervision, management and control of the state highway commission for the construction and maintenance thereupon of state highways and bridges."

Section 8132, R. S. 1929, is as follows:

"Whenever in the preceding section the words "civil subdivision" are used, they shall be deemed and taken to mean a county, township, road district or other political subdivision of the state or quasi public corporation having legal jurisdiction of the construction and maintenance of public roads."

We do not think it can be questioned, that by this definition of "civil subdivision" a special road district organized under Article 9 of Chapter 42, R. S. 1929, is included within the provisions of Section 8131, supra.

The question for determination, with the foregoing in view, appears to be whether the provisions of Section 8131, R. S. 1929, repeal or amend, by implication, the provisions of Section 8047, R. S. 1929. This is to be determined largely from what the intention of the legislature was when it enacted Section 8131, R. S. 1929.

It may be contended in this respect that such an amendment by implication is void by reason of the provisions of Section 34, Article 4 of the Constitution of Missouri, concerning how an act may be amended, but in *Schott v. Continental Auto Insurance Underwriters*, 31 S. W. (2d) 1.c. 11, it is said by the court that:

"As to this it is sufficient to say that the constitutional provision mentioned has no application to repeals or amendments by implication."

Further in the *Schott* case, supra, at 1.c. 11, it is said:

"It is * * * true that the presumption against implied repeals has peculiar and special force when the conflicting provisions which are thought to work a repeal are contained in a local or special act and a later general act. The presumption is that the special is intended to remain in force as an exception to the general act. * * * But there is no rule which prohibits the repeal of a special act by a general one, the question being one of intention."

To determine the intention of the legislature it is said in *Holder v. Elms Hotel Co.*, 92 S.W. (2d) 1.c. 622, that:

"Since the title to an act is essentially a part of the act and is itself a legislative expression of the general scope of the bill, it may be looked to as an aid in arriving at the intent of the Legislature."

We shall refer to the title of the act that is now Section 8131, R. S. 1929, which is found in Laws 1929, p. 226, and is as follows:

"An act authorizing civil subdivisions to contribute all or part of funds for the purchase of rights-of-way for state highways out of road funds and convey land to state for construction and maintenance thereon of state highways and bridges: * * * defining civil subdivisions."

The title of the act when considered with the act itself, expresses a plain intention that this act was intended to include all "civil subdivisions" as defined by Section 8132 R. S. 1929, and which, we think, includes special road districts organized under the provisions of Article 9 of Chapter 42, R. S. 1929, which are those special road districts in counties under township organization.

Section 8047, R. S. 1929, is a special enactment concerning those road districts organized under Article 9 of Chapter 42, R. S. 1929, and Section 8131, R. S. 1929, is a statute of a general nature, intended to cover all "civil subdivisions" and was enacted in Laws of 1929, p. 226, and subsequent to the enactment of Section 8047, R. S. 1929.

In O'Malley, Superintendent of Insurance Department v. Prudential Casualty & Surety Co., 80 S. W. (2d) 896, 897, it is said:

"A general statute will not be held to repeal a former statute special in its nature unless the intent to repeal is manifest, or the two acts are so patently inconsistent that they cannot stand together."

This rule has been followed in a long line of Missouri cases.

In the instant matter, before us for determination, we think it is clear, from the reading of Sections 8131 and 8132, R. S. 1929, and the title thereof, supra,

September 8, 1937

that the intention of the legislature was that all "civil subdivisions" as defined, should have the authority granted them in this section and that the intention of the legislature in said section was to repeal Section 8047, R. S. 1929, in so far as it prohibited special road districts, organized under Article 9, Chapter 42, R. S. 1929, from contributing all or a part of the funds necessary for the purchase of rights-of-way to be conveyed to the state. It cannot be claimed that these two enactments are not patently inconsistent and being so, they cannot stand together, but the latter act in view of the legislative intent must prevail.

It is, therefore, the opinion of this department that special road districts organized under the provisions of Article 9, Chapter 42, R. S. 1929, these being road districts in counties which have adopted township organization, may contribute, out of funds available for road purposes, all or a part of the funds necessary for the purchase of rights-of-way for state highways, and convey such rights-of-way to the State of Missouri to be placed under the control of the State Highway Commission.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB MR

ROADS: County may establish or widen public roads in excess of thirty feet.

September 10, 1937

10-4

Mr. O. A. Kamp
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri



Dear Mr. Kamp:

This acknowledges your request for an opinion under date of September 8, 1937, wherein you state as follows:

"A question has arisen on which the Highway Engineer of this county would like to have your opinion, regarding the establishment of a county road. He has been advised that a County Court cannot condemn right-of-way for a county road in excess of 30 feet in width.

I refer you to sections 7825 and 7840, Article I, R. S. 1929, and would like to have your opinion on the following question. Can the County Court condemn private property for the establishment of a county road in excess of thirty (30) feet in width? Also would the Court have the authority to condemn property for the purpose of widening a 30 foot county road that has been heretofore established?"

Section 7825 R. S. Missouri 1929, provides as follows:

"All public roads in this state which hereafter may be established shall not be less than thirty feet in width."

The Court in the case of Watson vs. City of Salem, 164 Pac. 567, 568, 84 Ore. 666, defined the words "not less than" thus:

"The words 'not less than', like the language 'at least', signify 'in the smallest or lowest degree; at the lowest estimate' * * *".

In the case of Miller vs. Rodd, 131 Atl. 482, 483, 285 Pac. 16, the Court gives this definition:

"The words 'not less than' mean 'at least'.
Com. vs. Brown, 210 Pa. 29, 34, 59 Atl. 479."

Under the above section all public roads in this state hereafter established must be at least thirty feet.

Section 7840 R. S. Missouri 1929, gives the County Court authority to condemn private property for the establishment of public roads as follows:

"The right of eminent domain is vested in the several counties of the state to condemn private property for public road purpose, including any land, earth, stone, timber, rock quarries or gravel pits necessary in establishing, building, grading, repairing or draining said roads, or in building any bridges, abutments or fills thereon. If the county court be of the opinion that a public necessity exists for the establishment of a public road, or for the taking of any land or property for the purposes herein mentioned, it shall by an order of record so declare, and shall direct the county highway engineer within fifteen days thereafter to survey, mark out and describe said road, or the land or material to be taken, or both, and to prepare a map thereof, showing the location, courses and distances, and the lands across or upon which said proposed public road will run, or the area, dimensions, description and location of any other property to be taken for the purposes herein, or both, and said highway engineer shall file said map and a report of his proceedings in the premises in the office of the county clerk. Thereupon the

county court shall cause to be published in some newspaper of general circulation in the county, once each week for three consecutive weeks, a notice giving the width, beginning, termination, courses and distances and sections and subdivisions of the land over which the proposed road is to be established, or the location, area, dimensions and descriptions of any other land or property to be taken, or both, and that said land or property is sought to be taken for public use for road or bridge purposes. If within twenty days after the last day of said publication no claim for damages for the taking of any of such land or property be filed in the county clerk's office by the owner of said property, or by the guardians or curators of insane persons or minors owning said property, then the claim of any such owner shall be forever barred, and the county shall be authorized to enter upon and appropriate said lands or other property; and the court shall make an order accordingly. If any claim for damages be filed, the same shall be heard on the first day of any regular or adjourned term of the county court after the expiration of the twenty days last aforesaid. If the county court and the land or property owner be unable to agree on the amount of the damages, the county court shall make an order reciting such fact, and cause a copy of same to be delivered to the judge of the circuit court of that county, and a transcript of the record and the original files in said cause shall be transmitted by the county clerk to the circuit clerk of the county. Upon receipt of the copy of the order of the county court last aforesaid by the circuit judge, the circuit court, or the judge thereof in vacation shall make an order setting the cause for hearing within fifteen days, and if the order fixing the date of said hearing be made by the judge in vacation, it shall forthwith be filed in the office of the circuit clerk. The court or judge in vacation, shall cause to be empaneled a jury of six freeholders not interested in the matter or of kin to any member of the county court, or to any landowner in interest. Said jury shall view the land, or other property, proposed

to be taken, and shall hear the evidence and determine the question of damages under the direction of the court or judge. Five of said jury concurring may return a verdict, and in case of a disagreement another jury may be empaneled. The public necessity for taking said property shall in nowise be inquired into by the circuit court, and the judgment of the circuit court, or judge thereof in vacation, in said cause shall not be reviewed on appeal or by writ of error."

From the foregoing we are of the opinion that the County Court can condemn private property for the establishment of a private road in excess of thirty feet in width.

Section 7841 R. S. Missouri 1929, defines the word "established" as used in the article as follows:

"The words 'established' and 'establishing,' as used in this article in relation to public roads, shall be held to embrace the locating, relocating, changing or widening of roads, and the word 'road' shall include bridges and culverts."

From the foregoing we are of the opinion that the County Court is authorized to condemn property for the purpose of widening a thirty foot county road heretofore established.

Respectfully submitted,

APPROVED:

MAX WASSERMAN,
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

MW:MM

CIRCUIT CLERK: Entitled to a fee of 75¢ for writ directed to sheriff for summoning petit jury for regular term of circuit court

November 9, 1937

11-10

Mr. Roy L. Kay
Prosecuting Attorney
Moniteau County
California, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of November 3, in which you request the opinion of this department. The question, from your letter is as stated:

Whether or not the circuit clerk is entitled to charge for issuing twenty-four certified copies of jurors drawn for each regular term of the circuit court the sum of \$14.40, such certified copies being delivered to the sheriff for service on the jurors of the regular panel.

By a supplementary letter, we understand that the clerk is of the opinion that he is entitled to ten cents for each summons and fifty cents for certificate to copy of same.

Upon examination of the fee section for circuit clerks and of courts of common pleas, we find under Section 11785, Revised Statutes 1929, the following:

"For a venire to summon a special jury, when actually ordered and issued75".

And, also, under Section 11787, Revised Statutes 1929;

"The clerks of the several courts of this state possessing criminal jurisdiction shall be entitled to

the following fees for their services in criminal proceedings, and no fee in such proceedings shall be allowed by virtue of any other provision in this chapter contained: (*italics ours*)

* * * * *

"For a venire to summon a grand or traverse jury when one shall have been actually ordered and issued. . \$0.75."

Under Article V, Chapter 49, Revised Statutes 1929, relating to the manner of the selection of grand and petit jurors, we find Section 8758, which provides as follows:

"The names of the persons so drawn shall be recorded by the county clerk in the records of the county court, and he shall as soon thereafter as practicable deliver to the clerk of the court for which such jury is drawn a certificate thereof, who shall record the same in a book to be provided for that purpose. And the clerk of the court for which the jury is drawn shall immediately thereafter issue a summons to the sheriff of the county, directing him to summon the persons thus drawn as petit jurors to appear on such day of the term of such court as shall be named in such summons by the clerk of said court to serve as petit jurors; and it shall be the duty of the sheriff to make service of such process at least ten days before the first day of the term of court for which such persons are drawn, which summons shall be served by reading the same to the person so summoned or by leaving a copy

of the summons at his usual place of abode with some member of the family over fifteen years of age, except in such cases as may be hereafter provided."

It will be noted from this section that after the jurors have been drawn in the manner provided by statute and the list certified to by the clerk of the county court, it is delivered to the clerk of the court for which such jury is drawn and he shall immediately thereafter issue a summons to the sheriff of the county, directing him to summon the persons thus drawn as petit jurors, etc. The summons is directed by the clerk to the sheriff to summon the jurors named in such writ, and it is not the duty of the clerk of the court to direct a summons to each juror as one would infer from the supplementary letter from the circuit clerk of Moniteau County. In common practice the name of the writ for summoning a jury is commonly called a venire facias, which is a judicial writ directed to the sheriff of the county in which a cause is to be tried, commanding him that he 'cause to come' before the court on a certain day therein mentioned, the good and lawful men of the county qualified according to law to serve as jurors. Black's Law Dictionary (2nd Ed.) page 1199.

In Section 11787, supra, the term 'traverse jury' is used. A traverse jury is a petit jury or a jury impaneled to try an action or prosecution as distinguished from a grand jury.

CONCLUSION

It is, therefore, our opinion, under the Sections of the statute mentioned above, that the circuit clerk is not entitled to the \$14.40 for issuing twenty-four certified copies of jurors drawn, that is, sixty cents for each juror as suggested in your letter of request.

Mr. Roy L. Kay

-4-

November 9, 1937

However, it is our opinion that the clerk is entitled to the sum of seventy-five cents for issuing the writ directed to the sheriff to summon the jury.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

CRH LC

AMENDMENT NO. 4 FISH AND GAME: The Legislature may pass such laws as it may deem proper in aid of but not inconsistent with the provisions of Amendment No. 4.

January 21, 1937 ^{r73}



Honorable Hiland D. Kelley,
Member House of Representatives
Jefferson City, Missouri

Dear Sir:

This department acknowledges receipt of your letter of January 20 in connection with Constitutional Amendment No. 4, relative to the creation of Conservation Commission. Your letter contains many important suggestions that you have in mind relative to the Wild Life Conservation, however, your specific question is as follows:

"May I have an opinion as to whether or not we may be permitted to enact enabling Legislation in connection with the Wild Life Conservation Program. The following letter contains a few points which I should like to incorporate in such legislation."

Constitutional Amendment No. 4 contains the plan in detail of the control, management, restoration, conservation and regulation of the fish and game of the State of Missouri. The last paragraph of the amendment is as follows:

"The General Assembly may enact any laws in aid of but not inconsistent with the provisions of this amendment and all existing laws inconsistent herewith shall no longer remain in force or effect. This amendment shall be self enforcing and shall go into effect July 1, 1937."

Therefore, it would appear by the amendment itself that the amendment is self enforcing, but the General Assembly can enact any law or sections in aid of the same which the

legislature deems desirable. In the decision of Tremayne vs. the City of St. Louis 6 S. W. (2) 935. The Court said:

"Self executing constitutional provisions may be supplemented by statutes and city charters."

The provision of the amendment itself could be carried out and would be effective on July 1, 1937, even if the legislature refused or desired to pass no laws in aid of the amendment, as was said in the case of McGrew vs. Missouri Pacific Railway Company 230 Mo. 496.

"Where a State Constitution establishes a rule creating a new right so that had the right, as created by the Constitution, existed at common law, it could have been enforced by some common-law action, the Constitutional Provision is self-enforcing to the extent of authorizing its enforcement by an appropriate action at law, and it is immaterial that the Legislature might be able to supply other and better methods for protecting or enforcing such right; or even that the Legislature should be directed by the Constitution itself to pass suitable laws for enforcing the rule established by it."

The amendment is self enforcing because it provides for the same; otherwise, it would not have been, as was said in the case of Ivie vs. Bailey 5 S. W. (2d) 50.

"The Constitution itself is not self enforcing unless provision be made for that purpose."

As stated above, Amendment No. 4 declares itself to be self enforcing. The effect of the Legislature failing to pass laws in connection therewith is discussed in the case of St. Joseph vs. Pattern 62 Mo. 444.

"Const. 1875 art. 10, sec. 11, limiting taxation for school purposes to a specified rate, but providing that in certain districts the Legislature may provide for an increase to a stated

limit by vote of the people, was self-executing as respects the firstmentioned limitation, and was not dependent on the act of the Legislature in providing for such increase, and therefore such constitutional provision repealed all pre-existing laws in respect to the rate of taxation for school purposes."

CONCLUSION

We are of the opinion that the Legislature may pass such laws as it may deem proper in aid of but not inconsistent with the provisions of Amendment No. 4.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OVN:JMW

BURIAL ASSOCIATIONS: Legislature may enact law prohibiting payment of death benefits in anything other than cash under police power.

March 9, 1937.



Honorable Edgar J. Keating
Member Missouri House of Representatives
Jackson County, Sixth District
Jefferson City, Missouri

Dear Mr. Keating:

This is to acknowledge your letter dated March 4, 1937, as follows:

"I have introduced House Bill 271, a copy of which is attached hereto and a question of constitutionality has arisen. It is claimed that the bill is unconstitutional as depriving persons of the right to contract for burial supplies and reference is made to the decision in 182 Atlantic Reporter 808.

"I would like to have an opinion on the constitutionality before Tuesday night of next week as the matter comes up before the committee then for a hearing.

"I would also like to have some representative from the Attorney-General's office present at the committee hearing to relate to the committee the facts concerning the recent Burial Association investigation. I will appreciate it if you will get this data as soon as possible."

House Bill No. 271 relates to Burial Associations and repeals Sections 5014 and 5017, R. S. Mo. 1929, and enacts in lieu thereof two new sections. The proposed new section, 5014,

is practically the same as Section 5014 found in the 1929 laws. The only change between the proposed new statute and the statute now in the 1929 revision being that the following words are deleted from the new statute, namely:

"Such association when formed shall be exempt from the provisions of the general insurance laws of this state, to-wit: Chapter 37, R. S. 1929:"

Section 5017, found in House Bill No. 271, is the same as Section 5017, R. S. Mo. 1929, with the exception that the following words are found in the 1929 statute, namely:

"not contracted to be paid in a specified manner,"

and

"except by contract in writing signed by the member in person,"

Thus, the purpose of House Bill No. 271 is to delete from Sections 5014 and 5017 certain words now found in the 1929 statutes.

You request our opinion on the constitutionality of House Bill No. 271 as to whether such would deprive a person of the right "to contract for burial supplies."

As heretofore pointed out, present Section 5017, R. S. Mo. 1929, provides that the association shall pay benefits in currency of the United States, but makes the exception that a member may contract with the association to be paid in a specified manner, which would be authority for the association to pay in the manner specified by the member. House Bill 271 is now taking away from the association that right, so that if House Bill 271 is enacted, then the association cannot pay benefits other than as provided by House Bill 271.

As we read House Bill No. 271, there is nothing found therein that relates or interferes with the right of contract. Burial Associations are creatures of statute and the Legislature permits such to be formed. The Legislature could forbid burial associations altogether. The Legislature has provided that burial associations may do business if and

when certain provisions of the statute are complied with. The Legislature has also defined burial associations' powers, rights and duties. Thus, if the Legislature now provides that the association can pay benefits only in a particular manner, to-wit: in currency of the United States, such a provision would not impair the right of contract. The limitation placed upon a burial association as to the payment of benefits is a matter properly for the Legislature to determine, because such is an exercise of the police power of the state.

While Article II, Section 15, of the Constitution of Missouri, provides:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly."

yet, said provision does not render a law unconstitutional if passed by virtue of the police power of the state. The liberty of contract is subject to regulation within the police power. *Powell v. Union Pacific Railway Co.*, 164 S. W. 628, 255 Mo. 420. And the right to contract is subject to reasonable limitations as the public interest and safety may demand. *State v. Cantwell*, 179 Mo. 245. Statutes passed by the Legislature, fixing the rate of interest and declaring a higher rate usurious, have been held constitutional. *Kreibohm v. Yancey*, 154 Mo. 67, 83. Acts of the Legislature giving a lien to attorneys have been held constitutional and such are not objectionable as destroying a person's right to contract. *O'Connor v. St. Louis Transit Co.*, 198 Mo. 622. Statutes enacted by the Legislature declaring suicide provisions in a life insurance policy to be no defense in a suit, were held constitutional and such did not abridge the freedom of contract because the state could prescribe terms on which corporations may be organized and empowered to do business and also impose upon them the methods of doing business and the conditions upon which such may do business. *Andrus v. Business Men's Accident Association of America*, 223 S. W. 70, 283 Mo. 442. We believe that this case is analogous to the question presented by your inquiry and is decisive of the constitutionality of

House Bill No. 271, when it is borne in mind that House Bill No. 271 relates to chartered corporations doing a burial association business and that the Legislature under its police power can regulate such associations and impose conditions and limitations upon their methods of doing business.

In *Andrus v. Business Men's Accident Association of America*, supra, the question presented was whether the "suicide section," found in Section 6945, R. S. 1909, was constitutional. The court at page 72 said:

"Appellant attacks the constitutionality of section 6945, R. S. 1909, which declares suicide shall not be a defense in suits upon policies of life insurance, and asks this court to examine that statute and the reasons advanced for its alleged conflict with certain provisions of the Constitution of the state of Missouri, as mentioned in the answer. The argument is that it is unconstitutional, because it abridges the right of contract; the constitutional guaranty of the right to liberty includes the right to make such contracts as the individual sees fit. If the argument of appellant was sound as applied to individuals, it would not necessarily apply to corporations, which are creatures of the statute. This court has said in the case of *Julian v. Kansas City Star*, 209 Mo., loc. cit. 66, 107 S. W. 499:

"The Legislature, in dealing with artificial creatures of the law, may, in certain particulars, make them a class to themselves, and impose conditions upon them not imposed on individuals."

"And further (209 Mo. on page 67, 107 S. W. 499):

"The state, in issuing the charter, may impose its own terms, and, when accepted, the corporation is bound by the terms."

"The state, in prescribing terms and conditions upon which a corporation may be organized and may be empowered to transact business, merely exercises the ordinary power vested in the sovereign state. It could forbid accident insurance companies from doing business in Missouri altogether, which it would be powerless to do in regard to natural persons. It can limit the activities of a corporation, and prescribe the manner and conditions under which it may transact business, in a way that could not be applied to individuals. This has been determined so often that argument in support of the distinction between artificial and natural persons is unnecessary. *N. W. Life Ins. Co. v. Riggs*, 203 U. S. 243, loc. cit. 354, 27 Sup. Ct. 126, 51 L. Ed. 168, 7 Ann. Cas. 1104; *Applegate v. Travelers' Ins. Co.*, 153 Mo. App. loc. cit. 82, 83, 132 S. W. 2; *Houston v. Pulitzer Pub. Co.*, 249 Mo. loc. cit. 338, 155 S. W. 1068.

"Appellant argues at length that the statute, by declaring suicide to be no defense to an action on an insurance policy, places a premium on suicide and is inimical to public welfare and to public morals. In that argument the appellant merely attacks the propriety and the policy of the statute, a consideration which does not concern this court. It is within the discretion of the Legislature to determine the propriety of an enactment and decide whether it may have a beneficial effect upon the subject to which it applies, and that determination it not to be questioned by this court in determining the validity of the statute."

Your letter refers to a decision of the court found in 182 Atl. Rep. 808. The name of said case is *Prata Undertaking Company v. State Board of Embalming and Directing*, and

is a decision of the Supreme Court of Rhode Island. We have read said case and are of the opinion that it is not in point or analogous to the question under consideration. The decision in that case was based upon a statute giving the State Board of Embalming the right to revoke an undertaker's license if such undertaker participated in benefits derived from the activities of burial associations. The Legislature enacted a law which gave the Embalming Board of the State of Rhode Island the right to revoke the license of any licensed undertaker who participated in any scheme or plan wherein a burial association did not give freedom of choice as to the "type or style of funeral or the type or style or price of equipment used in connection with the funeral or the freedom of choice as to what funeral director shall be employed." The court merely held that the above provision was not grounds for revocation of license because an undertaker could contract with any person he wished. The Rhode Island Legislature did not make it unlawful for the undertaker to contract with individuals as to the type and style of funeral, but only provided that if the undertaker participated in the plan or scheme that such participation was grounds for the revocation of his license.

House Bill 271 simply regulates the burial associations and if a burial association does not desire to be regulated it does not have to be a burial association. And if a person knows that the burial association cannot pay benefits other than in currency of the United States, then the person does not have to be a member of the burial association. Thus, the regulating of burial associations is an exercise of the police power of the state, and the provision that benefits must be paid in currency of the United States would be a valid exercise of the police power, and therefore constitutional.

From the above it is our opinion that House Bill 271 does not deprive persons of the right to contract and is constitutional. We express no opinion as to whether contracts entered into with burial associations for the paying of benefits in a manner specified other than in currency of the United States and entered into prior to the enactment of House Bill No. 271, would be impaired or done away with. We are writing this opinion, as to the validity of House Bill No. 271, by assuming that such is now a law.

Yours very truly,

APPROVED:

James L. HornBostel
Assistant Attorney-General

J. E. TAYLOR

(Attorney General)

CHattel MORTGAGES!
RECORDER OF DEEDS

Instruments affecting title to real estate and personal property need not be filed in a separate book for the filing of chattel mortgages where such instruments have been duly recorded in a book as conveyances of land, but should index in a book used for indexing and filing all chattel mortgages, upon request of mortgagee or grantee.

April 13, 1937

4-23



Mr. J. H. Kennedy
Circuit Clerk
Grundy County
Trenton, Missouri

Dear Mr. Kennedy:

This will acknowledge receipt of your request for an opinion, which reads as follows:

"On January 25th, 1937, we received from the Missouri Public Service Corporation for recordation one Indenture and one Supplemental Indenture in the nature of a deed of trust to secure to Continental Illinois National Bank and Trust Company of Chicago, for the issuance of bonds.

This indenture includes both real estate and personal property belonging to said Missouri Public Service Corporation, and was recorded in the Miscellaneous Deed of Trust Record and such notations made on the indenture.

We have been asked by the Attorneys for Missouri Public Service Corporation that this indenture also be indexed in the Chattel Mortgage Register.

We would like to have your opinion as to whether this indenture should be recorded and indexed in both Miscellaneous Deed Record and the Chattel Mortgage Record."

April 13, 1937

Appended to your request for an opinion is the original letter from the law offices of Chapman and Cutler, requesting the recordation of certain indentures.

At the outset of this opinion, we may well observe that the recording or filing of written instruments, as required by law, have for their object the imparting of notice. There are a few exceptions, but none that need be considered in this opinion. As relates to the duty imposed upon the Recorder of Deeds in recording conveyances of personal property, your attention is directed to Section 11545, R. S. Mo. 1929, which reads as follows:

"Instruments in writing, conveying chattels or personal property done, which by any law of this state are required to be recorded or admitted of record in any recorder's office in this state, shall be recorded in a series of volumes separate from those used for recording conveyances of real estate."

In the case of Faxon vs. Bridge, 87 Mo. App. 299, l.c. 307, the court in considering a lease that was recorded in the records affecting real estate and not in the record for chattel mortgages and also construing what is now Section 11545, supra, said:

"The agreed statement of facts shows that the lease was recorded in the records affecting real estate and not in the record for chattel mortgages. The question, therefore, is, where the same instrument affects both real and personal property, will a recording in the records for real estate be a sufficient recording of the instrument as a chattel mortgage. In our opinion, it will. It was so held in an opinion by Judge Rombauer in Jennings v. Sparkman, 39 Mo. App. 663.

See, also, Anthony v. Butter, 13 Peters 423. The statute itself, while providing for separate registration, does not apply to cases where the instrument conveys both kinds of property. The statute (Section 9064, R. S. 1899) only directs separate recording in a chattel record where the instrument conveys 'personal property alone.'

In the case of Jennings vs. Sparkman, 39 Mo. App. 663, l.c. 668, the court in construing Section 11545, supra, said:

"We concede the position, contended for, that instruments, in order to impart constructive notice, must not only be recorded in the proper county, but also in the proper book, but we find nothing in the statutes, reading them together, or even seriatim, which leads to the conclusion that, where the same instrument affects real estate and conveys personal property, the law necessitates in all cases a double record. The word 'alone' in the section last quoted, can certainly not be rejected as surplusage."

In the case of Emerson-Brantingham Implement Co. v. Rogers, et al, 216 S. W. 994, l.c. 996, the court had before it for consideration the validity of a conveyance that had been improperly recorded by the Recorder of Deeds. The court in passing upon what are now Sections 3097, 3040, 11545, supra, R. S. Mo. 1929, said:

"Applying this rule to the case in hand, it would appear that the failure to make a proper index of this chattel mortgage did not affect its validity. Nor do we think that imparting notice in the case of a real estate mortgage

April 13, 1937

or the validity of a chattel mortgage is dependent, not only on its being filed and recorded, but recorded in the proper book. That is a collateral matter, imposed by another and subsequent section of the statute than the one declaring that unrecorded chattel mortgages are void as to third parties. The statute (section 2861) declaring when chattel mortgages shall not be valid declares that effect 'unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are by law directed to be acknowledged or proved and recorded.' This section, like the corresponding one relative to real estate (section 2810) is found under the subject of 'conveyances,' while the section requiring chattel mortgages to be recorded in separate books from real estate conveyances (section 10383), like that requiring a proper index (section 10384), is found under the subject of 'Recorder of Deeds' and prescribing his duties. These are duties imposed on the recorder, for the violation of which he is responsible; but they do not go to the validity of the conveyance."

From the above considerations, you will note that as affects the validity of a written instrument, it is not necessary that mortgages of personalty, which are included in a conveyance affecting real estate, need be filed and recorded by the Recorder in a volume separate from those used for the recordation or filing of realty alone.

Your further attention is directed to Section 11543, R. S. Mo. 1929, which reads in part as follows:

"It shall be the duty of recorders to record: First, all deeds, mortgages, conveyances, deeds of trust, bonds,

April 13, 1937

covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices; * * "

We observe from the reading of the above sections of the statute that, when the Recorder has recorded an instrument which affects both realty and personalty, the intendments of the above section of the statutes have been subserved.

Your attention is further directed to Art. III, R. S. Mo. 1929, relating to chattel mortgages, particularly Sec. 3099, as amended, Laws of Mo. 1935, page 208, which reads in part as follows:

"Such recorder shall enter in a book, to be provided by him for such purpose, the names of all the parties to such instrument, arranging the names of such mortgagors or grantors alphabetically, and shall note thereon the time of filing such instrument or copy, for which said recorder shall receive a fee of twenty cents. Said fee shall also include and cover all costs for discharging said mortgage or deed of trust according to the methods hereinafter provided.
* * * *"

The above part of the statute contemplates the furnishing of a book by the recorder for the purpose of indexing all mortgages or deeds of trust concerning personalty. Since the statute contemplates indexing and discharging of deeds of trust concerning personalty, we see no objection on the part of the recorder in indexing an indenture covering realty which also includes a mortgage of personalty in the book used by the recorder for the purpose of indexing and discharging of mortgages or deeds of trust concerning personalty.

April 13, 1937

CONCLUSION

In view of the above, it is the opinion of this department that the recorder of deeds is not required to index and record an indenture affecting both realty and personalty in a book used for the indexing and recording of chattel mortgages, since the indenture has been duly recorded in the book used for recording of conveyances of land. However, we see no harm in indexing an indenture affecting both realty and personalty in the book used for the indexing of chattel mortgages when such a request has been made by the mortgagee or grantee and fee paid therefor.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS:RT

MERCHANTS: Persons preparing and serving meals in a dining room in connection with a hotel are not merchants.

1-19
January 8, 1937



Mr. Arch King
County Assessor
Koplar Bluff, Missouri

Dear Mr. King:

This will acknowledge receipt of your request for an opinion, which reads as follows:

"I would like an opinion on this question: Would a person who prepared and sold meals in a dining room in connection with a hotel, but sold no other commodities than cooked food, i. e., no candy, cigarettes, or gum, be classed as a merchant, and be entitled to pay a Merchants' tax?"

Section 10075, R. S. Mo., 1929, defines who is declared to be a "merchant". This section reads in part as follows:

"Every person, corporation or co-partnership of persons, who shall deal in the selling of goods, wares and merchandise, * * * is declared to be a merchant."

The conclusion reached in this opinion is dependent upon the word "merchant" as used in the above section of the statute. In the case of State vs. Whittaker, 33 Mo., the court in construing the above statute, page 459, said:

Jan. 8, 1937

"We can not go beyond the statute to find any other definition of a merchant."

Although the court has said in the above case that it can not go beyond the statute to find any other definition of the word "merchant", we attempt to pursue the word further to determine whether or not it is sufficiently generic to include in its meaning the person that sold and prepared meals in a dining room in connection with a hotel. In the case of *Kansas City vs. Lorber*, 64 Mo. App. 1. c. 608, the court discussing the word "merchant" defines it as follows:

"The term 'merchant' has been defined to be strictly a buyer, but by extension, one who buys to sell, or buys and sells; one who deals in the purchase of goods; a dealer in merchandise; a trader, Kinney's Law Dict. & Glos. 459. One who buys to sell again and who does both, not occasionally, but habitually, as a business; one who buys and sells an article. Anderson's Law. Dict. 671. One who is engaged in the business of buying commercial commodities and selling them again for the sake of profit."

Again, at page 609, the court further said:

"The word merchant, * * * * we think comprehends the various kinds of merchants. If one is a dealer in any article or commodity, that is to say, is engaged in buying and selling the same, for profit, he is a merchant."

In the case of the *City of Ozark vs. Hammond*, 49 S. W. (2nd) 1. c. 131, the court defined the word "merchant" as follows:

"A merchant is one who is engaged in the purchase and sale of goods; a trafficker; a trader."

Jnn. 8, 1937

In the case of in re Ah Yow, 59 Federal Reporter, l. c. 562, the court had before it for consideration as to whether a Chinese person engaged in that business was privileged to enter the United States as a merchant. In defining the term "restaurant keeper" the court said:

"A restaurant keeper is a caterer, who keeps a place for serving meals, and provides, prepares, and cooks raw materials to suit the tastes of his patrons. A person in that business is not a merchant, * * *".

It is to be noticed from the above cases that the word "merchant" in its common acceptation comprehends anyone who buys, sells or deals in commodities with a view of earning a profit. Applying this definition to one who prepares and serves meals in a dining room in connection with a hotel, can it be said that the term "merchant", as used in the statute, was intended to include one who pursued that calling? We think not. Even though the restaurateur necessarily buys various commodities such as goods, wares and merchandise, all of which goes into the preparation of a meal, it does not follow that such is his occupation so as to make him subject to the provisions of Section 10075.

It is also to be noted that the statute uses the words "to deal in the selling of goods, wares and merchandise". This contemplates bartering and trafficking such as is not true in the preparation and sale of meals.

CONCLUSION

It is the opinion of this department that a person preparing and selling meals in a dining room in connection with a hotel is not a merchant.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

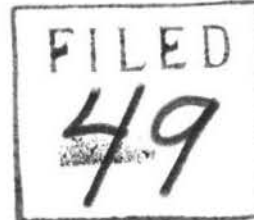
APPROVED:

J. E. Tabor
(Acting) Attorney General

RCS:RT

SCHOOLS: A new building may be erected on present site and not violate Sec. 9330, R. S. 1929. Words "addition" and "supplemental" defined; notice to voters should be full enough to apprise them of the exact purpose for which the building is being erected.

February 11, 1937.



Honorable Lloyd W. King
State Superintendent
Department of Public Schools
Jefferson City, Missouri

Dear Mr. King:

This is to acknowledge your letter dated February 10, 1937. Your letter is quite lengthy but as it contains a complete explanation of the questions with citations of authorities, we copy it, as follows:

"This Department has received a request for an interpretation of Section 9330, R. S., 1929, as it applies to the erection of a new elementary school building in addition to, and on the site of the present elementary school building. The facts as reported to this office are as follows:

"The Board of Education of the School District of Washington, Franklin County, Missouri, finds it necessary to erect and furnish a new elementary school building containing an auditorium, library, classrooms, etc. The Board of Education desires to locate the proposed new building on the site of the old primary (or elementary) school building in said district and borrow money and issue bonds for the payment thereof, under the provisions of Section 9198, Revised Statutes of Missouri, 1929.

"The School District of Washington is a city district duly organized and existing under Article 4, Chapter 57, Revised Statutes of Missouri, 1929, relating to

city, town and consolidated schools, on the site of the present elementary school in said district is located a school building which is now, and was for a long time heretofore, used as an elementary grade school. For the past several years, the first seven elementary school grades have been housed in this building. This building is somewhat congested and lacks the facilities of an auditorium, study hall, library, and sufficient classrooms for efficient instruction.

"It is the purpose of the board to construct, in addition to the present building, a new building about sixty feet from the old building to take care of the fifth, sixth, and seventh grades while permitting the first four grades to remain in the old building. Both divisions of the elementary school would then use the auditorium in the new building. The proposed new building will not be directly connected with the old building except by a concrete walk. Members of the board believe it would be better to build a new building to which new additions could later be made than it would be to construct a building contiguous with an old building erected in 1871, to which one addition has already been made.

"The district is not divided into primary or ward schools, and, in the opinion of the board, the necessities of the district do not demand such division at this time.

"References:

"1. Section 9198, Revised Statutes of Missouri, 1929, - the board of directors has power, when authorized by a two-thirds vote, to borrow money and issue bonds for the payment of schoolhouse sites, school buildings, furnishing buildings, and building additions to old buildings.

- "2. Section 9330, Revised Statutes of Missouri, 1929, provides for the establishment of an adequate number of primary or ward schools.
- "3. In the case of Martin v. Bennett, 139 A. 237, 122 S.W. 729, the court ruled as follows:

'The statute should receive a reasonable construction. Such a construction, I think, would authorize school boards of districts organized under Article 2, Chapter 154, Revised Statutes, 1899, to build additions to a primary school building when the necessities of the district do not demand a division of the district into a primary or ward school, but prohibits the erection of more than one primary school building on one school site.'

"Questions:

- "1. Under the facts and circumstances stated herein, and the law providing for the erection of new buildings, Section 9198, R. S., 1929, would the construction of a new elementary school building, on the same site and non-contiguous to the old building but as an addition to and supplementing the present building, conflict with the law governing the establishment of primary or ward schools, as provided in Section 9330, R. S., 1929?
- "2. Does the construction of an addition to a school building require that the new building be contiguous to the old building? Or could the new building be erected several feet away from the old building and be considered as an addition to the present building facilities?

"3. Would the following proposition to be submitted at a special election meet the legal requirements for authorizing the board to erect a new elementary building in addition to, but non-contiguous to, the old building?

'(1) To authorize the Board of Education of the School District of Washington, Franklin County, Missouri, to incur an indebtedness of said District in the amount of Thirty-six Thousand Dollars (\$36,000.00) for the purpose of erecting and furnishing a school building on the site of the present primary school in said District and to evidence such indebtedness by the issuance of Bonds of said District in said amount for said purpose.'

Or, should this proposition contain a qualifying statement following the word "building" to indicate that the construction would be in addition to, and supplementing the present building?

"I shall appreciate your advice and opinion. Since the board plans to call a special election early in March, an immediate opinion is needed."

I.

Section 9198, R. S. Mo., 1929, referred to in your letter, gives the school boards power to erect school houses. Said section, in part, reads:

"For the purpose of * * * erecting school houses * * * and furnishing the same, and building additions to or repairing old buildings, the board of directors shall be authorized to * * * issue bonds for the payment thereof, in the manner herein provided.

* * * * *

When bonds are voted under this section for the erection of one or more school houses, to be erected on the same or different sites in common school districts, said bonds shall not be negotiated by said board until said bonds have been deposited with the county or township in which said district shall be situated, * * * * *."

It is thus seen that bonds may be voted in order to erect school houses and additions thereto.

Section 9330, R. S. Mo. 1929, and referred to in your letter, in our opinion does not apply to the situation under consideration for the reason that said section provides in part as follows:

"When the demands of the district require more than one public school building therein, the board shall, as soon as sufficient funds have been provided therefor, establish an adequate number of primary or ward schools, corresponding in grade to those of other public school districts, and for this purpose the board shall divide the school district into school wards and fix the boundaries thereof, * * *"

Section 9330 merely means that when a district is overcrowded with pupils, that for the purpose of making the school buildings more accessible to the pupils, that then the board of directors is to divide the district into wards.

The facts presented in your letter indicate that there is no demand for more than one school building but only for an enlargement of the present school building. As stated in your letter, the present building is congested and "lacks the facilities of an auditorium, study hall, library, and sufficient class rooms for efficient instruction" and that the building will "take care of the fifth, sixth and seventh grades while permitting the first four grades to remain in the old building." You further state that the new building will be an addition to and supplement the old building. The new addition will be about sixty feet from the old building.

The serious question involved is as to what is meant by an addition to, or supplementing the present building.

Words and Phrases, 2d Series, Vol. 1, page 105, says the following as to the word "additional":

"'Additional' means 'added; supplemental; coming by way of addition.' Collier v. Smaltz, 128 N. W. 396, 399, 149 Iowa, 230, Ann. Cas. 1912C 1007."

The Kansas City Court of Appeals in Tate v. Insurance Co., 133 Mo. App. 584, had the following to say as to whether a detached building was an addition to a main building (p. 588):

"Was the detached building, although used as a part of the main dwelling, an addition within the description of the policy? The question is answered in the affirmative by numerous decisions of which the following are a part: * *"

In Manufacturing Company v. Insurance Company, 167 Mo. App. 566, the Kansas City Court of Appeals in its opinion detailed the facts as follows (p. 569):

"The factory consisted of the main building and three other structures. One 35 by 60 feet, was known as the lumber shed, paint shop and storage room, which was 13 feet distant from the main building. Another, 12 by 14 feet, was a coal house, and some castings were kept there; and it was fifteen feet from the main building. The third was a store and work house and was about 28 feet from the main building. The last mentioned was an old house and had once been a residence. All were parts of an entire plant."

The court held, (P. 572):

"It is not to be denied that an addition to a building may commonly mean something attached thereto, but no one should say that such word necessarily means that."

It often is plainly seen to have a broader meaning. A clearly appearing intention will give it a broader meaning. Circumstances and conditions, as, for instance, such as shown in this case, will influence the interpretation. so we repeat that the expression: 'One-story frame building, and its additions adjoining and communicating,' does not always mean structures physically attached to, or otherwise connected with the building by machinery, or specific passways. That cannot be said as a matter of law."

Words and Phrases, 2nd Series, Vol. 4, page 797, has the following to say as to the word "supplement":

"The term 'supplement' signifies something additional, something added to supply what is wanting. It is that which supplies a deficiency, adds to or completes, or extends, that which is already in existence, without changing or modifying the original. * * McCleary v. Babcock, 82 N. E. 453, 455, 169 Ind. 228."

II.

We answer your questions in the order presented.

Question 1.

It is our opinion that under the facts and circumstances enumerated in your letter that the erection of a new building on the same site and not contiguous "to the old building but as an addition to and supplementing the present building" would not conflict with Section 9330, R. S. Mo. 1929.

We answer your first question in the negative.

Question 2.

We answer your second question as to "Does the construction of an addition to a school building require that the

Feb. 11, 1937.

new building be contiguous to the old building?" in the negative.

In our opinion the new building could be erected several feet away from the old building and yet be considered as an addition to the present building.

Question 3.

In our opinion the notice for election should be more complete in order to fully apprise the voters of what the board intends to do. In other words, the proposition should contain the qualified statement found in your letter that the word "building" should "indicate that the construction would be in addition to, and supplementing the present building" and that it would be erected on the present site.

Trusting the above answers your questions and if you desire further clarity, kindly so apprise us.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

JLH:EG

PROPOSED SALES TAX ACT: Senate Amendment No. 7 to Senate Committee Substitute for House Committee Substitute for House Bill No. 7, prohibits cities from passing a sales tax act; does not prevent cities from passing other forms of excise tax now in force or hereafter enacted.

May 24, 1937

5-26

Honorable Michael Kinney
Missouri Senate
Jefferson City, Missouri



Dear Senator Kinney:

We acknowledge receipt of your communication of May 18 wherein you request an opinion regarding the Sales Tax Bill now under consideration by the Senate. Your letter is as follows:

"The Senate placed an amendment on the Sales Tax Bill prohibiting cities or municipalities from aiding or passing ordinances to collect city sales taxes. Will you kindly give me your opinion as to whether this will interfere, as for instance, ad valorem tax, now collected by cities."

We assume that you refer to Senate Amendment No. 7 being an amendment to Senate Committee Substitute for House Committee Substitute for House Bill No. 6, and designating the amendment as a new section, and to be known as Section 44-a, as follows:

"No city, town or village, whether organized by general law or by special charter, shall, either directly or indirectly, levy, impose or collect any tax upon the sale of or charge for any tangible personal property taxed by the state under the provisions of this act, or, upon the sale of or charge for any service or other thing taxed by the state under the provisions of this act."

The purport of the amendment is to prohibit all cities in the State of Missouri from passing, by ordinance, what may be termed a "city sales tax act." All classes of cities receive their powers of taxation from the Legislature, the Legislature being empowered to grant cities the power of taxation by the Constitution of Missouri and especially Sections 1 and 10 of Article X. Section 1 being as follows:

"The taxing power may be exercised by the General Assembly for state purposes, and by counties and other municipal corporations, under authority granted to them by the General Assembly, for county and other corporate purposes."

Section 10 is as follows:

"The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

In accordance with the above provisions the General Assembly has from time to time delegated to cities of all classes the power to enact certain forms of taxation including merchants' licenses, occupation taxes and ad valorem taxes. The power of cities to levy taxes of every nature must be granted by the Legislature, and, if the authority can only be granted by the Legislature, then by the same logic the General Assembly can deny cities of any class or classes from enacting certain forms of taxation. In the instant case the Legislature is attempting to prevent cities from enacting a sales tax, which we are of the opinion is within the scope of authority of the General Assembly.

City of Los Angeles v. Riley, 59 Pac. (2d) 137.

Coming closer to your question to the effect does the proposed amendment No. 7, quoted supra, conflict or prevent cities from exacting other forms of taxation which are now in existence, it will be necessary to analyze and define and differentiate briefly the various forms of taxation which now exist in municipalities, as well as the present contemplated sales tax act. Broadly speaking, there are two forms of taxation; property taxes, being the original and most common form wherein the tax at a certain rate is exacted on assessment of an individual's property. Missouri Portland Cement Co. v. Smith, 90 S. W. (2d) 1. c. 407; Viquesney v. Kansas City, 305 Mo. 488.

The Constitution of Missouri refers chiefly to what we commonly refer to as "property taxation." The other broad form of taxation is known as excise taxation. No reference to excise taxes is contained in our Constitution. It has been ruled by the Supreme Court in many instances that an excise tax does not violate our Constitution because the sections referring to taxation in the Constitution referred to property taxation. The Sales Tax Act of 1935, Laws of Missouri 1935, page 411 et seq., has been denominated by the Supreme Court in the decision of State ex rel. Missouri Portland Cement Company v. Forrest Smith, 90 S. W. (2d) 405, as an excise tax. The decision in the Smith case defines an "excise tax" as follows:

"If a tax is imposed directly by the Legislature without assessment, and its sum is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer irrespective of the nature or value of the taxpayer's assets, it is regarded as an excise."

By the above definitions clearly the proposed amendment would not in anywise prevent, interfere or conflict with cities levying property taxes. There are

May 24, 1937

various forms of excise taxes, and the proposed sales tax act being identical in its form of exacting the tax as the Act of 1935, said act being declared in the Smith decision as an excise tax, likewise, the contemplated act is an excise tax. Therefore, your question finally resolves itself into: Does the denial of cities the right to enact a sales tax act (an excise tax) interfere or conflict with other forms of excise taxation. Many cities have ordinances valid under statutes passed by the General Assembly under which occupations and merchants are licensed.

In the case of *Ex parte Andrews*, 334 Mo. 254, the court makes the statement that the term

" 'license tax' may include occupation tax and is used indiscriminately to designate impositions exacted for exercise of privileges of all kinds."

A license tax is primarily intended to regulate particular business and not to raise revenue, while an occupation tax is primarily to raise revenue.

In the recent case, which will be hereinafter referred to again, of *Kroger Grocery and Baking Company, et al. v. City of St. Louis* (unreported), it was held that a license or occupation tax may be placed on chain stores based on the amount of sales or business done by said chain stores.

Section 7584, Revised Statutes Missouri 1929, referring to cities having a population of more than 500,000 inhabitants, construes "license" and "license tax" to include licenses for all purposes authorized or required by law or ordinance and also the tax on telegraph and telephone poles, the dog tax, the merchants' ad valorem tax, the vehicle license tax and the special tax on foreign insurance companies.

Section 10077, Revised Statutes Missouri 1929, refers to the taxation of merchants, or, as you have mentioned in your letter as an example, ad valorem tax. The section, in substance, is as follows:

"Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in March and the first Monday in June in each year."

Construing the above statute the Kansas City Court of Appeals, in the case of Monett v. Hall, 128 Mo. App. 91, decided that the State may collect an ad valorem tax on property used in a calling and at the same time impose a tax on the pursuit as a condition to carry it on and the power may be delegated to a municipal corporation, and to the effect that the tax is a personal property tax and not on the occupation.

The very recent case of Kroger Grocery and Baking Company, et al. v. city of St. Louis (unreported by our Supreme Court), analyzes the power of cities of over 300,000 population, under Section 7596, Revised Statutes Missouri 1929, with reference to exacting license taxes under said section, and, included in the decision, are examples of various ordinances in force by cities and the constitutionality thereof, all of which we deem to be of a different nature than the contemplated sales tax act. We have attempted to define the different forms of excise taxes and at the same time bearing in mind that the contemplated sales tax act is also a form of excise tax but that it differs in form, manner and effect from the other excise taxes.

The decision in State ex rel. Missouri Portland Cement Company v. Smith, contains the general rule that the substance of a taxing act rather than the name given to the tax determines its type or kind.

By Section 5 of the proposed act the tax "is upon the sale, service or transaction and shall be

collected by the person making the sale or rendering the service at the time of making or rendering such service, sale or transaction. The other forms of excise taxation herein mentioned in nowise exacts a tax on the sale of a commodity or service.

The nearest approach or conflict of any form of excise tax which the amendment referred to in your letter is that of the license or occupation tax which has been enacted by many cities. While sounding somewhat similar to the contemplated Sales Tax Act, yet, there is a vast difference in the mechanics of the exaction of the tax. The Sales Tax Act places the payment of the tax on the purchaser or consumer; each individual sale is subject to the tax; the merchant is liable to the administrative officer for the collection and remittance of the tax to the State of Missouri; the license or occupation tax is not based on each individual sale, but the amount of business done by the merchant may be used as a measuring stick to determine the amount of tax he should pay as a license or occupation tax for the privilege of doing business; it is not exacted directly from the public and the merchant, in the case of a sales tax act, is not granted the privilege of conducting a business as in a license or occupation tax, but performs services for the State in the collection of the tax. *Wiseman v. Phillips*, 84 S. W. (2d) 91.

CONCLUSION

It is, therefore, the opinion of this Department that Section 44-a of the proposed sales tax act only prohibits cities, towns and villages from levying and collecting taxes upon the sale of or charge for any tangible personal property or upon the sale of or charge for any services or other thing taxed by the State under the provisions of the Sales Tax Act, and does not prohibit cities, towns or villages from levying or collecting a license or occupation tax and fixing the amount of said tax on the amount or volume of business

Honorable Michael Kinney

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May 24, 1937

done, nor from levying and collecting any other excise tax, and neither does said section prohibit cities from levying or collecting an ad valorem tax.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

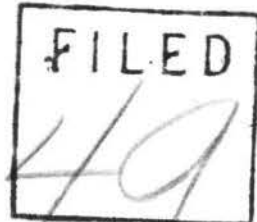
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

SCHOOLS: Change of boundary lines of school districts gives to the new school district all school property located therein.

6-16
June 14, 1937.



Honorable Lloyd W. King
State Superintendent of
Schools
Jefferson City, Missouri

Dear Mr. King:

This is to acknowledge your letter dated
February 3, 1937, as follows: (Illustration omitted)

"Inquiry has come to this Department concerning the ownership of an athletic field, when, by the changing of school district boundary lines, the athletic field becomes located in more than one school district. Illustration:

"A few years ago, the Clayton School officials purchased a twenty-four (24) acre athletic field, which, at that time, was located in the Clayton school district just outside of the city limits. It was not a part of any incorporated city or town. Shortly after the purchase of this tract by the Clayton School Board, the city of University City extended its southern boundary so as to include the strip marked "2" in the sketch, which automatically extended the school district boundary line. Then the city of Clayton extended its boundary so as to include the strip marked "1" in the sketch.

Honorable Lloyd W. King

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June 14, 1937.

"Recently, the area marked "3" in the sketch has become included in the corporate village of McKnight. Following the incorporation of the village of McKnight, the school district of Ladue was organized which included the McKnight village.

"Would the changing of school district boundary lines which has placed the major portion of the athletic field in two other school districts affect the Clayton School District's title of ownership of this tract?

"Would the athletic field still belong to the Clayton School District even though the boundary of two other school districts cuts across this tract?

"Or, would the school districts of University City and Ladue have the right of ownership of the parts of this athletic field located in the respective districts by virtue of the fact school district boundary lines were changed?

"I shall be glad to have an opinion at your earliest convenience."

We believe that the recent case of School District of Oakland vs. School District of Joplin, 102 S. W. (2d) 909, decided March 11, 1937, by Division No. 2 of the Supreme Court of Missouri answers your question.

The question submitted in said case was as stated by the Court:

"Does real property purchased from public funds held by and conveyed by general warranty deed to town school district of less than nine square miles in area, vested in city school district on extension of its boundaries so as to embrace territory within which such realty was situated?"

The Court in a very exhaustive opinion reviewed many decisions of the Court on the question, and concluded that the title to school property vests in the district in which the property is located. We quote: (page 915)

"That this is the foundation of the ruling in the Winona Case is evidenced by the statement (40 Minn. 13, loc. cit. 20, 21, 41 N. W. 539, 542, 3 L. R. A. 46, 12 Am. St. Rep. 687): * * * * Upon reason and principle we cannot see why any distinction should be made as to property, which on change of boundaries falls within the limits of another municipality, or why the title should not, like that of all other property, remain unaffected by the change." Therein lies the distinction- the distinction between a private and a governmental interest. In Missouri the property of school districts acquired from public funds is the property of the state, not the private property of the school district in which it may be located, and the school district is a statutory trustee for the discharge of a governmental function entrusted to the state by our Constitution."

The above case was an action to "quiet and determine title and for ejectments, damages, and monthly rents and profits." It was between the School District of Oakland and the School District of Joplin. The School District of Joplin in extending its boundaries took in part of the property belonging to the School District of Oakland. Upon trial before the Circuit Court the School District of Oakland prevailed, and the Court vested title to said

Honorable Lloyd W. King

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June 14, 1937

property (sought to be included in the Joplin School District by virtue of the extension of city boundaries) in the school district of Oakland, and also awarded damages. The School District of Joplin appealed, and the Supreme Court reversed the Circuit Court. The Court concluded its opinion as follows: (page 915)

"But, we have ruled the property involved is public property of the state, not the property of plaintiff or defendant. The General Assembly, as within its power, has undertaken to provide protection for the school districts in plaintiff's situation. Under the provisions of section 9344, R. S. Mo. 1929 (Mo. St. Ann., section 9344, p. 7181), plaintiff, its territory not embracing 9 square miles as we read the record, may become, if it so desires, a part of defendant school district. In such event, it appears that plaintiff's obligations would become defendant's obligations. Hughes v. School District, 72 Mo. 643, 644 (1); Thompson v. Abbott, 61 Mo. 176, 177. We need not pursue the issue further.

"The judgment is reversed."

From the above and foregoing it is our opinion that the School Districts of University City and Ladue have the right of control and possession of the parts of the athletic field located in their respective districts by virtue of the fact the school district boundary lines were changed. Title to school property vests in the State and school districts are statutory trustees of same.

Yours very truly,

James L. HornBostel
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

MISSOURI DENTAL BOARD: Present Members Remain in Office
Until October 16, 1940.

June 15, 1937.

Senator Michael Kinney,
Missouri Senate,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your request for an
opinion as to the following:

"Will you kindly let me know whether or not
under the new Dental Law a new Board does not
have to be appointed."

Section 13557 R. S. Mo. 1929 by authority of which the
present Dental Board was appointed, provided for a Board of five
members to be appointed by the Governor for a term of five years.
The appointments of the present members of the Board expire in
1940.

During the last session of the Legislature (1937) Section
13557 R. S. Mo. 1929 was repealed and a new section (13557) re-
enacted in lieu thereof. Under the new section, a new system of
appointments to the Dental Board is provided: beginning October 16,
1940, the Governor shall appoint one member for a term of one year,
one member for a term of two years, one member for a term of three
years, and one member for a term of five years. Thereafter, all
members shall be appointed for a term of five years. It is apparent
that the intention of the Legislature in enacting this modification
of the former system of appointments was to effect a change in the
personnel of the Board of only one member at a time rather than to
require the appointment of an entirely new Board at the expiration
of each five year period.

However, it will be noted that the Legislature expressly
provided that the present members of the Board shall remain in
office until the expiration of their respective terms, that is,
until October 16, 1940, and that the new system shall not be in-
augurated until that date. By reason of this proviso, therefore,
there can be no question but that the present members of the Board
retain their offices until October 16, 1940.

Nor can it be said that the repeal of Section 13557
R. S. Mo. 1929 automatically terminated the appointments of the
present members of the Board for the reason that Section 13557

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was re-enacted in the same section that repealed the former section. The fact that there are some modifications of the former section created in the present section 13557 would not, as a matter of law, affect the continuation of the provisions of the former section where applicable. In the case of *State v. Ward* (Supreme Court of Missouri) 40 S. W. (2) 1074, the Court said:

"The point that the repeal by the Fifty-fifth General Assembly in 1929 of Section 5396, R. S. 1919, and the enactment in lieu thereof of a new section to be known as section 5396 (Laws 1929 p. 217 (now Rev. St. 1929 § 8246)) terminated the two year closed season voted by Harrison county in 1928, is without merit.

In *Brown v. Marshall*, 241 Mo. 707, 145 S. W. 810, loc. cit. 815, this court ruled: 'A subsequent act of the legislature repealing and re-enacting, at the same time, a pre-existing statute, is but a continuation of the latter, and the law dates from the passage of the first statute and not the latter. *State ex rel. v. Mason*, 153 Mo. 23, loc. cit. 58-59, 84 S. W. 524; *State ex rel. v. County Court*, 53 Mo. 126, loc. cit. 129-130; *Smith v. People*, 47 N. Y. 330.'

And this is true even though the new section 8246 of Rev. St. 1929 contained modifications of the repealed sections. *State v. Bradford*, 314 Mo. 684, 225 S. W. 496."

In view of the foregoing, therefore, it is the opinion of this department that the enacting by the Legislature of a new section of the law regulating Dentistry in Missouri (Section 13557) does not affect in any manner the status of the present members of the Dental Board appointed under Section 13557 R. S. Mo. 1929.

Respectfully submitted.

AUBREY R. HAMMETT, Jr.
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

STATE BOARD OF HEALTH: No school of Cosmetology, Hair-dressing or Manicuring may be operated in this State without obtaining a certificate of registration.

September 24, 1937. 10/21

Miss Nellie L. Killion
Director, Division of
Cosmetology and Hairdressing
Jefferson City, Missouri



Dear Miss Killion:

This will acknowledge receipt of your request for an opinion reading as follows:

"Is it permissible to operate a branch school, located in the same city and at least fifteen miles from the main school, as this school owner terms the school she has registered with the State of Missouri."

Your attention is directed to Section 9089 R. S. Mo. 1929, relating to the requirement of a certificate of registration before one may conduct a hairdressing or cosmetologist school. It provides in part as follows:

"It shall be unlawful for any person in this state to **** conduct a hairdressing or cosmetologist's or manicurist's establishment or school, unless such person shall have first obtained a certificate of registration as provided by this article."

Section 9092 R. S. Mo. 1929, relating to the certification of registration provides in part as follows:

"It shall be competent for any person, firm or corporation to apply to the state board of health for a certificate of registration of a school for any one or more of the classified occupations within this article upon the payment of a reason-

September 23, 1937.

able annual registration fee as determined annually by the said board but in no case to exceed the sum of one hundred dollars.* * * *."

A further and careful reading of all of Article V, Chapter 52 of R. S. Mo. 1929, in which the sections of the statutes above cited are included, does not disclose wherein it is permissible for any person, firm or corporation to operate a branch school or what may be termed a "chain system" of Beauty Schools, without obtaining a certificate of registration for each school.

You will have noted from the above cited sections of the statutes that the word "school" is used in its singular sense, but may be extended or enlarged when applied to persons or things. This is fundamental in the construction of statutes. As tersely said in the case of *Garrett v. Wiltse*, 161 S. W. 694, 697:

"* * * *In construing public statutes, the rule is to include the plural in singular number. * * * *."

But from this does it follow that these schools could be operated on one certificate of registration, when so doing would possible defeat the object and purpose of the statutes? We think not.

When we consider other portions of Section 9092, supra, relating to the attaching of a regular licensed physician to the staff of a school, this conclusion is inescapable, in view of the fact that these laws are passed in view of general health and welfare of the community. To permit the establishment of a branch school without a certificate of registration would only serve to defeat this necessary requirement imposed by statute.

It is also provided in another part of Section 9092, supra, as follows:

"No school * * * * shall operate within this state unless a proper certificate of registration * * * * has been obtained."

Miss N. L. Killion

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September 23, 1937.

This part of the statute is plain, mandatory in its terms, free from any ambiguity and needs no interpretation. State ex rel. Jacobsmeier v. Thatcher, 92 S. W. (2d) 640.

CONCLUSION

In view of the above it is the opinion of this department that Article V, Chapter 52, R. S. Mo. 1929, does not contemplate the operation of any school or schools for cosmetologists, hairdressers or manicurists unless the person, firm or corporation operating the same shall have secured a certificate of registration from the State Board of Health for the school or schools. Further, that no branch school may be operated without a certificate of registration being obtained therefor.

Respectfully submitted

RUSSELL C. STONE
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

RCS:AH

FEES: Probate Court. Fees of probate judge up to the filing of inventory.

December 17, 1937

Mr. Grover R. Kirchner,
Judge of the Probate Court
Clark County,
Kahoka, Missouri.



Dear Sir:

This office acknowledges receipt of yours of December 9 requesting an official opinion as to what fees probate judge is allowed to charge in cases of administration prior to the filing of the inventory in estates. The request is as follows:

"Would you be kind enough to send me the actual costs of Administration without Will in Filing application Bond Oath, and Letters of Administration including two sureties on Bond and the cost and allowance of recording same and if any fees are allowed for copies of same and what the Court is allowed for attaching Seal to Letters of Administration including all costs including vacation order up to issuing Inventory. Is there any blanks issued that conform with Statutes of 1929 by any printing Co. and are there any additional fees allowed by Statutes besides Section 11782 as by first paragraph."

All of the fees which the probate judges are permitted to charge in the administration of estates are set out in Section 11782 Revised Statutes of Missouri 1929. That part of said section which applies to fees earned by the probate judge prior to the filing of the inventory in the estate are as follows:

"For granting letters of administration or testamentary, recording the same, appointing witnesses, administering oaths, and everything relating thereto..... \$1.00

For taking and filing bond of executor,

administrator, guardian or curator, and recording such bonds.....	.75
For an order of publication.....	.40
For copy of every such order....	.35
For every order relating to administrators, executors or guardians, not herein otherwise provided for.....	.15
For copying any order, or record or paper, not herein provided for, for every hundred words and figures.....	.10
For every certificate and seal.....	.50
For issuing every subpoena.....	.25
For administering every oath....	.05
For commission to take deposition.....	.50
For an execution or other writ not hereinbefore provided for.....	1.00
For filing every paper not herein specified.....	.05
For hearing and determining every cause submitted to him for trial.....	.50

As to the right of the officer to charge fees for any service for which a fee is not provided by the statute, I find the rule stated in case of State ex rel v. Brown, 146 Mo. 401, 406, in which the court stated:

"It is well settled that no officer is entitled to fees of any kind unless provided for by statutes and being solely of statutory rights statutes allowing the same must be strictly construed."

Applying this rule, the probate judge must go to Section 11782, Revised Statutes of Missouri, for his authority to charge for any service he performs in connection with the administration of an estate.

As stated in Kelley's Probate Guide, Fifth Edition, Sec. 108:

"The provisions of this statute (Sec. 11782, R.S. Mo., 1929) are very indefinite and elastic in character."

For these reasons this office is unable to render an official opinion on this probate fee question which is not general in its nature, but the writer will attempt to render an opinion which will cover the questions and fees which generally come up in the administration of an estate up to the filing of the inventory.

The first step in the administration of an estate is the application for letters of administration as provided by the provisions of Section 8, R.S. Mo., 1929. The fees which are chargeable in connection with this application vary, depending upon the circumstances. If there should be a contest as to who shall administer, or if those who are entitled to administer, fail to make application, then the Court on motion of any person interested, may issue citation to any such person to appear and qualify and if they fail to do so within a specified time, the Court or clerk in vacation may grant letters to some person that the court deems most suitable.

For all papers filed in connection with such hearings the court may charge a fee of five cents each; for recording such application, if it is recorded a charge of ten cents per hundred words and figures may be charged; for each oath administered at such hearing the court may charge a fee of five cents; for attaching the certificate and seal of the probate court that any paper in connection with the application has been recorded, a fee of fifty cents is allowed, and for every order the court may make pertaining to the application, a fee of fifteen cents.

The Probate Judge, by said section 11782, R.S. Mo., 1929, is permitted to charge a fee of one dollar for granting letters of administration or testamentary, recording same, appointing witnesses, administering oaths, and everything relating thereto.

The writer notes from your letter that you ask whether or not the court is allowed a fee for attaching the seal to letters of administration. It is the opinion of this department that by the provisions of the above clause, the legislature intended that this fee of one dollar is to include every charge the probate judge is authorized to make for his services which are performed by virtue of Sections 1, 2, and 3 of the Revised Statutes of Missouri, 1929, which pertain to the granting of letters, recording

same, appointing witnesses, administering oaths and everything relating thereto, which includes the charge the court makes for attaching the seal of the court to the letters of administration.

For taking and signing of the bond of the administrator, and recording it, the fee of seventy-five cents is allowed. It is the opinion of this department that this fee includes any charge made for administering oaths, for any examination that may be made in connection with the taking and approving of the bond; including the certificate and seal of the court that such bond has been filed and recorded.

If the probate judge issues a subpoena for witnesses in any hearing pertaining to the administration, it is the opinion of this department that he is entitled to charge a fee of twenty-five cents.

For certified copies of the letters of administration, a charge at the rate of ten cents per hundred words and figures and fifty cents for the certificate and seal may be made by the Court.

Section 15, Revised Statutes of Missouri, 1929, provides that the administrator, after his appointment and qualifying, shall make affidavit that he will make a perfect inventory of the estate and fully administer the same, pay the debts as far as the assets will permit, and furnish the court with the names and addresses of the widow and heirs of the deceased. The Court may charge a fee of five cents for filing this affidavit and for administering any oath in connection therewith he may charge a fee of five cents, and if the affidavit is recorded he may charge the fee of ten cents per hundred words and figures and fifty cents for the certificate and seal of the recording of such affidavit.

Section 75, R. S. Mo. 1929, provides that after letters of administration have been granted, the administrator shall sign and swear to a notice which is termed 'notice of letters', and a copy of this notice of letters must be published.

It is the opinion of this department for the services performed in connection with this duty, the probate judge is permitted to charge as follows:

Order of publication.....	40¢
Copy of such order.....	35¢
Certificate and seal to same.....	50¢

Mr. Grover R. Kirchner

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December 17, 1937

Administering one oath.....05¢

Section 61 Revised Statutes of Missouri 1929 provides that at the time of the appointment of the administrator the court shall appoint three disinterested witnesses to aid the administrator in the appraisal. It is the opinion of this department that the charge for this service is included in the allowance of one dollar for granting letters, etc. It is also the opinion of this department that the legislature intended that the vacation order made by the probate clerk in granting letters of administration should be included in the fee of one dollar for granting letters, etc.

The writer would suggest that you write to some record printing company to ascertain whether the blanks you inquire about in your letter are printed.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J.E. TAYLOR
(Acting) Attorney General

TWB:DA

HIGHWAYS: Salary may be paid from bond issue, absent bond provisions to the contrary, but township board cannot, directly or indirectly, employ president thereof as supervisor.

January 5, 1937. r 8



Honorable Charles F. Lamkin, Jr.,
Prosecuting Attorney,
Chariton County,
Keytesville, Missouri.

Dear Sir:

We have received the following inquiry from you,
to-wit:

"The following situation has arisen in this county, which you know, is under township organization. A certain township sponsored a WPA road project. At the same time they issued road bonds, the proceeds of which were to be used in part for paying of the WPA project and part for their share of a PWA road project. In connection with the WPA road project, the trustee of the board was hired by the WPA as foreman of the job and was to be paid a salary by them. He, in turn retained the president of the board to act as the township supervisor of the job, following the direction of the WPA office, with the understanding that this township supervisor's salary was to be paid from the township funds, being a part of the costs which the township, as sponsor, agreed to assume. This board president in that capacity, has worked for about three months, it being understood that he was to receive a salary of \$50.00 per month.

"I will appreciate an opinion from you as soon as possible regarding the legality of paying the salary of this township supervisor as outlined, out of part of the proceeds of the bond issue. The only section which I find directly bearing on this point, is Section 8154, R.S. Mo. 1929, which does not seem to me to be directly in point. Since this work has gone on for this length of time and the president of the board is anxious to have it settled, I will appreciate an opinion

from you as soon as conveniently possible."

Replying thereto, will say that in an opinion rendered by this office on January 28, 1936 to Honorable G. Logan Marr, Prosecuting Attorney of Morgan County, we stated that the money owned by a special eight-mile road district as the result of a bond issue by said district may be legally expended by the district for the purchase of road building machinery to be used in such special road district. Also, in an opinion dated August 6, 1936 to Honorable Rex H. Moore, Prosecuting Attorney of Grundy County, this department held that if the township has money on hand with which to carry on a WPA project of the township, the same may be lawfully expended in cooperation with the WPA authorities in improving said roads.

The payment of a reasonable salary out of the township funds for officers supervising the work of improvement of the roads is just as essential in order that the completed unit, i.e., the greatest amount of results in improvement to the public may be obtained as is the purchase of proper machinery, each being an essential to securing the ultimate objective, which is a good road built without squandering the money in abortive efforts.

Absent a limitation by the provisions of the bond issue itself by which the township raised certain funds, the township authorities would have the right to expend the money on hand that came to them as the proceeds of the bond issue in the same way that they are authorized to expend the ordinary revenues of the township.

Another question is presented by your inquiry and it refers to the authority to employ the president of the board to act as the township supervisor, and to receive his compensation from the township funds. Stating that part of your inquiry in a different way, we interpret the inquiry to be substantially the following, to-wit: A given township issued bonds to finance road projects - the WPA employed the trustee of the township board as foreman and paid him out of their funds, and he being so employed, employed the president of the township board to act as township supervisor and the latter is paid a salary out of township funds, this all being done at the direction of the WPA. Is such employment of the president of the township board to act as such township supervisor, authorized by law?

The member of the township board employing the president of the township board, who is paid out of township funds, can be but the agent or mouthpiece of the township board in employing some one who is to be paid by them, as appears to be the fact here. One cannot accomplish indirectly that which he is not permitted

to directly accomplish. The township board in fact is doing the employing. They must necessarily be doing the employing because they are paying for the employment. If they were not paying for the employment, then they would be making a donation of the public funds without consideration, no value being received in return therefor.

It appears to us that the necessary result of the set-up as you mention it, is that the township board, through the foreman, is employing the president of the township board to perform these services as supervisor and is agreeing to pay him a salary of \$50.00 a month therefor.

In an opinion of this office dated February 11, 1933 to the Honorable T.J. Harper, Prosecuting Attorney of Stone County, with reference to the right of road district commissioners to employ themselves, this conclusion was reached:

"As we understand your inquiry: - a board of commissioners of a special road district was appointed under the provision of Section 8026 R.S. Mo. 1929, who under the provision of Section 8031 R.S. Mo. 1929, were to serve without pay, except for their actual necessary expenses. Are they, or either of them, while holding the office of commissioner, entitled to work upon the road in some capacity and draw compensation therefor the same as a road overseer, and at the same time draw the expenses as provided for the board of commissioners, or would they be permitted to draw the road overseer's salary and forego the expenses as so provided?

"The adjudged cases upon the validity of appointment to office, made from the membership of the appointing board, hold uniformly that such appointments are illegal, as against public policy and for that reason are generally discountenanced. The reason for declaring such act against public policy is obviously from the fact that the power to fix and regulate the duties and compensation of the appointee, is lodged in the body of which the commissioner is a member. Unless such rule was promulgated and enforced, it might permit the general public to be taken advantage of by the board or commission created as their agent and for their protection. It is of the highest importance that municipal and other bodies of public servants should be free from every kind of personal influence.

"For the reasons as hereinabove stated, it is

the opinion of this department that it would be unlawful as against public policy for the member of your special road district board to be employed by the board, or engage themselves as an employee and draw compensation for working upon the highway of the road district in which he is serving as commissioner."

In the case of State v. Bowman, 184 Mo. App. 549, the Court had before it the question of whether or not a member of the City Council of Springfield, Missouri, could be appointed City Clerk. The Court said:

" * * * Other reasons might be given, but it is sufficient to say, and we so hold, that it is against the policy of the law to allow a member of the appointing body, in a case like this, where the appointive office is a lucrative one, to become the beneficiary of the appointment. * * *

"We are not without abundant authority for this ruling. The case of Meglemery v. Weissinger, (Ky.) 131 S.W. 40, 31 L.R.A. (N.S.) 575, is a leading case on this subject. The editorial note to that case says: 'The adjudged cases upon the validity of appointment to office made from the membership of the appointing body hold uniformly that such appointments are illegal and to be generally discountenanced.' In that case it was held that the fiscal court of a county, empowered to appoint a bridge commissioner, a salaried officer, could not appoint one of their own number. No specific statute or constitutional provision is cited as prohibiting such action. The court held the appointment void as against public policy, and said: 'Nor does the fact that his term expired within a few days after his appointment, or the fact that his duties would be prescribed and his compensation allowed by a body of which he was not a member, or the fact that he was not present with the court when his appointment was made, have the effect of changing this salutary rule. The fact that the

the power to fix and regulate the duties and compensation of the appointee is lodged in the body of which he is a member is one, but not the only, reason why it is against public policy to permit such a body charged with the performance of public duties to appoint one of its members to an office or place of trust and responsibility. It is of the highest importance that municipal and other bodies of public servants should be free from every kind of personal influence in making appointments that carry with them services to which the public are entitled and compensation that the public must pay. And this freedom cannot in its full and fair sense be secured when the appointee is a member of the body and has the close opportunity his association and relations afford to the place the other members under obligations that they may feel obliged to repay.' Other cases to the same effect will be found, giving the same and other reasons for so holding. (Smith v. City of Albany, 61 N.Y. 444; Gaw et al v. Ashley, et al., (Mass) 80 N.E. 790; The People v. Thomas, 33 Barbour's Repts. 287; Ohio ex rel. v. Taylor, 12 Ohio St. 130; Kinyon v. Duchene, 21 Mich. 497. * * *)"

CONCLUSION

It is our opinion that the proceeds of the bond issue issued for the purpose of raising money to improve the roads of the township, absent some limitation or restriction in the issuance of the bonds themselves (and no such restriction or limitation appears here) may be expended in employing a supervisor or overseer of the road work and paying him a reasonable salary therefor.

It is our further opinion that that person so employed as such supervisor by the township board, whether said board be acting directly or indirectly, whether doing the employing themselves or authorizing some other person so to do, regardless of whether it be a person designated by the WPA or by another authority as such employing agency, such person receiving his compensation from the township board is employed by the township board, and the president of the township board may not legally be employed by said board

Jan. 5, 1937.

to perform road services for the township board and receive compensation therefor from said board.

Respectfully submitted,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

DW:AH

COUNTY TREASURER: In counties having township organization when the treasurer-elect dies before qualifying for the office in April the person holding the office will continue to hold same until the next general election for electing a treasurer in said counties.

March 1, 1937



Mr. Charles F. Lamkin, Jr.
Prosecuting Attorney
Chariton County
Keytesville, Missouri

Dear Sir:

This Department is in receipt of your request for an opinion dated February 25, 1937. Your request reads as follows:

"The following situation has arisen in this county. Chariton County is under township organization and the office of treasurer and collector is combined. Under the law, the term of the treasurer ends ordinarily April 1 of this year. The person elected to that office at the general election last November had died since his election and before the expiration of the term of the present treasurer. I will appreciate an opinion from you as to whether or not the present treasurer holds over and if so, how long, and if there is a vacancy on April 1 because of the death of the person elected, and how the vacancy is to be filled."

In 1933 the Legislature repealed Section 12130, Revised Statutes Missouri 1929, and re-enacted the section so that it now reads, Laws of Missouri 1933, page 338,

"On the Tuesday after the first Monday in November, 1936, and every four years thereafter, there shall be elected by the qualified voters in all counties of this state now or hereafter having a population of 40,000 or more inhabitants according to the last decennial United States census, and in all counties of less than 40,000 inhabitants if under township organization, a county treasurer, who shall be commissioned by the County Court of his County, and who shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election, and shall hold his office for a term of four years, and until his successor is elected and qualified, unless sooner removed from office; Provided, that in counties having adopted or that shall hereafter adopt township organization, the term of office of said treasurer shall be extended to the first day of April next after the election of his successor."

Chariton County, having been for a number of years under township organization, is not affected by the Act of 1933 which provided for the abolishment or

the consolidation of county treasurers in counties of less than 40,000 inhabitants. It appears from the facts as contained in your letter that at the last general election a person was elected to the office, but as the statute provides that the incumbent shall hold his office until April and since the person elected has died we assume that said person made no effort or did not qualify before his death.

Section 5 of Article XIV of the Constitution of Missouri relates to the tenure of office of officers, and is as follows:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

But the grave question is whether or not there is a vacancy. If there is a vacancy the same could be filled by the Governor, under Section 10216. If no vacancy exists does the present incumbent hold over, if so, how long.

Vacancies usually exist and occur upon the death, resignation, failure to qualify or from an ouster of the incumbent. The statutes relating to vacancies in the individual offices usually govern.

In the instant case we are unable to locate any statute which is a guide or determines a vacancy exists in the office of treasurer when a successor, due to death, fails to qualify, or the procedure to be followed in the event such a condition creates a vacancy.

In 22 Ruling Case Law, 437,438, the word 'vacancy' is treated as follows:

"The word 'vacancy' as applied

to a public office has no technical meaning. Its ordinary and popular meaning is that the office is unoccupied and without an incumbent who has a lawful right to continue therein until the happening of some future event. An office is not vacant so long as it is supplied in the manner provided by the Constitution or law with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it."

It is a well recognized principle of law that the law abhors vacancies. The various political subdivisions of the state, in order that our system of government may function to the best interests, will not declare a vacancy as long as an incumbent is in office. The general rule with reference to the state of facts which you present is stated in 74 A. L. R. 486, as follows:

"In a majority of jurisdictions, the rule obtains that the death or disability of an officer-elect before qualifying does not create a vacancy in the office which may be filled by the appointing power, since he never occupied the office, and that under the provision that an incumbent shall hold his office until his successor is elected and qualified the prior incumbent is entitled to continue in the office until the election and qualification of his successor."

In view of the absence of any statutory or constitutional provision which creates any vacancy under the conditions mentioned in your letter, we are of the opinion that under the decisions herein quoted that no

vacancy now exists, assuming that the present incumbent is remaining in office and discharging his official duties; that by virtue of the Constitution the present incumbent will remain in office until his successor is elected and qualified.

Under the facts which you present there is no successor elected and qualified and there can be no successor elected and qualified, then how long will the present treasurer continue to hold over?

If a vacancy had existed by reason of the death of the treasurer-elect, then the appointive power, under Section 10216, Revised Statutes Missouri 1929, would have appointed some person to fill the vacancy. The statute provides that the appointive power should appoint a person until the next general election or until his successor is elected and qualified. The next general election in your county would be in 1938, but, having ruled that there is no vacancy and no statutory procedure to care for a situation such as you present.

An election to any office can only be held when provided for by law. As was said in the case of State ex rel. McHenry v. Jenkins 43 Mo. l.c. 265:

"Or if not, who is the present clerk? By the terms of the act creating the Kansas City Common Pleas, as well as by the constitutional provision, the clerk shall hold his term until the election and qualification of his successor. Thus there is no vacancy, and Mr. Vincent holds over.

"In relation to relator's second claim, that the omission to hold an election in 1866 can be supplied by one in 1868, we can only say that it is a valid one if the law provides for any such election. But he has failed to show us any such provision, and it would be

difficult to give legal validity to a volunteer election. No election can be had unless provided for by law. As the law makes no provision for the election of clerks in 1868, such election is wholly void and of no effect. This position has never been questioned. In the State v. Robinson, 1 Kansas, 17, a question was raised as to the validity of an election for governor, and it was held that the election under consideration was not provided for by law, that the person elected could not take the chair, and that the previous governor should hold over until the next general election. No case has been known where a volunteer election has been held valid, even though the term of the incumbent had expired."

Also, in the decision of State ex inf. v. Dabbs
182 Mo. 1. c. 367:

"The act of March 25, 1901 (Laws 1901, p. 120), providing for an additional judge of the circuit court of Jasper county, under which defendant was appointed and commissioned, provides, that 'he shall continue in office until the first Monday of January, 1903, and until his successor is elected and qualified.' His successor was elected at the general election held in November, 1902, but died before qualifying and it must follow that defendant is 'entitled to hold over until the next regular term for holding an election for that office.' "

The Legislature having provided for the election of treasurer, in the event that there is no vacancy had in mind uniformity as to time. As was said in the case of State ex inf. v. Smith 152 Mo. l. c. 521:

"In the case at bar Haughton was appointed under section 7 of the Act of 1891, to fill the unexpired term of Sheehan, which ended at the regular election in 1898, and until his successor was duly elected and qualified. The attempted election of his successor in 1898 failed by reason of a tie vote. No successor was then elected and hence none qualified. Therefore no vacancy existed or occurred in the office. The effect was the same as if no election for a successor had been held in 1898. There being no vacancy there was no power in the judges named to appoint defendant to the office, either by virtue of the Act of 1891 or of any other statute, and hence their action was a nullity and defendant had no title to the office. Inasmuch as the Act of 1891 provided that there should be an election for justice of the peace, in St. Louis, at the regular election in 1894 'and every four years thereafter,' and inasmuch as there was in legal intendment no election held in the fourth district in St. Louis for justice of the peace in 1898, there has been no successor yet elected for Haughton, and as the purpose of the law-makers is that there shall be uniformity in the time of electing

Mr. Charles F. Lamkin, Jr.

-8-

March 1, 1937

all justices of the peace, and as there is no special statute covering cases like this, it follows that there can be no legal election held to elect a successor for Haughton until the regular election in the year 1902, and that he has a right to continue to hold the office of justice of the peace for the fourth district, in the city of St. Louis, until a successor is elected at that time, and thereafter duly qualifies, by virtue of his appointment until his successor is duly elected and qualified."

We are, therefore, of the opinion that the present incumbent will continue to hold the office of treasurer until the next regular election for electing a treasurer of Chariton County, which, according to the provisions of Section 12130, quoted supra, will be in November 1940.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

CONSTABLES: Fee entitled for attending elections.

March 17, 1937

372✓



Mr. Charles W. Lamkin, Jr.
Prosecuting Attorney
Chariton County
Keytesville, Missouri

Dear Mr. Lamkin:

This department is in receipt of your request for an opinion, under date of March 10, 1937, wherein you state as follows:

"Chariton County is under township organization. See Branch Township in this county recently held two special elections for the purpose of voting on road bonds, which were duly called according to law. There are two voting precincts in this township. The judges and clerks of the election did not request the presence of the constable. However, he appeared at one precinct, with a deputy at the other to perform such official duties as he might be called upon to perform. I will appreciate an opinion from your office as to whether this constable and his deputy are entitled to any compensation, and if so, how much."

We are enclosing an opinion rendered by this department to Mr. Lewis B. Hoff, Prosecuting Attorney, under date of August 27, 1936, wherein the fees of a constable and his

Mr. Charles F. Lamkin, Jr.

March 17, 1937

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deputies for attending elections are discussed.

It will be noted that Section 11777, as set out on page 2 of the enclosed opinion provides that before the constable is entitled to his fee for attending any election in his township, he must be required to do so by the judges of election.

From the foregoing, it is our opinion that the constable is not entitled to any fee for attending any election in his township unless he be required to do so by the judges of the election.

Under the ruling of the enclosed opinion, the deputy constable would not be entitled to a fee for attending elections in either event.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WOS:RT
MW

PROSECUTING ATTORNEYS : Expenses of the Prosecuting Attorneys
EXPENSES SALES TAX : in collection of sales tax not payable
COLLECTIONS : out of State funds.

9-4
August 30, 1937.



Mr. Charles F. Lamkin, Jr.,
Prosecuting Attorney,
Chariton County,
Keytesville, Mo.

Dear Sir:

This office acknowledges yours of the 24th instant, requesting an opinion of this Department as to whether or not Prosecuting Attorneys are entitled to any expenses incurred by them in the performance of the duties imposed upon them by the provisions of Section 40 of the Sales Tax Act of Missouri for 1937 (1937 Missouri Session Acts, page 552).

By Section 40 of said Act, it is provided that:

"upon the request of the Attorney General, it is the duty of each Prosecuting Attorney and Circuit Attorney to forthwith institute and prosecute suits for the collection of the tax."

Section 41 of said Act, provides that:

"The expenses necessarily incurred by the Auditor and Attorney General, and his assistants in charge of litigation that may arise hereunder, shall be paid out of appropriations made by the General Assembly."

Upon the examination of appropriations made by the 59th General Assembly, we fail to find that any moneys were appropriated for the payment of the expenses of Prosecuting Attorneys in performance of duties pertaining to sales tax collections.

Upon the question of the intention of the legislature to pay this expense out of State funds, we may consider remarks of Judge Leedy J. in the case of State v. Smith, 90 S. W. 2nd 1. c. 409:

"The view that such was not the intention was fortified by an examination of the Appropriation Acts of the 58th General Assembly, which show that, that body made no appropriation for such purpose."

The foregoing statement was made by the court in considering the question of whether or not the Legislature intended that the State Highway Department should pay the 1% sales tax upon its purchases.

By analogy the 59th General Assembly having failed to make an appropriation for payment of the expenses of the Prosecuting Attorneys in performing the duties imposed upon them by the 2% Sales Tax Act, it would seem that the Legislature did not intend to pay such expense out of State funds and the appropriations made by the 59th General Assembly.

The duties of the Prosecuting Attorneys with reference to matters pertaining to the State are set out in Section 11316 R. S. Mo. 1929, which section is as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their duty to represent the state in such case in said courts, and make out and cause to be printed, at the expense of the county, and in cities of over 300,000 inhabitants, by the city, all necessary abstracts of record and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such courts, and for their services shall receive such compensation as may be proper, not to exceed twenty-five dollars for each case,

and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county court of such county, and in such cities by the proper authorities of the city."

From the foregoing section, it seems that the duties of the Prosecuting Attorney in attending to sales tax matters in his county are imposed on him the same as attending to any other matters in which the State of Missouri is a party.

Although the Legislature did not make an appropriation to pay for these expenses, such as postage, stationery, etc., yet it has been the rule of the courts that such expenses be not imposed upon the officials but be paid by the county (See opinion of this Department dated May 25, 1935 which is enclosed with this opinion).

In all of our research upon this subject, we find that the courts follow the rule that official expenses cannot be imposed upon an official without reimbursement, even though the statute is silent on this subject (See cases cited in enclosed opinion).

As the County Treasury is relieved of some of its burden because some of the receipts from the sales tax go back to the county by way of taking care of relief obligations and schools, it would appear that the Legislature intended that the expenses of the Prosecuting Attorney incidental to his performance of duties pertaining to the sales tax should be paid out of the County Treasury as other incidental expenses of said office are now paid.

CONCLUSION.

It is, therefore, the opinion of this Department that the expense of the Prosecuting Attorney in performance of sales tax duties for the State are not payable out of the State appropriations of the 59th General Assembly, but that such expenses may be paid out of the County Revenue Fund, as expenses are now paid to Prosecuting Attorneys for attending to State and County matters.

Respectfully submitted,

TYRE W. BURTON.
Assistant Attorney General.

APPROVED:

J. E. TAYLOR

ANIMALS: Free stock range: Interpretation of Section
12778, Revised Statutes Missouri 1929

11-10

November 9, 1937



Mr. Hubert E. Lay
Prosecuting Attorney
Texas County
Houston, Missouri

Dear Sir:

This Department is in receipt of your recent letter requesting an opinion relative to the statutes pertaining to inspection of cattle and other animals.

I

For the sake of convenience, we will attempt to answer the different questions presented in your letter numerically.

"In a county where certain Townships have free stock range would persons shipping or permanently moving cattle or hogs from such townships that have stock law be required to have such stock inspected by the Brand Inspector?

"Would this Article apply to persons moving stock across the county from some other point when they do not have a certificate showing that such stock was inspected in the county from which they were taken? "

Article II, Chapter 88, Revised Statutes of Missouri 1929, consists of Sections 12778 to 12782, inclusive, which were passed by the Legislature in 1921. We are unable to find any decision interpreting the sections by any of our courts, hence we must attempt to glean the meaning of the statute by its own terms.

Section 12778 was amended by the Fifty-ninth General Assembly so that it now reads as follows:
(Laws of Missouri 1937, page 223)

"All persons, firms or corporations shipping, driving or permanently moving any neat or horned cattle or hogs from any county in this State or subdivisions thereof, having free stock range, to any point or destination outside the confines of such county, shall, before removing the same, have such cattle and/or hogs, duly inspected by an authorized brand inspector whose duty it shall be to inspect the same and make a record of all brands, marks, labels of other means of identification and to furnish a certificate thereof to the effect that such cattle and/or hogs, have been duly inspected, to such person, firm or corporation applying therefor, and such brand inspectors certificate shall be legal authority to procede in the removal of such cattle within the meaning of this Article, Provided, that nothing in this Article shall prevent persons or individuals from driving or removing their own cattle from their range as defined in Section 12818 of the Revised Statutes of the State of Missouri, for the year of 1929, to their own premises. "

Taking into consideration the exception as contained in Section 12818, as mentioned in the proviso of Section 12778, quoted supra, we think the statute is plain in its provisions to the effect that persons shipping or permanently removing cattle or other animals from a township having free range to another county are required to have such stock inspected by the brand inspector.

With reference to moving stock and other animals across the county from some other point, when such animals do not have a certificate showing that the stock was inspected in the county from which they were taken, we assume that you mean that the stock is removed from one county having free range across a given county having free range to its final destination in another county. If we are correct in the facts, we are of the opinion that such constitutes a violation of Section 12778, but that the venue of the crime would not be in the county which the animals were transported across but rather in the county of the origin, or, in other words, the point of beginning of the transportation, as Section 12778 uses the expression

"from any county in this State or subdivisions thereof, having free stock range, to any point or destination outside of the confines of such county."

We arrive at this conclusion mainly for the reason that Section 12778a, being the penalty section, and none of the statutes state that an offender may be prosecuted in any county from which such animals are transported or driven over. And the fact that Section 12781 states that it shall be the duty of the inspector or assistants to appear at the place and time designated for such inspection forthwith and inspect such cattle as are intended to be removed or shipped.

II

"Section 12781 says that this article shall not apply to any

cattle not having a brand on the body. Would this in your opinion only apply to cattle which had a figure or device burned on same by a hot iron or would it also include stock which had other marks or labels for identification?

"It appears to me that if this Article could be enforced by placing Brand Inspectors on the Highways leading out of the county we would be able to stop a lot of cattle stealing and I would like to have your opinion on this manner of enforcing it."

The exact exception or proviso of Section 12781 is as follows:

"Provided, that this article shall not apply to any cattle not having a brand on the body."

From an entire reading of Sections 12778 to 12781, it would appear that it was the intention of the Legislature, in passing said sections, to prevent the stealing or the loss of cattle and other animals by mistake caused by the mixing or wandering of such animals when open stock range exists.

The word 'brand' in its significance is defined in State v. Wolfley, 75 Kas. 406:

"The practice of branding has become the recognized mode of marking animals so that the owner may recognize

them, and so widely used is it that it has become almost the only means employed for that purpose When the herd is a large one it becomes necessary that some practically indelible mark should be placed on them, and branding has been found to be the best mark for that purpose. It is in every cattle country a well recognized mode of identification."

In the decision of Churchhill v. Georgia R., etc. 108 Ga. 265, it is said:

"Civ. Code Sec. 2248 makes it the duty of overseers or track menders of railroads to file with the station agents 'a list of the different marks and brands of all stock killed upon their respective sections the preceding week.' It was held that 'brand' indicates some figure or device burned on the animal by a hot iron, a means of identification, and is more commonly used on animals, such as horses, mules, and the like, while others are identified by marks made by knife cuts in the ear, such as cattle, hogs, and the like."

However, even though the decisions indicate that 'brand' means some figure or device burned on the animal by a hot iron, yet, we think that it was the intention of the Legislature to include marks and labels and other means of identification. We base this conclusion on the statutes when read together. The pertinent part of Section 12778, Revised Statutes Missouri 1929, is as follows:

November 9, 1937

"have such cattle * * * *,
duly inspected by an authorized
brand inspector whose duty it
shall be to inspect the same
and make a record of all brands,
marks, labels or other means
of identification."

Therefore, even granting that Section 12781 uses the word "brand," we think that the word "brand," as used in said section, includes not only brands made by hot irons but marks, labels or other means of identification on the body of the animal.

We call your attention to the fact that Section 12780, in mentioning the duties of the sheriff, contains the provision to the effect,

"to be furnished by the county,
showing for whom inspected, show-
ing for whom inspected, date of
inspection, brands, marks or other
description suitable for identifica-
tion."

With reference to the enforcement of Article II, Chapter 88, as stated in the beginning, there are no legal precedents which may serve as a guide; However, we think your suggestion to the effect that brand inspectors may be placed on the highway leading from the county with authority to stop and inspect such cattle or other animals would be an efficient manner to prevent cattle stealing.

However, it would appear that the crime is committed when such cattle are removed before being duly inspected.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

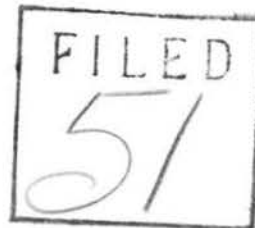
J. E. TAYLOR
(Acting) Attorney General

OWN LC

CRIMINAL COSTS: County must pay costs where defendant has been sentenced to a county jail sentence or by fine even when paroled.

December 16, 1937

Mr. Hubert E. Lay,
Prosecuting Attorney,
Texas County,
Houston, Mo.



Dear Sir:

This is to acknowledge receipt of your letter of December 10, 1937, with reference to costs in a criminal case. Your letter reads as follows:

"I would like to have an opinion on whether the County would be liable for costs in a criminal case where the following proceedings were had?

In February, 1930, Defendant was convicted of felonious assault without malice and his punishment was assessed at \$200.00. At the same term of court, the court made the following order; 'Now on this day it is ordered by the court that stay of execution be granted to the first Saturday in June, 1931, in this cause, it is further ordered, adjudged and decreed by the court that the defendant be paroled to Harry Kelly as to fine only, on condition that he will not again violate the law, and pay costs in this case and report to the court on the first day of each term of this court and from day to day during the term and not depart without leave until discharged.' No bond was given and nothing further was done until in February, 1933. At this time a capias execution was issued by the Clerk and delivered to the Sheriff and under such writ the Sheriff took the defendant in custody. The defendant then filed petition for Writ of Habeas Corpus. The writ was granted and in February, 1932, the Court discharged the defendant on the ground that since no bond was given the defendant has served his time. The defendant never did pay the costs in this case and now the Clerk has made out a fee bill against the County.

Thanking you for this opinion at your earliest convenience."

Will state that Section 3827 R.S. Mo. 1929 reads as follows:

"When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

In Section 3828 R.S. Mo. 1929, you will notice that when the defendant is charged with a capital case and the only punishment is punishment under a capital case or punishment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; but in all other trials on indictment or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law. In *State v. Hackman*, 257 S.W. 457, the sheriff filed a suit of mandamus against the State Auditor who had refused to honor a fee bill in a murder case, for the reason that an instruction had been given upon fourth degree manslaughter. The court in that case held that the instruction was merely an incident in the trial of the case and the fact that the case was a capital case, it became the duty of the state to pay the costs under Section 3828 R.S. Mo. 1929.

The Circuit Courts of this state have the authority to grant a parole for persons convicted under the criminal laws of the state in accordance with Section 3809 Revised Statutes of Missouri 1929. This section reads as follows:

"The circuit and criminal courts of this state, and the court of criminal correction of the city of St. Louis, shall have power, as hereinafter provided, to parole persons convicted of a violation of the criminal laws of this state."

Section 3809 is restricted by Section 3811 of the Revised Statutes of Missouri 1929 in reference to certain crimes for which the defendant cannot be paroled. Section 3811 reads as follows:

"When any person of previous good character

and who shall not have been previously convicted of a felony, shall be convicted of any felony except murder, rape (where the rape charged and the proof shows said rape to have been committed by means of force, violence or by putting the female in fear of immediate injury to her person), arson or robbery, and imprisonment in the penitentiary shall be assessed as the punishment therefor, and sentence shall have been pronounced, the court before whom the conviction was had, if satisfied that such person, if permitted to go at large, would not again violate the law, may in his discretion, by order of record, parole such person and permit him to go and remain at large until such parole be terminated as hereinafter provided: Provided, that the court shall have no power to parole any person after he has been delivered to the warden of the penitentiary."

As you notice under Section 3811 the court is only given jurisdiction under that section to crimes in which the defendant has been punished by imprisonment in the penitentiary only.

Section 3813 Revised Statutes of Missouri 1929 also restricts Section 3809 and sets out the method of the parole. Section 3813 reads as follows:

"When any person shall be paroled under the provisions of section 3811 of this article, it shall be the duty of the court, before or at the time of the granting such parole, to require such person, with one or more sureties, to enter into bond to the state of Missouri in a sum to be fixed by the court, conditioned that he will appear in court on the first day of each regular term of court and during each and every day of such term of court during the continuance of such parole, and not depart without leave of court. Such bond shall be approved by the court, and forfeiture may be taken and prosecuted to final judgment on such bond in the same manner as now provided by law in cases of bonds taken for appearance of persons awaiting

trial upon information or indictment."

You will notice that under Section 3813 of the Revised Statutes of Missouri 1929, the reference to Section 3811, which covers a punishment by imprisonment in the state penitentiary only. In setting out the procedure of parole in this section 3813, it provides that before granting such parole, to require such person, with one or more sureties, to enter into bond to the state of Missouri in a sum to be fixed by the court, etc. Under Section 3810 Revised Statutes of Missouri 1929, this section sets out the procedure for the paroling of a person who has been sentenced by a jail sentence or by an imposed fine only, either by the Circuit Court of a Justice of the Peace. As you notice by this Section 3810, there is no requirement as to making bond before parole as is set out in Section 3813 of the Revised Statutes of Missouri 1929.

Under Section 3817 of the Revised Statutes of Missouri 1929, this section provides that no person under the provisions of Section 3810 shall be granted an absolute discharge at an earlier period than six months after the date of his parole, nor shall such parole be continued for a longer period than two years from date of parole, as set out above. Section 3810 is the section where the conviction imposed a sentence to the county jail or imposed a fine only. Section 3817 further provides that under the provisions of Section 3813 no person shall be granted an absolute discharge at an earlier period than two years from the date of his parole, nor shall such parole continue for a longer period than ten years. Under this latter part of Section 3817, it refers to Section 3813 where the punishment imposed by imprisonment in the state penitentiary.

Your case mentioned in your letter, although it was originally filed on a charge of felonious assault with malice and his punishment was assessed at two hundred dollars (\$200.00), the minimum of the duration of the parole would be not before six months and not more than two years before the defendant should be given an absolute parole.

Section 3818 reads as follows:

"It shall be the duty of the court granting the parole to require the person paroled to pay or give security for the payment of all costs that may have accrued in the cause, unless the person paroled

shall be insolvent and unable to either pay said costs or furnish security for the same. In the latter case the costs shall be paid by the state or county as in other cases without such persons being required to serve any time in jail for non-payment of fine or costs. Such payment of costs by the state or county shall not relieve such person from liability for the same, but if at any time before his final discharge he shall become able to pay said costs, it shall be the duty of the court to require said costs to be paid before granting a discharge, and said costs when so paid shall be turned into the state or county treasury, as the case may require."

As you notice in Section 3818 it specifically sets out to require the person paroled to pay or give security for the payment of all costs that may have accrued in the cause, unless the person paroled shall be insolvent and unable to either pay said costs or furnish security for the same. In the latter case the costs shall be paid by the state or county as in other cases without such person being required to serve any time in jail for non-payment of fine or costs. It also further says that the payment of the costs by the state or county shall not relieve such person from liability for the same, but if at any time before his final discharge he shall become able to pay said costs it shall be the duty of the court to require said costs to be paid before the granting of a discharge. Under this Section 3818 the payment of the costs in this case is mandatory upon the county for the reason that the punishment assessed was only a fine which is covered by Section 3810.

As to the time of the granting of an absolute discharge, the court in your case was governed by Section 3817 wherein the section set out that if no absolute discharge was granted nor the parole terminated within two years and failed to make such an order. Such failure to act should operate as a discharge of the person paroled at the end of two years. The two years limits governing the automatic absolute discharge is set out according to the method of parole in Section 3810 to which Section 3817 refers as the limitation.

You have not asked an opinion of this office as to the collection of this costs, but under Section 3730 Revised Statutes of Missouri 1929, the Clerk of the Court having criminal jurisdiction for the county must issue execution for the costs of convictions in criminal cases. After the execution the parolee

may avail himself of the insolvency act described in Article 20, Chapter 29 of the Revised Statutes of Missouri 1929.

The execution for the costs would only be in the nature of a civil execution and not for the imprisonment for non-payment of the costs for the reason that under the parole act he has been lawfully discharged from the conviction. In 15 Corpus Juris, page 346, Section 868, it is said:

"Costs made in a criminal prosecution are remitted by a pardon before conviction or before judgment and sentence, although after conviction. On the other hand, it is very generally held that, after sentence, the costs have vested and a pardon cannot operate to extinguish the right to them, whether costs of the prosecution or costs incurred by defendant. Nor can the means for collection of these costs be abridged or lessened by a pardon. While the question has usually arisen in cases where the right to the costs was in private persons, yet the rule has been held to apply in respect of costs due the state or the county. It has been held, however, that, although the liability for costs is not extinguished by pardon, there can be no right in the officers or other persons entitled to the costs to imprison him for nonpayment thereof."

"Ryan v. State. 176 Ind. 281. 95 NE 561; Angela v. Com., 10 Gratt, (51 Va.) 696. But see Libby v. Nicola, 21 Oh. St. 414 (dictum to the effect that the pardoning power may release uncollected costs that may be coming to the state).

(a) REASONS FOR RULE.--(1) 'Under existing laws, the costs, which were formerly taxed and adjudged on conviction in favor of such officers, are now taxed and adjudged in favor of the county and State, and such officers are paid for their services by the State or the county out of its own treasury. The costs are the property of the state or the county the same as they were the property of the officers under former laws, and are intended to reimburse, in part at least, the

State and county for the salaries paid to such officers,' Ryan v. State, 176 Ind. 281, 283, 95 NE 561. (2) 'The fine is imposed for the purpose of punishment ***** But with regard to costs it is different. They are exacted simply for the purpose of reimbursing to the public treasury the precise amount which the conduct of the defendant has rendered it necessary should be expended for the vindication of the public justice of the state and its violated laws. It is the money paid, laid out and expended for the purpose of repairing the consequences of the defendant's wrong. It is demanded of him for a good and sufficient consideration, and constitutes an item of debt from him to the commonwealth***** The right to enforce payment of them is a mere incident to the conviction, and thereby vested in the commonwealth for the sole purpose of replacing in the treasury the amount which the defendant himself has caused to be withdrawn from it. And it can make no substantial difference whether the money is going directly to the witnesses and others who are entitled to be paid for their services in the prosecution, or the commonwealth having paid them stands by substitution in their place.' Angela v. Com., 10 Gratt. (51 Va.) 696, 701.

Ryan v. State, 176 Ind. 281, 95 NE 561."

The law of this case is governed primarily by the statute and must be followed directly as set out by the sections therein under the parole act. The sections referred to in this opinion are not conflicting in any respect nor are they ambiguous. In State ex rel. Cobb v. Thompson, State Auditor, 5 S. W. (2d) page 57, the court held as follows:

"A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is

December 16, 1937

no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself."

CONCLUSION

In conclusion it is the opinion of this office that under Section 3818 R.S. Mo. 1929, which section provides for the parole of the defendant who has been convicted of either a felony or misdemeanor, the county is liable for the costs where the defendant has been paroled on a misdemeanor, except costs incurred on the part of the defendant.

It is also the opinion of this office that under Section 3818 R.S. Mo. 1929 that where the person paroled shall be insolvent and unable to either pay said costs or furnish security for the same, in the case of a conviction on a misdemeanor, the costs shall be paid by the county as in other cases without such person being required to serve any time in jail for non-payment of fine or costs.

It is also the opinion of this department that the payment of the costs by the county shall not relieve such person from liability for the same, but that under Section 3730 R.S. Mo. 1929, the clerk of the court, having criminal jurisdiction for the county, must issue execution for the costs of convictions in criminal cases, but after the execution, the parolee may avail himself of the insolvency act described in Article 20, chapter 29 of the Revised Statutes of Missouri, 1929.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

COUNTY CLERK:

FINANCIAL STATEMENT:

Can only receive compensation for making one copy of statement for the publisher

September 13, 1937.

9-14
FILED
52

Mr. Elvin R. Lehman,
Clerk of County Court,
California, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of September 3rd, relating to charges for the preparation of the County Financial Statement. Your letter is as follows:

"The question has arisen as to the Fee properly chargeable for the preparation of the County Financial Statement.

"While the States' Auditors i. e. H. F. Scoffield and J. E. Sanders were auditing the various County Offices in Moniteau County, and at the time when I arranged my Bill for the Statement of Receipts and expenditures of 1935 by and with the advice of Mr. Scoffield I made a Charge for Two copies at 10¢ per Hundred words and Figures, because as he said, (and possibly having been advised by your Office) it was necessary for the Printers to have a Copy for use in printing, and we needed another copy for the information of the Court and for proof-reading purposes etc., therefore I made the above charge.

"Since that time the question was raised as to whether the Statutes would bear us out in making said charge; and I would therefore appreciate it if you would give me your opinion in this matter (with due respect to the opinion of Mr. Scoffield) as I want to be sure before I make my Charge for making the Statement for the year 1936.

"Thanking you in advance for an early reply, I am,"

The form of statement and the compensation is govern by Section 12166 Laws of Missouri 1933, page 356. The pertinent part of said Section is, in part, as follows:

"The statement shall be set in the standard column width measure that will take the least space and the publisher shall file two proofs of publication with the county court and the court shall forward one proof to the state auditor and shall file the other in the office of the court. The county court shall not pay the publisher until said proof of publication is filed with the court and shall not pay the person designated to prepare the statement for the preparation of the copy for said statement until the state auditor shall have notified the court that said proof of publication has been received and that it complies with the requirements of this Section. The statement shall be spread on the record of the court and for this purpose the publisher shall be required to furnish the court with at least two copies of said statement that the same may be pasted on the record. For the preparation of the copy for the statement the court may allow not to exceed the price per hundred words and figures permitted to the clerk of the court for the writing of the record and no pay shall be allowed for pasting printed copy in the record. In submitting bill to the county court the person preparing the statement and the publisher shall itemize the amount as properly chargeable to the several funds and the county court shall pay out of each fund in the proportion that each item bears to the total cost of preparing and publishing said statement and shall issue warrants therefor."

Mr. Elvin R. Lehman.

³
-2-

September 13, 1937.

Analyzing this Section, it appears the publisher must file two proofs of publication with the county court. The section refers frequently to "the preparation of the copy for the statement". We assume that you, as County Clerk, will be designated to prepare a financial statement in the manner and form as set forth in Section 12165. The statute uses the expression:

"For the preparation of the copy for the statement the court may allow not to exceed the price per hundred words and figures permitted to the clerk of the court for the writing of the record and no pay shall be allowed for pasting printed copy in the record."

We call your attention to the fact that the statute uses the word "copy" and not "copies", in other words, the singular and not the plural.

CONCLUSION.

Therefore, we are of the opinion that in the absence of statutory authority entitling you to the same, that you are only entitled to charge for one copy for the statement. We realize that the additional copy is useful and, no doubt, needful but for the reasons stated above, we think the statute only allows you to charge a fee for one copy.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General.

APPROVED:

J. E. TAYLOR

(Acting) Attorney-General.

OWN:LR

INSURANCE } District may insure in non-assessable
FIRE }
SCHOOL DISTRICT } reciprocal insurance.

1/8
January 7, 1937



Hon. Alva F. Lindsay
Attorney for St. Joseph
School District
Kirkpatrick Building
St. Joseph, Missouri

Reinstated
9-18-56

Dear Mr. Lindsay:

We are in receipt of your communication of recent date wherein you request the opinion of this office on the following proposition:

"I am writing you as attorney for the St. Joseph School District.

I am herewith enclosing copy of policy in the Lumbermen's Underwriting Alliance. We will appreciate your opinion as to whether or not the St. Joseph School District can legally carry fire insurance in the form provided in the enclosed policy."

After an examination of the policy submitted, being #56350 in the Lumbermen's Underwriting Alliance of Kansas City, Missouri, and particularly the Guaranty Deposit against assessment agreement attached thereto and made a part thereof and executed by the U.S. Epperson Underwriting Company, we have reached the conclusion that such policy may be purchased by your District.

I.

School District of St. Joseph
may legally carry fire insurance
in the form submitted.

In dealing with the problem presented we assume that the question does not deal with the right of the school board in the first instance to carry fire insurance on the district property, nor does it deal with the power of an insurance exchange or reciprocal to issue non-assessable policies, this latter issue being covered in an opinion of this office dated July 31, 1936, to the Hon. W. W. Graves, Prosecuting Attorney of Jackson County.

Under the provisions of Section 5971 R. S. Missouri 1929, it is required that cash or securities shall be on hand in the office of the attorney in fact equal to fifty per cent of the annual advanced premiums collected, or in lieu thereof one hundred per cent of the unearned premiums or deposits collected together with a guaranty fund or surplus of not less than Fifty thousand or One hundred thousand dollars, depending upon the kind of risk assumed, and an additional loss reserve in the event employers' liability, public liability, workmen's compensation or automobile insurance is written. It is also provided:

"If at any time the amounts on hand are less than the foregoing requirements, the subscribers or their attorney for them shall make up the deficiency."

By the provisions of this Section the legislature contemplated that the attorney in fact might establish such a fund as provided for in the contract in the instant case, and such being the case it appears that the reserve fund set up and established in the instant case is a supplement to that specifically required by law for the purpose of guaranteeing full compliance with the law. The Guaranty Deposit Agreement reads as follows:

"LUMBERMEN'S UNDERWRITING ALLIANCE
Kansas City, Missouri

GUARANTY DEPOSIT AGAINST ASSESSMENT.

WHEREAS contingent liability of subscribers to pay assessments on account of excess losses, if any, is a desirable feature of the plan of Reciprocal Insurance, and

WHEREAS certain subscribers at Lumbermen's Underwriting Alliance desire to be severally relieved from the payment of any and all such assessments;

NOW, THEREFORE, in consideration of the execution by each such subscriber at Lumbermen's Underwriting Alliance of a Power of Attorney or Subscriber's Agreement appointing U.S. Epperson Underwriting Company at Kansas City, Missouri, as attorney to represent each such subscriber in the exchange of indemnity at Lumbermen's Underwriting Alliance, said U.S. Epperson Underwriting Company does hereby agree as follows:

(1) Said U.S. Epperson Underwriting Company hereby states that he has deposited in the assets of Lumbermen's Underwriting Alliance the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00) in cash or securities of the kind required by the Laws of the state of Missouri respecting assets of Reciprocal Insurance Exchanges, said fund to be termed a 'Guaranty Fund' and kept separate from the other assets of Lumbermen's Underwriting Alliance and to be used only for the purpose of paying any assessments on account of excess losses accruing against such subscribers at said Alliance who avail themselves of the provisions of this agreement.

(2) Any assessment made against any subscriber accepting this agreement shall be paid out of said Guaranty Fund by U.S. Epperson Underwriting Company and said payment applied to the credit of such subscriber in discharge of such subscriber's liability to pay such assessment.

(3) Said U.S. Epperson Underwriting Company agrees to maintain said Guaranty Fund as provided for in paragraph (1), and same shall be and remain the property of said U.S. Epperson Underwriting Company, and said Company may from time to time withdraw from said Guaranty Fund any amount in excess of the annual premium deposits on the policies of subscribers to whom the provisions of this agreement apply.

(4) The provisions of the Power of Attorney or Subscriber's Agreement executed by such subscribers referred to herein and applicable hereto are made a part hereof.

(5) This agreement shall become effective concurrently with the policy contract to which it applies and shall terminate with said policy at expiration or cancellation date.

SubscriberThe School District of
St. Joseph, Missouri

Policy Number 56350...Amount \$3,277,500.00
Premium \$27,531.00

IN WITNESS WHEREOF, U.S. Epperson Underwriting Company has caused this instrument to be executed at Kansas City, Missouri, this 14th day of December, 1936.

Agency Ferd LaBrunerie & Son.

U.S. Epperson Underwriting Company

By (Signed) J. W. Ward

Assistant Secretary."

By virtue of paragraph (1) the underwriter or attorney in fact for the alliance has set aside and established a fund of Two hundred and fifty thousand dollars made for the sole purpose of guaranteeing the school board and others holding similar policies against any assessment that might otherwise be made against them. This constitutes a revolving fund established and which must be maintained by the attorney in fact from which is to be paid any and all additional premiums which might otherwise under some circumstances in the future be assessed against the policy holders.

Under the provisions of paragraph (3) of the foregoing agreement the U.S. Epperson Underwriting Company agrees to establish and maintain this reserve fund, adding to such fund any such sums as might be required from time to time so as to maintain the fund at the sum of Two hundred and fifty thousand dollars or its equivalent.

By virtue of these provisions liability of the school board of St. Joseph is limited to the payment of the initial premium set out in the policy and no further or additional demands of any kind may be made upon the school board as representing the district for any further or additional sums irrespective of the losses which may be sustained. This Guaranty Deposit Agreement recites that the provisions of the power of attorney executed by such subscribers are made a part of the agreement and we therefore assume that the power of attorney executed by the policy holders contemplates and authorizes the issuance of this policy in the form submitted.

We are unable to find any case in which the Appellate Courts of this State have passed upon the legal effect of such an agreement but in the case of Sysong vs. Automobile Underwriters, 184 N. E. 783, the Supreme Court of Indiana had occasion to pass upon the validity of an agreement of this general character by which policy holders in the alliance were exempted from the payment of additional premiums. The Court in this case stated, page 786:

"The liability of any subscriber is determined by the terms of the power of attorney executed by and the policy issued to a subscriber. These constitute the contract of each subscriber with all other subscribers. The power of attorney is the controlling factor. The attorney in fact cannot go beyond the powers granted in the power of attorney creating his appointment. He cannot bind the subscriber beyond the limitations expressed in the power of attorney. The limitation set out in each subscriber's power of attorney is known to each subscriber and he also knows that the same limitation is set out in every other subscriber's power of attorney. Each subscriber knows that, in case the amount he has agreed to pay in and the amount other subscribers have agreed to pay is not sufficient to pay his loss, there is no further liability on the part of the subscribers to pay additional sums over and above what they have contracted to pay.

The subscribers have the right to contract among themselves and fix the limit of their liability unless there is some law preventing it, and we are unable to find any holding that the subscribers have not the right to fix the limit of their liability as among themselves, and as to each other. Reciprocal or interinsurance is not a statutory entity, but only regulated by law. It is by private contract that the relations created among and between the subscribers are fixed and determined. * * *

It therefore appears that the contracts entered into are binding and effective even to the extent of a full release and discharge from liability, while in the instant case although the policy holder is subject to no further demand for premium payment a fund is established which is subject to payment of any excessive loss.

Although the Guaranty Deposit Agreement in the instant case is denominated as the property of the attorney in fact we believe that this does not change the situation existing as by the terms of the contract the fund is liable for the payment of any excess loss which might under the ordinary plan be assessed to the subscribers.

The Supreme Court of Wisconsin in the case of Schoetz vs. Insurance Commissioner, 247 N. W. 839, had before it the question as to the status of a similar guaranty fund insofar as stock holders of the attorney in fact were concerned. In this reported case stock holders of the attorney in fact had deposited securities which were used by the attorney in fact as a guaranty fund for the benefit of policy holders in the Reciprocal Exchange. In the course of time the guaranty fund was exhausted, the securities being liquidated and the proceeds paid on claims of the exchange. The stock holder and the attorney in fact were denied recovery of the securities and the Court in the course of the opinion stated, page 841:

"The evidence does not disclose that the policyholders who were members of the 'Association' were ever advised that this \$50,000 guaranty fund was a part of their liability. No mention of it appears in the application for a policy or in the policy itself, and the course of conduct of the directors and officers of the corporation are consistent only with the idea that the obligation rests upon the corporation to refund to the contributors the securities so deposited or the proceeds thereof.

The facts and circumstances thus briefly reviewed furnish sufficient evidence to sustain the ruling of the trial court that no assessment can legally be made against the policyholders or the 'Association' for these claims of the stockholders of the corporation arising out of the agreement by which it secured their stock. * * *

It is quite certain from a reading of the agreement in the instant case that the guaranty fund of Two hundred and fifty thousand dollars established by the attorney in fact is in no sense a liability of the alliance but is a fund established for the benefit of certain policy holders for a valid consideration. It appears that the attorney in fact in the instant case has construed the provisions of Section 5971 as authorizing the attorney in fact to make up any deficiency and have established this fund as one means of accomplishing the statutory requirement. The school district and the other contracting parties are charged with full knowledge of the agreement and understanding. As stated in the case of Griffith vs. Associated Employers' Reciprocal, 10 S. W. (2d) 129, 132:

"Griffith thus being a party to the contract, he, as well as all other parties thereto, could and did, in the instant case, limit their rights and liability as among themselves in such manner that the subscribers do not owe their liability to an individual claimant but to all claimants through the association to the limited extent of two premiums in any year; * * *"

So in the instant case the school district has limited itself by its agreement to the cash premium deposited and all of the subscribers and parties are charged with knowledge of this limitation of liability.

In an opinion dated January 17, 1934, to the Honorable Edward H. Miller, the question was discussed as to the power of directors of a school district to insure property of the district in mutual companies, but in that opinion it was held that where the liability or obligation of the policy holder is fixed in amount on the date of the issuance of the policy and does not depend on losses of similar policy holders the acceptance of such a contract would not constitute the policy holder a stockholder of a mutual insurance company. Page two of the opinion reads in part:

January 7, 1937

"If the liability and obligation of a policy holder under his insurance contract is fixed or determinable in amount at the date of the issuance of the policy or if the obligation and liability of the policyholder does not depend on the losses of similar policyholders or other such contingencies, then the acceptance of such a contract would not make the holder thereof a member of nor stockholder in a mutual insurance company in the real and strict sense of mutual insurance. In other words, such insurance would not be mutual insurance. The character or classification of a fire insurance company, generally speaking, is to be determined from the contract or policy issued by the company and not from the name employed and in use by such company."

The liability and obligation of the school district under the insurance contract is fixed and determined in amount at the date of the issuance of the policy and is limited to the initial premium which has been paid. The obligation and liability of the district does not depend on the losses of similar policy holders or other such contingencies and therefore the district does not become a member of or stockholder in the reciprocal exchange. Such being the case the conclusion which we have reached in this opinion is inescapable.

CONCLUSION

It is therefore the opinion of this office that the school district of St. Joseph, Missouri, may accept the policy of insurance submitted without violating the provisions of Section 47 of Article IV of the Constitution of the State of Missouri.

We are herewith returning to you the policy submitted for examination.

Respectfully submitted,

APPROVED:

HARRY G. WALTNER, Jr.,
Assistant Attorney General

ROY MCKITTRICK,
Attorney General

Enclosure.

DEFINITION OF A BONA FIDE TAXPAYER

March 8, 1937



Honorable Will H. Lindhorst
House of Representatives
Jefferson City, Missouri

Dear Sir:

You recently requested this department to define what is meant by a bona fide taxpayer, as contained in Section 6150, Revised Statutes Missouri 1929.

The section referred to in your inquiry, namely, Section 6150, Revised Statutes Missouri 1929, is as follows:

"No person shall be deemed eligible to any office in the city unless he is a qualified voter of said city, a citizen of the United States and of the state of Missouri, a resident of the city at least one year next preceding his election or appointment, and a bona fide taxpayer of such city for at least two years next preceding his election or appointment."

The Latin words "bona fide" mean good faith.

In the case of Stephens v. Union Graded School District 275 Pac. 1056, the words "bona fide" are defined as equivalent to honestly.

As to the term "taxpayer" it is defined in the case of Castillo v. State Highway Commission 312 Mo. 244, as follows:

"A taxpayer is a person chargeable with tax; a person owning property in the state subject

to taxation and on which he
regularly pays taxes."

Webster's International Dictionary defines taxpayer as

"One who pays a tax;"

It is further defined as

"One who pays any tax or
who is liable for the pay-
ment of any tax."

In the case of State v. Fasse 71 S. W. 1. c.
745, the St. Louis Court of Appeals defines a taxpayer
as a "person owning property in the state subject to
taxation and on which he regularly pays taxes."

In the very early case of State ex rel. v.
Nacklin 41 Mo. App, defines taxpayer as follows:

"If a person owns an interest
in property and pays the tax
thereon, he pays his tax regard-
less of the fact to whom the
property is assessed."

This definition is cited and approved in the
case of State ex inf. v. Menengali 307 Mo. 447.

Therefore, we are of the opinion that a bona
fide taxpayer is one who honestly or in good faith pays
a tax or is subject to payment of a tax on property in
which he has an interest, regardless of the fact to
whom the property is assessed.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

OWN:LC

TAXPAYER: Eligibility to hold public office

March 9, 1937



Honorable Will L. Lindhorst
House of Representatives
Jefferson City, Missouri

Dear Sir:

Replying to your letter of March 8 wherein you
make the following inquiry:

"Would you also define

"If a man's name never appeared on the tax books, personal or real and his bank president says he owns bank stock and the bank pays all the tax and then prorates the charge against the dividend would this man be eligible for any public office in the city according to 6150 Mo. - R. S., "

we submit the following:

In our original opinion to you defining a "taxpayer" we quoted from the case of State v. Menengali 307 Mo. 447, wherein the Supreme Court quoted with approval a very early definition of a taxpayer, as defined in the case of State v. Macklin 41 Mo. App., said definition being as follows:

"If a person owns an interest in property and pays the tax thereon, he pays his tax regardless of the fact to whom the property is assessed."

Therefore, the question resolves itself into whether or not by the bank paying the taxes on the stock owned by a person contemplating being a candidate for public office

constitutes a "bona fide taxpayer" within the meaning of Section 6150, Revised Statutes Missouri 1929.

This question has been decided in the case of Leventhal v. Gillmore 206 N. Y. S. 1. c. 125, wherein the court said:

"Stock in a corporation is an evidence of ownership of a certain portion of its property, and the owner receives a dividend on same, from the income of the corporation. Taxes are a fixed charge on the income of a corporation, and the amount of dividend of one's stock is reduced in proportion to the amount of tax paid; and thus, while the actual title to the real estate may be in the corporate name, the actual owner is the stockholder, and a reduction of his dividend by a tax paid is a payment of tax by him, or on his account, on such property.

"In 1906 the Village Law of this state (Laws 1897, c. 414, sec. 42) provided, as to the qualifications of a person elected as president of a village, as follows:

" 'A president * * * must, at the time of his election and during his term, be the owner of property assessed upon the last preceding assessment roll of the village.'

"The qualification of one Remington, elected president of the village of Ticonderoga, N. Y., was assailed on the ground that he owned no property so assessed. It developed that he owned certain stock in the Ticonderoga Electric Light & Power

Company, which corporation was so assessed for real and personal property on the last preceding assessment roll of the said village, and, on an application to remove the said president as such official, the Attorney General of New York held and stated in his opinion therein as follows:

" 'The statute does not require that the candidate must be assessed upon the last preceding assessment roll of the village, but that he must be the owner of property assessed thereon. * * * I am of the opinion that Mr. Remington comes within the spirit and intent of this act. He is the owner, and was at the time of his election, of property which was assessed upon the last preceding assessment roll of the village, and was, therefore, eligible to the office of president of the village. ' Matter of Hoyt, Opinion Attorney General, 1906, p. 248.

"In departing from the wording of the former statutes on qualification, limiting eligibility to assessment of property, and in the adopting of the broader one of 'resident taxpayer' in the latter statute, the Legislature evidently intended to qualify a larger number of available citizens for these public positions, recognizing the fact that many of them might, in fact, be large taxpayers, under the various schemes of taxation now in effect, and yet not be freeholders, or personally on the assessment rolls, and thereby affording

March 9, 1937

the municipality the benefit of their ability, experience, and activity in public positions of trust. It therefore follows that, at the time of their appointment as commissioners upon the Utica city lands commission as aforesaid, said Frederick J. Bowne and said Clifford E. Lewis, Jr., were each eligible therefor, and that, at all times since their said appointment, acceptance, and qualifying as such members of said board or commission, each said commissioner has been duly qualified, vested, and clothed with all the powers of said office as provided for in and by said act creating such commission. "

In view of the accepted definition of "tappayer" in Missouri, and the decision of the State of New York, we are of the opinion that a person owning bank stock on which the bank is assessed and pays the tax is eligible to public office under Section 6150, Revised Statutes Missouri 1929.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

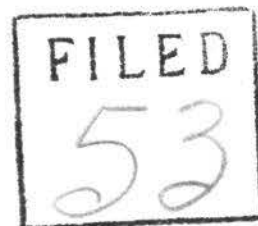
OWN:LC

TAXATION:

of the fourth class are given power to enforce collection of
personal taxes by Sec. 6995, R. S. Mo. 1929.

April 23, 1937.

4-29



Hon. Guy L. Lloyd,
State Representative,
Lawrence County,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of April 13, 1937, requesting an opinion to be rendered to Mr. J. B. Moore, City Collector of Pierce City upon the following questions:

"First:" "Our County Prosecuting Attorney seems to think that there is no way for a city of a fourth class to force the collection of personal taxes'. If there is no law to collect them, please inform me so that our City Clerk will not have to make out a delinquent list of personal property tax. Further inquiry reads as follows:

Second:" "Please give me the interpretation of the Pension Tax Law on Municipal owned water works where the citizens of the town own their own plant and maintain it."

We will take up the questions in the order that they were asked.

The power, of a city of the fourth class, to tax real and personal property is given to those cities by Section 6994 R. S. Mo. 1929, and is as follows:

"In assessing property, both real and personal, in cities of the fourth class, the city assessor shall jointly, with the county assessor, assess all property in such cities, and such assessment, as made by the city assessor and county assessor jointly and after the same has been passed upon by the board of equalization, shall be taken as a basis from which the board of aldermen shall make the levy for city purposes. The assessment of the city property, as made by the city and county assessor, shall conform to each other, and after

such board of equalization has passed upon such assessment and equalized the same, the city assessor's books shall be corrected in red ink in accordance with the changes made by the board of equalization, and so certified by said board, and then returned to the board of aldermen. Provided, that in cities which do not elect an assessor the mayor shall procure from the county clerk of the county in which such city is located, and it shall be the duty of such county clerk to deliver to the mayor on or before the first day of July of each year a certified abstract from his assessment books of all property within such city made taxable by law for state purposes, and the assessed value thereof as agreed upon by the board of equalization, which abstract shall be immediately transmitted to the council, and it shall be the duty of said council to establish by ordinance the rate of taxes for the year. A lien is hereby created in favor of such city against any lot or lots or tract of land for any such tract assessed by such city against the same, which said lien shall be superior to all other liens or encumbrances except the lien of the state for state, county or school taxes."

The power to enforce the collection of delinquent taxes in fourth class cities is given in Section 6995 R. S. Mo. 1929, which is as follows:

"Upon the first day of January of each year all unpaid city taxes shall become delinquent, and the taxes upon real property are hereby made a lien thereon. The enforcement of all taxes authorized by this article shall be made in the same manner and under the same rules and regulations as are or may be provided by law for the collection and enforcement of the payment of state and county taxes, including the seizure and sale of goods and chattels, both before and after said taxes shall become delinquent: Provided, that all suits for the collection of city taxes shall be brought in the name of the state, at the relation and to the use of the city collector."

This section provides, among other things, that cities of the fourth class shall collect delinquent taxes, both real and personal, in the same manner that delinquent taxes are collected for state and county purposes. Section 9940 R. S. Mo. 1929, prescribes the manner in which delinquent state and county personal property taxes are to be collected and would govern the procedure in suits to enforce collection of said delinquent taxes in cities of the fourth class.

In *State v. Dunn*, 209 S.W., 1.c. 112, the court, in construing a statute, said:

"It is a well settled rule that the Legislature is not to be held to have done a vain and useless thing."

In *Missouri Granitoid Co. v. George*, 131 S.W. 1.c. 472, the court, in construing a statute before it, said:

"Statutes are not to be construed so as to pervert the very object aimed at."

The Legislature gave power to cities of the fourth class to assess personalty in Section 6994 R. S. Mo. 1929, and to say that the Legislature did not also provide a means to enforce the collection of the personal tax authorized, would be holding the Legislature to have done a vain and useless thing and pervert the very object of Section 6994 R. S. 1929.

The statutes above referred to are plain and unambiguous and as such are not even open for construction, and clearly prescribe the manner to be used in enforcing collection of personal delinquent taxes in cities of the fourth class.

There are several cases in our reports in which suits have been brought to enforce collection of delinquent personal taxes in cities of the fourth class, and we are citing two merely as a guide. (*Corn v. City of Cameron*, 19 Mo. App. 573; *State v. Collier*, 256 S.W. 455). These cases are not directly in point since the authority of the city to bring said suit was not questioned, but we are citing them, as heretofore stated, merely as a guide.

CONCLUSION.

Therefore, it is our opinion that cities of the fourth class are given power by Section 6995 R. S. Mo. 1929, to enforce the collection of delinquent personal taxes, and the city collector may bring suit to collect said tax in the name of the state, at the relation and to the use of the city collector.

Hon. Guy L. Lloyd, 4.

4-23-37.

We cannot ascertain just what "Pension Tax Law" is referred to in the second question before us, and suggest, if you desire an opinion upon this question, to write and make your request as clear and definite as possible.

Respectfully submitted,

HARRY G. WALTNER, JR.,
Assistant Attorney-General

APPROVED:

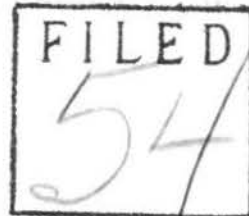
J. E. TAYLOR
(Acting) Attorney-General.

LLB/LD

SALARIES AND FEES:

CIRCUIT CLERKS: County Court is authorized to fix the number and compensation of deputies to the Circuit Clerk, and the Clerk must abide thereby

January 14, 1937



Honorable Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

We are in receipt of your inquiry, which is as follows:

"Will you please give me a ruling on the following situation?

"In our County the offices of Circuit Clerk and Recorder are combined. There is a Deputy Circuit Clerk who works in the Circuit Clerk's office and the Circuit Clerk and Recorder ex officio spends the majority of his time in the Recorder's office. This Circuit Clerk is now requesting the County Court to furnish him another full time Deputy to stay in the Recorder's office. The Court agreed to allow him an additional \$500.00 for clerk hire but he contends that such is not a sufficient amount and is endeavoring to compel the Court to pay the person whom he has employed \$1200.00. The Court has refused to do this. It seems to me that from this law it is clear that the Circuit Clerk can appoint his Deputy but the amount of the

January 14, 1937

salary is set by the County Court.
Please give me an official ruling."

Section 11528, Laws of 1933, page 360, provides:

"The clerks of the circuit courts shall be ex officio recorders in their respective counties, except in counties containing 20,000 inhabitants or more."

By the last Federal census the population of Pike County is 18,001 and it follows that the clerk of the circuit Court is exofficio recorder in Pike County.

Section 11786, Laws of 1933, page 370, dealing with salaries and fees of circuit clerks and their deputies, states:

"Provided, that in any county wherein the clerk of the Circuit Court is ex-officio recorder of deeds, said offices shall be considered as one for the purpose of this section."

However, it further provides that the circuit clerk may retain, in addition to the fees allowed under that section, all fees earned by them in cases of change of venue from other counties. It fixes the salary of the clerk of the circuit court in counties having a population of 17,500 and less than 20,000 persons at the sum of \$1900.00 per year.

Section 11812, Laws of 1933, page 371, provides, with reference to the deputies and assistants for the circuit clerk, in the following way:

"Every clerk of a circuit court shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the county court, as such court shall deem necessary for the prompt and

proper discharge of the duties of his office. The County Court, in its order permitting the clerk to appoint a deputy or assistant, shall fix the compensation of such deputy or assistant which, in counties having 12,500 persons and less, shall not exceed the amount allowed deputy or assistant to the county clerk for the actual time employed and shall designate the period of time such deputy or assistants may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the county clerk. The clerk of the circuit court may at any time, discharge any deputy or assistant, and may regulate the time of his or her employment, and the county court may, at any time, modify or rescind its order permitting any appointment to be made, and may reduce the compensation theretofore fixed by it."

Section 11814 requires the clerk of the circuit court to quarterly pay into the county treasury the amount of any fees collected in excess of the sums permitted to be retained for services and pay of deputies and assistants, and places liability on his official bond for all fees collected and not accounted for by him as provided by law. By the terms of Section 11812, supra, it appears that the Legislature has left to the wisdom and discretion of the county court the authority and duty to determine the number of deputies and assistants that the clerk of the circuit court is authorized to employ, and has likewise left the authority lodged in the county court to fix the compensation of such deputies. The Legislature has provided as to counties of 12,500 and less a maximum amount that may be paid out as compensation to deputies, but the maximum amount has not been designated by the Legislature as to counties having a

January 14, 1937

population of more than 12,500 persons, the amount of money therefore required being left to the wisdom of the county court. In order that no mistakes or misunderstandings arise with reference thereto the Legislature likewise made a safeguard, in the following, in providing that the county court should enter of record their order fixing the deputy hire and a certified copy thereof is required to be filed in the office of the county clerk. Discretion is lodged in the clerk of the circuit court to discharge any deputy at any time he sees fit and also to regulate the time of his employment; likewise, the county court is left with the residual authority to at any time modify or rescind its order permitting any appointment to be made or to reduce the compensation theretofore fixed by it for such deputy.

CONCLUSION

It is our opinion that the county court of Pike County is authorized to determine and fix the amount of compensation payable to the deputies in the office of circuit clerk and recorder, and that the clerk of the circuit court does not have authority to compel the court to pay deputies in his office a greater amount than the county court sees fit to authorize.

Very truly yours,

WM. ORR SAWYERS,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

DW:LC

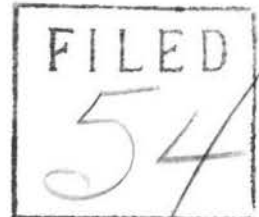
OFFICERS

COUNTY COURTS: Where no restrictive words are used in the statute providing for the holding over of an officer, such person holds over until his successor is duly appointed and qualified.

The policy of selecting an individual by the court to any office within the county should be left to the discretion of the court.

February 24, 1937

2-27



Mr. Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Mr. Long:

This will acknowledge receipt of your letter of recent date requesting an opinion from this department upon the following set of facts:

"Our County Court here is endeavoring to select a Highway Engineer. Each of the three judges have a candidate and are dead-locked as neither of them will yield. They have asked me for the following rulings.

(1) Under the above situation will the present Highway Engineer hold over until his successor is appointed?

(2) Under the present situation should the Presiding Judge, who is the Presiding Officer, support a candidate of his own or should he break the tie and support one of the candidates advanced by one of the other judges?"

Your attention is directed to Section 8006, R. S. Mo. 1929, relating to the appointment of a county highway engineer, which reads as follows:

"There is hereby created in the several counties of the state of

Missouri the office of county highway engineer, and the county courts of each county in this state are hereby authorized and empowered to appoint, and may appoint a highway engineer within and for their respective counties at any regular meeting for such length of time as may be deemed advisable in the judgment of the court, at a compensation to be fixed by the court."

It is to be noted from the above section that the county courts in all counties of this state are authorized and empowered to appoint, and may appoint, a county highway engineer for such length of time as may be deemed advisable in the judgment of the court. This section of the statute does not give the court power to appoint an engineer for any definite length of time, except to say for such length of time as may be deemed advisable in the judgment of the court.

Under the provisions of Article XIV, Section 5, of the Constitution of Missouri, it is provided:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

Your precise question as to whether a county highway engineer may hold his office until his successor is duly appointed, or chosen, was ruled upon in the case of Langston vs. Howell Co., 79 S. W. (2nd) 99, 1. c. 102. The Court, in passing upon the constitutional provision above cited, as well as the statutory provisions said:

"Our Constitution (section 5, art. 14)

provides that: 'In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified,' and section 11196 R. S. 1929 (section 6168, R. S. 1919), Mo. St. Ann. Sec. 11196, p. 6141, reads: 'All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified.' We find no constitutional or statutory provision which either expressly or by implication excludes the county highway engineer, or the office of county highway engineer, from the operation and effect of the foregoing constitutional and statutory rule so that since there is no 'contrary provision' the rule so prescribed must be applied. It is said in 46 C. J. p. 968: 'The general trend of decisions in this country is that, in the absence of an express or implied constitutional or statutory provision to the contrary an officer is entitled to hold his office until his successor is appointed or chosen and has qualified.' Langston's official term was fixed at one year, but upon the expiration thereof, no successor having been appointed, his right to hold such office, and his title thereto, continued until the right of a duly appointed and qualified successor attached. His right to hold over and his continuance in the office was of course contingent and defeasible subject to be terminated at any time by the appointment and qualification of his successor. During the time an officer so holds over, under the provisions of the constitutional and sta-

February 24, 1937

tutory provisions, supra, he holds the office as a de jure officer (46 C. J. p.969) and by the same tenure, at the prescribed term, until the right of his duly chosen and qualified successor attaches. It therefore appears that the trial court was in error as to the applicable rule of law, and in holding that Langston was not entitled to hold over and continue in office after the expiration of the term prescribed by the order of appointment."

In light of the above, it is the opinion of this department that your present county highway engineer is permitted to continue in his office until such time as a successor is duly appointed and has qualified.

We are reluctant in respect to your second question to suggest to the county court, or any of its members, as to what they should do in order to break a "dead-lock" which exists.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

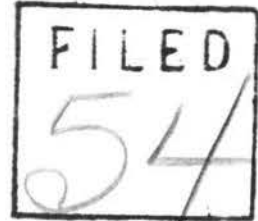
J. E. TAYLOR
(Acting) Attorney General

RCS:RT

SCHOOLS: The erection of a second story on present school building is not a "repair" so as to require only majority vote of qualified voters, but must be given two-thirds majority by voters.

6-9

June 8, 1937



Honorable Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

This department is in receipt of your letter of May 8, 1937, in which you request an opinion as follows:

"The Clarksville School District at the last school election voted for a levy of 20¢ on the \$100.00 assessed valuation as provided for under Section 9226 of the Revised Statutes of Missouri, 1929. The ballot read as follows: For a levy of 20¢ on the \$100 assessed valuation for repair and building purposes. There were 210 cast for the levy and 159 against. This tax money which will be raised is to be actually spent on putting a second story room over the present school building. As provided in Section 9226 a levy must receive two-thirds of the vote cast if the purpose of such levy is for buying or erecting school buildings. If such levy is to be used for repairing or re-furnishing a school building only a majority of the votes cast is necessary. Under those conditions as set out above and set out in the ballot was it necessary that the levy receive a two-thirds vote or a majority."

In answer to a part of your question, we are enclosing an opinion heretofore handed down by this office on May 8, 1936, and written by the Honorable Olliver W. Nolen, Assistant Attorney General, to Mr. L. H. Coward, Superintendent of Public Schools of Greene County, in which Mr. Nolen concludes that:

"It is the opinion of this department that only the majority of the qualified voters of a school district are required to carry a proposition solely for the purpose of repairing and furnishing a school building."

In your request you state that the tax money to be raised by the levy will actually be used to construct a second story on the present school building. This, then, brings us to the question as to whether or not this levy is solely for the purpose of repairing and furnishing the school building, so as to require the assent of only a majority of the qualified voters of the school district.

The word "repairs" as it is used in Section 9226 R. S. Mo. 1929, has been judicially defined a number of times in other jurisdictions which have statutes similar to ours.

In the case of Board of Education of Hancock County, et al. v. Moorehead, et al., an Ohio case reported in 136 N. E. 913, 914, the Supreme Court of that state said:

"Repairing, which means, as we understand it, the restoring of a decayed, injured, dilapidated, or partially destroyed building to a more or less sound, substantial state."

In the case of Murphy v. Duffy, Town Treas., et al., a Rhode Island case reported in 124 Atl. 103, 105, where a school district sought to build another story on its school building without a vote as was required by statute, the Rhode Island Supreme Court said:

"We will consider the nature of the work provided for in the contract between the special committee and McCusker. We regard it as a contract for new construction to furnish additional school facilities for the town. It was not for repairs upon the old school building, save in some minor particulars."

In the case of Kuykendall v. Hughey, 224 Ill. App. 550, 553, the court said:

"The contention of appellants cannot be sustained on the theory that the building of the additional room is but the repair of the school house and that repairs may be made without a vote of the people. In our opinion the word 'repair' is used in the statute in its ordinary sense and means restoration after decay, injury, or partial destruction, and does not include alterations or additions which the directors may choose to make."

In the case of Hacken v. Isenberg, 288 Ill. 590, a case where the word "repairs" as used in a clause in a lease was before the court for interpretation, the court said:

"The word repair has its ordinary meaning in this clause as given in Funk & Wagnall's New Standard Dictionary: Restoration after decay; waste; injury or partial destruction; supply of loss, reparation. It does not include, in this lease, alterations or additions that lessee may choose to make."

The cases we have quoted from, we think, define "repairs" as used in our statutes in connection with voting a tax levy in school districts for the repair of school buildings. The levy in the instant case was for "repair and building purposes" and in no way, in view of the premises, can the construction of a second story on the present school building be interpreted to mean "repair" as this term has been judicially defined.

Therefore, it is the opinion of this department that the erection of a second story upon the present school building is not a "repair" in the sense that the word is used in Section 9226, R. S. Mo. 1929, and unless the tax levy was for the sole purpose of repairing and furnishing a school building, the proposition submitted to the qualified voters must receive their assent by a two-thirds majority as is provided by Section 9226, R. S. Mo. 1929, and in accordance with the opinion attached hereto.

Further, the proviso in Section 9226 R. S. Mo. 1929 provides;

"That when the proposition to be voted on refers only to repairing or furnishing, or both repairing and furnishing such school building, the proposition shall be deemed to have been carried at the election if a majority of the votes cast are cast in favor of the proposition."

The proposition submitted in the instant case did not "refer only to repairing and furnishing" but was for "building and repair purposes". This proposition was defeated for failure to receive two-thirds majority vote, but did receive a majority vote. This however does not carry the proposition as to "repair", because said proposition referred to "building" and the levy failed to carry for any purpose when it did not receive the two-thirds majority and cannot be levied and collected.

Respectfully submitted,

JAMES L. HORNBOSTEL
Assistant Attorney General

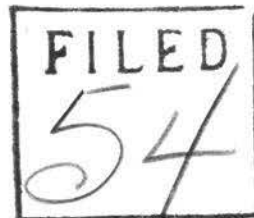
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB:SW

LOTTERIES- "ANNIE-OAKLEY" MACHINES.

July 13, 1937



Mr. Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

We have your request of July 1, 1937, which is
in words and figures as follows:

"Please give me a ruling as to whether or not a machine operated as follows is a violation of the gambling laws of this State. You will find enclosed herewith a cut of this particular machine. There is a square card with the letter S on each corner placed in the back of this machine and you are entitled to three shots with a rifle for ten cents. If you are able with the three shots to shoot one of the letter S completely out of the card you win a jack-pot which is paid in cash. The machine itself does not pay off but the operator pays if you will win.

Please give me a ruling as to whether or not a pin ball machine that is so construed that when the player scores a certain

July 13, 1937

number of points that the machine automatically trips itself so that he is permitted to play an additional free game or games. There is no pay off either by the machine or by the operator but the machine is so mechanically constructed that it can be played for the additional games."

Section 4287, R. S. Missouri, 1929, provides in part as follows:

"Every person who shall set up or keep any table or gaming device commonly called A B C, faro bank, E O, roulette, equality, keno, slot machine, stand or device of whatever pattern, kind or make, or however worked, operated or manipulated, or any kind of gambling table or gambling device adapted, devised and designed for the purpose of playing any game of chance for money or property and shall induce, entice or permit any person to bet or play at or upon any such gaming table or gambling device, or at or upon any game played or by means of such table or gambling device or on the side or against the keeper thereof, shall, on conviction, be adjudged guilty of a felony,"

The "Annie-Oakley" machine as described in your letter together with circular attached thereto, contains all the gambling elements of a lottery scheme, namely; prize, consideration and chance. State v. Emerson, 1 S.W. (2d) 109.

An effort has been made to dress up this machine so as to make it a game of skill through the method of requiring the operator to shoot the targets. Efforts have previously been made to camouflage lotteries by dressing them up as games of skill. Such games of skill as the throwing of a ball, *People v. Baddeley*, 36 Pacific (2d) 634, and a dart game, *State v. Schwelner*, 60 Pacific (2d) 938, have been held to be lotteries and not games of skill.

In *Commonwealth v. Plissner* (1936), 4 N. E. (2d) 241, the Supreme Court of Massachusetts held a grabbing machine played by the skill of the operator was a lottery. In the approved charge of the trial court we find the following, l.c. 245:

"That means that it is not necessary that a game should be a lottery because chance should predominate or that skill should predominate. As you will hear me say later, if there is a chance as an effective and active cause in the game, even though skill we will say might be ninety per cent and chance the rest the game is still a lottery. * * * Assume * * * that by nature or by experience, or by both, a player should come to have and be able to exercise the very greatest degree of skill which the construction of that machine permits to be used, and that he actually exercises that skill to the extreme limit required in order to win, required possible in order to win * * * then ask yourselves this question * * * does there still remain before the player can succeed, 1st. An opportunity for the taking effect of one or more forces over which by reason of the construction of the machine the player can have no possible control? * * * 2nd. A sure and certain possibility that such uncontrollable forces will take effect at each and every operation of the machine by reason of the nature and construction of the mechanism? * * * 3rd. A cer-

Mr. Edward V. Long

-4-

July 13, 1937

tainty that if those uncontrollable forces do take effect the player will be unable to win his prize?"

This office has previously written opinion with reference to similar so-called devices such as "Rocket", "Sportsman", "Whiffle Boards", "Ball Machines", "Tit-Tat-Toe Machines", "Suit Clubs", "Weekly Drawings", "Win-O", "Pay-Off", "Hollywood" and similar schemes, holding them all to be violations of state lottery law of Section 4314, R. S. Missouri, 1929.

It is, therefore, the opinion of this Department that the machine described in your letter and known as the "Annie-Oakley" machine, is in violation of the gambling and lottery laws of this state.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR (Acting)
Attorney General

FER MR

TAX ON DOGS: Construction Section 12874b, House Bill 149, 1937 Session Acts. Penalty on dogs running at large without payment of taxes not amended by House Bill 140.

Spetember 18, 1937 ^{10/9}



Mr. Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

This Department wishes to acknowledge receipt of your request for an opinion which is as follows:

"Please give me a ruling on the following situation:

The last legislature passed certain laws relative to a tax on dogs. Please tell me how far back can we go to compute stock losses which would come under this law. Are such losses payable if occurred only after September 6th, 1937, or as set out in Section 12874b of such acts at the time running from March 1st, 1937.

Also what provisions are to be made for the enforcement of this law in the event parties fail to comply therewith in the purchase of dog license."

Three sections of Article XII, Chapter 88, of the 1929 Statutes were amended by House Bill 140, 1937 Session Acts, among which is Section 12874b, which is as follows:

"The county court shall between the 1st and 15th days of March of each year hereafter meet in session to consider and examine said applications and affidavits covering losses over a period of one year, which said year shall be from the 1st of March of the year prior to the meeting of said court to the last day of February of the same year on which it meets. The

court shall examine carefully each application and affidavit which has been filed before the first day of March, and after hearing all evidence in the matter shall pass such judgment as the Court may deem equitable. Whenever the county court meets pursuant to the provisions of this article each member shall receive his mileage and per diem out of the county dog license fund."

This section means that the County Court shall meet in session under Section 12874b of House Bill 140, between the 1st and 15th day of March 1938, and each year thereafter, to consider and examine applications and affidavits covering losses (live stock or poultry) over a period of a year, which said year shall be from the 1st day of March of the year prior to the meeting of the Court to the last day of February of the same year on which it meets, said year above referred to beginning March 1, 1938, to the last day of February 1939, and each year thereafter.

The bill went into effect September 6, 1937, there being no emergency clause, and the Court could only examine applications and affidavits covering that part of a year from that date to the period when the Court meets in March 1938.

To hold differently, i. e., that the Court had to examine applications and affidavits covering a full year prior to the time of its setting in March 1938, would make the law as to the first year retroactive.

In the case of Supreme Council vs. Heitzman, 140 Mo. App. 1. c. 111, the Court in passing on this question said:

"Statutes will not be held to affect transactions which antedate them, unless the intention of the Legislature for them to retroact is clear, and especially is this the rule when the opposite construction would render a statute unconstitutional and void.

September 18, 1937

CONCLUSION

Therefore, it is the opinion of this Department that applications and affidavits covering losses of live stock or poultry by being injured or killed by dogs, are for a period beginning September 6, 1937, to the last day of February 1938.

II.

House Bill 140 repealing Sections 12872, 12873 and 12874, Article XII, Chapter 88 of the 1929 statutes, did not embody any enforcement or penal clause, but the penal clause is in (unamended) Section 12880 in said Article XII, 1929 Statutes, which is as follows:

"Every owner of a dog and every person who shall suffer or permit a dog to remain upon such premises under his immediate control without having caused such dog to be listed and the tax thereon to be paid as provided for by this article shall be guilty of a misdemeanor, and on conviction thereof fined not less than five dollars nor more than twenty-five dollars. Provided, that none of the provisions of this article shall apply to cities which now have or may hereafter have a population of 300,000 inhabitants or more."

Also, Section 12877 in Article XII supra, provides for the impounding of dogs running at large without collars marked as provided in said article.

CONCLUSION

It is therefore the opinion of this Department that House Bill 140, 1937 Session Acts, being an amendment of a part of Article XII, Chapter 88, 1929 Statutes, and including no provision for a penalty for a failure to pay a dog tax, such penalty would be fixed by said Article XII, Chapter 88, 1929 Statutes.

Respectfully submitted,

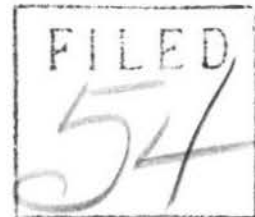
APPROVED:

S. V. MEDLING,
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

COUNTY CLERK: Deputies and Assistants: Method of Salary.

10/29
October 18, 1937



Mr. Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of October 13, 1937, with reference to the construction of Section 11811, Laws of Missouri 1937. Your letter reads as follows:

"The County Clerk of this County has asked that I secure a ruling from your department for him on the following situation.

Section 11811 Missouri Laws 1937 provides that the Clerks of the County Courts and their deputies and assistants, shall receive for their services annually, to be paid out of the County Treasury in monthly installments at the end of each month by warrants drawn by the County Court upon the County Treasury. I would like your opinion on whether the Court should issue one warrant for total due the Clerk and deputies to the County Clerk and him to disburse to the deputy the amount due them or should the

Court issue to the Clerk
one warrant for the amount
due him and issue to each
deputy a separate warrant
for the amount due them."

In answer to your letter will state that Section 11811 of the Laws of Missouri, 1937, reads as follows: (page 441)

"Salaries of county clerks,
deputies and assistants -
fees to county treasury.

"The clerks of the county
courts of this State and
their deputies and assist-
ants shall receive for their
services annually, to be
paid out of the county
treasury in monthly install-
ments at the end of each
month by warrant drawn by
the county court upon the
county treasury, the follow-
ing sums: * * * * *

In 59 Corpus Juris, paragraph 569, page 952,
it is said:

"The intention of the legisla-
ture is to be obtained primarily,
from the language used in the
statute. The court must impartial-
ly and without bias review the
written words of the act, being
aided in their interpretation
by the canons of construction.
Where the language of a statute

is plain and unambiguous, there is no reason for construction, even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it because of some supposed policy of the law, or because the legislature did not use proper words to express its meaning, or the court would be assuming legislative authority. "

The case of Keane v. Strodtman, Sheriff, 18 S. W. (2nd) 896, at paragraph 5 states:

"Certainly, where, as at bar, the statute limits the doing of a particular thing to a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done. This is the general rule as to the application of the maxim. Even more relevant under the facts in this case is the interpretation given to it by the Kansas City Court of Appeals in Dougherty v. Excelsior Springs, 110 Mo. App. 623, 626, 85 S. W. 112, 113, to this effect: 'That when special powers are conferred, or where a special method is prescribed for the exercise and execution of a power,'

that exercise is 'within the provision of the maxim * * * and * * * forbids and renders nugatory the doing of the thing specified except in the particular way pointed out. ' "

In State ex rel. Cobb v. Thompson, State Auditor, 5 S. W. (2d) page 57, the Court held as follows:

"A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself."

Section 12169, Revised Statutes of Missouri 1929, gives a form of county warrant to be used by the county court on its order to the county clerk.

Section 12170 of the same statute reads as follows:

"Every such warrant shall be drawn for the whole amount ascertained to be due the person entitled to the same, and but one warrant shall be drawn for the amount allowed to any person at one time, and shall be written or printed in Roman

Mr. Edward V. Long

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October 18, 1937

letters without ornament.
It shall be signed by the
president of the court
whilst the court is in
session, attested by the
clerk, and warrants shall
be numbered progressively
throughout each year:
* * * * *

In conclusion will state that, taking into consideration the original session law under which you asked construction and decisions in reference to same, it is the opinion of this Department that the county court must draw the warrant on the county treasury in the name of each clerk, deputy and assistant clerk.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB LC

- TAXATION:
- (1) Co-tenants may redeem undivided interest in real estate or redeem entire interest and hold as trustee for the other co-tenant the interest such co-tenant formerly owned.
 - (2) Mortgagee may, within statutory period, redeem from stranger purchasing certificate at tax sale. Record owner may within statutory period, December 8, 1937 redeem from mortgagee

Mr. Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri



Dear Mr. Long:

We wish to acknowledge your request for an opinion of November 24, 1937, which is as follows:

"The Collector of this County has requested that I secure a ruling on the following situation relative to the tax redemption law for him.

"A and B own a piece of property together which was sold for taxes to C. Within less than one year A redeems this property from C and pays the taxes for the following year and is given a deed at the end of the two year period. Can A redeem all of the property when he has only a part interest and if he does can he cut out the interest of B who was a joint owner with him?

"A owns a piece of real estate on which B has a mortgage. The property is sold to C for taxes and B, the holder of the mortgage, redeems the property. Does he thereby get a good title and cut off the interest of A?"

I

Section 3114, 1929 statutes, relating to tenants in common, is as follows:

"Every interest in real estate granted or devised to two or more persons, other than executors and trustees and husband and wife, shall be a tenancy in common, unless expressly declared, in such grant or devise, to be in joint tenancy."

Therefore, your first question is one of the rights of tenants in common who have an undivided interest in or share in real estate.

Section 9955b, 1933 Session Acts, at page 436, providing who may redeem an undivided share in real estate, is as follows:

"Any person claiming an undivided share in any land out of which an undivided part shall have been sold for taxes, may redeem his undivided share by paying such portion of the purchase-money, interest, penalty and subsequent taxes as he claims of the land sold."

One having an undivided interest in real estate could therefore, under the above statute, redeem his undivided interest therein.

We are unable to find anything in said statute prohibiting such party from redeeming the entire interest in the land but in event that he did redeem the entire interest in the entire tract he would hold the interest of his co-tenant in trust for such co-tenant, who could assert his rights under such redemption.

The confidential relation of tenants in common and an implied obligation on the part of each to protect the common title is construed in the case of *Hinters v. Hinters*, 114 Mo. l. c. 29, in the following language:

"Tenants in common occupy a confidential relation to each other, and because of this relation there is an implied obligation on the part of each to sustain and protect the common title. It is, therefore, a general rule that if a tenant in common buy up an outstanding title or incumbrance, the purchase will be deemed to have been made for the benefit of all the co-tenants, the other co-tenants being bound, however, to contribute their respective proportions of the consideration paid for the outstanding title or incumbrance. Freeman on Co-tenancy & Partnership (2 Ed.) secs. 151, 156; Allen v. DeGroodt, 105 Mo. 442. In this case Julius Hinters, one of the co-tenants, caused the property to be sold under the deed of trust to the end that he could acquire the entire legal title at the amount of the incumbrance which was not more than a sixth part of the value of the property; and there can be no doubt but that he took and held that title in trust for himself and his co-tenants. The plaintiffs have the undoubted right to call upon him and his estate for an accounting and for title, unless barred by the statute of limitations."

In Kohle v. Hobson, 215 Mo. 1. c. 217, the same rule is stated, the case of Hinters v. Hinters, supra, being quoted therein, said rule being stated as follows:

"As a general rule, one tenant in common cannot purchase, for his own exclusive use and benefit, an interest in real estate which is the common property of himself and others; but when he does so he holds the title thus acquired as the trustee for the use and

benefit of his cotenants, who may compel him to convey to them their respective interests, upon refunding to him the amount expended in the acquisition of the title and costs attending the sale and execution of a deed or deeds to the party or parties interested.

* * * * *

"In the case last cited it is held that, where one of the tenants in common of a tract of land which had been sold for taxes, instead of redeeming directly from the sale, made an agreement with the holder of the certificate of purchase that the latter should take out a tax deed thereon and then convey the premises to the former, which was done, the transaction amounted to but a redemption for the benefit of both tenants in common, and that a court of equity would compel the one taking a conveyance of the tax title to convey to the other one undivided half of the tax title upon payment of half the cost thereof.

"The certificate of purchase did not, of course, pass the title, but only entitled the purchaser, or the defendant as his assignee, to a deed passing the title at the expiration of two years from the time of the tax sale, during which time any of the cotenants had the right to redeem the land; and defendant's purchase of the certificate of purchase, as before stated, amounted to nothing more than a redemption from that sale, and inured to the benefit of his wife and her cotenants."

The rule is stated in *Stephens v. Ellis*, 65 Mo. l. c. 461, where, at a partition sale of land under a decree of court, the buyer is part owner, such judicial sale severs the co-tenancy and the buyer cannot make the former co-tenant contribute to extinguish incumbrances but in the following paragraph the same decision states that the above rule does not apply to the rights of cotenants under a tax sale in the following language:

"The payment of money to remove a tax or other lien by the co-tenant during the tenancy, or the expenditure of money to preserve the common property, presents entirely different considerations. And so in regard to voluntary partitions. *Jones v. Stanton*, 11 Mo. 433; *Picot v. Page*, 26 Mo. 399."

In *Becker v. Becker*, 254 Mo. l. c. 681, the above excerpt in *Stephens v. Ellis*, supra, is quoted. Also, in the *Becker* case, supra, the court gives its conclusion as to the rule on this point in *Kohle v. Hobson*, supra, which is in the following language:

"In *Kohle v. Hobson*, 215 Mo. 213, the life tenant in possession permitted land to be sold for taxes. The husband of one of the tenants in common procured a third person to buy the property, and before the time for the redemption of the certificate of purchase had the certificate assigned to him. Suit was brought to redeem by one of the cotenants who was a minor at the time of the tax sale. Held, that the purchase of the certificate of redemption did not confer title and that its purchase by a husband of one of the cotenants before the time for redemption created a trust which inured to the benefit of all of the cotenants."

The rule stated in *Jones v. Stanton*, supra, l.c. 280, and quoted in the above opinions, is as follows:

"Jones being a co-tenant with his brother's heirs, was as much bound to pay the taxes as they were. Each of the owners were severally liable for them. If a tract of land is mortgaged for a joint debt by two, will the discharge of the incumbrance by one of them vest the legal title in him to the whole? He who pays the debt is not without recourse against his co-debtor, but by doing that which he was bound to do, he cannot, under the pretence that another was liable to do the same thing, deprive him of his rights. In the case of *Williams v. Gray*, 3 Greenl. 207, two non-residents held in common an unsettled tract of land, which without their knowledge, was sold for the non-payment of the State taxes; and they afterwards made partition by mutual deeds of release and quit-claim, in common form; after which one of them, within the time of redemption, paid the tax to the purchaser at the sheriff's sale, from whom he took a deed of release and quit-claim to himself alone, for the whole tract; it was held that this payment, and deed enured to the benefit of them both; that the party paying had his remedy by action against the other for contribution; and that he who had not paid might still maintain a writ of entry against the other, for his part of the land. So in the case of *Van Horne v. Fonda*, 5 Johns. Ch. R. 388, that where two devisees are in possession of land, under an imperfect title, devised to them by

their common ancestor, one of them cannot buy up an outstanding or adverse title, to disseize or expel his co-tenant, but such purchase will enure to their common benefit, subject to an equal contribution to the expense."

CONCLUSION

Therefore, it is the opinion of this Department that one co-tenant may redeem from a purchaser at a tax sale the interest of his co-tenant as well as that of his own, but, by such redemption, he holds the original interest of his co-tenant in trust for such co-tenant.

II

In an opinion rendered by this Department July 25, 1935, to G. R. Breidenstein, of Kahoka, Missouri, it was held that the mortgagee, although purchasing at a tax sale, cannot prevent the owner from redeeming within two years. Copy of said opinion is inclosed herein.

An opinion rendered by this Department to Mr. J. K. Robbins, New Madrid, Missouri, On October 15, 1935, under the subject of the right of redemption from tax sales, in conclusion, under sub-section III, states:

"Without question, in the event the improvement district or the mortgagee exercised their right of redemption, the record owner of the land could within the statutory time redeem from the

Mr. Edward V. Long

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December 8, 1937

improvement district of the
mortgagee."

A copy of the above opinion is inclosed here-
with.

Respectfully submitted

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

SVM LC

Inclosures

SCHOOLS: An estimate may be withdrawn and another substituted if done before the first estimate has been acted upon.

May 26, 1937.

5-29
FILED

Mr. J. C. Lynch
County Superintendent
of Schools
Keytesville, Missouri

Dear Sir:

This is to acknowledge your letter dated
May 17, 1937, as follows:

"At an annual school election held in a rural district, a levy of thirty cents was voted. State Aid has been denied this district on account of low average daily attendance. If the children are transported, there is an abundance of money on hand to pay the expense.

"Can the school board now reduce the levy from thirty cents to nothing? I believe they do have this power, but I would like to have your opinion."

We note that the levy of thirty cents is within the limitations of the Constitution, namely Article X, Section 11.

Section 9214 R. S. Mo. 1929, reads in part as follows:

"The board of directors of each district shall, on or before the fifteenth day of May of each year, forward to the county clerk an estimate of the amount of funds

necessary to sustain the school of their district for the time required by law;* * stating clearly the amount deemed necessary for each fund, and the rate required to raise said amount."

Section 9261 R. S. Mo. 1929, reads in part as follows:

"On receipt of estimates of the various districts, the county clerk shall proceed to assess the amount so returned on all taxable property, real and personal, in said district, as shown by the last annual assessment for state and county purposes, including all statements of merchants in each district of the amount of goods, wares and merchandise owned by them and taxable for state and county purposes."

You will note that by virtue of Section 9214, supra, the Board of Directors submits an estimate to the County Clerk, stating the amount of funds necessary to sustain the school, and by virtue of Section 9261 the County Clerk assesses the amount requested.

You state that at the annual election a levy of thirty cents was voted, but that such amount is not needed, and you inquire if the Board can reduce said amount from thirty cents to nothing, the reason for the reduction being that said amount as estimated will not be necessary.

As Section 11 of Article X of the Constitution provides that the annual rate on property shall not exceed forty cents on the hundred dollars valuation without a majority vote of the taxpayers, it is seen that the vote at the

annual election for the levy of thirty cents is not binding on the Board of Directors. In other words, the Board of Directors can levy in a rural district up to forty cents without a vote.

Therefore it is our opinion that while thirty cents was voted at the annual school election by the voters, yet it is the duty of the Board of Directors to file an estimate of the amount needed, and said vote does not preclude the Board of Directors to revise the estimate different from that voted. It is well settled that an estimate may be withdrawn before it is acted upon and taxes extended.

In the case of State ex rel vs. Phipps, 148 Mo. 31, the Supreme Court said: (pp.36, 37)

"On the trial the defendant introduced evidence tending to prove that in pursuance of the election, another and different estimate from the one in question was made and forwarded to the clerk, in which the apportionment was different from that suggested in the notice of the election and from that adopted in this estimate. But as that estimate was withdrawn and never acted upon, and the estimate in question substituted therefor and was the one upon which the levy was made, we do not see how the validity of this tax can be in any way affected by the facts that such an estimate was made, or by any defects thereof."

In Lyons vs. School District of Joplin, 278 S. W. 74, the Supreme Court of Missouri said: (p.78)

"* * * The estimate filed under the provisions of section 11142 (Sec. 9214 R. S. Mo. 1929) may be withdrawn, and revised estimates may be substituted, if done before the first estimates were acted upon, and a valid levy may be made upon such revised estimates. State ex rel. v. Phipps, 148 Mo. 31, 49 S. W. 865."

Mr. J. C. Lynch

-4-

May 26, 1937.

In view of the above and foregoing it is our opinion that the School Board would have the right to revise the estimate from thirty cents to nothing, and if an estimate has been forwarded, as required by Section 9214, supra, that such may be withdrawn and a new estimate substituted,

Respectfully submitted,

James L. HornBostel
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JLH/R

CRIMES: Escaping jail. Aiding prisoner to escape.

January 15, 1937



Hon. Douglas Mahnkey,
Prosecuting Attorney-Elect,
Taney County,
Forsyth, Missouri.

Dear Sir:

We have your request for an opinion of this office
reading as follows:

"I am the Prosecuting Attorney-Elect of
Taney County. I have a question I would
like some advice about as it will come
up at once upon my taking over the office.

A man was arrested and lodged in the city
jail of Branson by the city marshall on a
charge of drunkenness. All necessary steps
were taken to lodge him in said jail. While
in the jail another person sawed the lock
off the jail door and released the prisoner.

Will you please advise me as to the
strongest case I can make against each of
these parties? I understand that I can
charge the party who sawed the lock under
Section 3909. But that is only a misde-
meanor and would like to know if there is
any stronger Section.

I am anxious to prosecute these parties
to the limit as they have been for years
a constant bother to all law enforcing
officers."

Section 3903, R. S. Mo. 1929, provides:

"If any person or persons shall, by force, set at liberty or rescue any person held in custody or prison for any offense other than felony, whether before or after conviction, or upon any writ or process, original or judicial, every person so offending shall, on conviction, be adjudged guilty of a misdemeanor."

The question arises whether the word "offense" is limited to a crime against the State, or whether it includes the violation of an ordinance of a city or town.

In the case of *Dunson v. Baker*, 80 So. (La.) 238, 1. c. 239, the plaintiff's son was arrested on the order of the defendant, the Mayor of the town, for having broken into the town jail and set at liberty a prisoner who had been placed in custody for violating a town ordinance under Section 864, R. S. of Louisiana, 1904, which is, in part, as follows:

"Whoever shall, by force or without due authority, set at liberty any person in custody for any offense not capital, shall on conviction," etc.

"That section follows two other sections referring to those who set at liberty persons in custody for capital offenses.

"Plaintiff contends that the word 'offense' in section 864, R. S., means a crime against the state, and not the violation of a city or town ordinance penal in its nature; and that he was illegally arrested under the section, as the person whom he was charged with having liberated had been jailed for violating a town ordinance denouncing the carrying of concealed weapons, which offense is also denounced by a state statute.

"The object of the law is to punish jail breaking and the liberating of prisoners by force, or without authority.

The law is not concerned with the nature of the crime, offense, or misdemeanor with which the person liberated was charged, provided his offense was not capital. It is immaterial, under the law, whether his offense was against the state, or the state and a municipality."

In the above case the person liberated from jail was charged with the carrying of concealed weapons, which offense was also denounced by a state statute, so the argument might be advanced that it differs from the instant case in that the person liberated was charged with drunkenness, which is not in violation of a state statute, as evidenced by the language of the court in the case of City of St. Joseph v. Harris, 59 Mo. App. 123, 1. c. 127:

"It would seem that in this state drunkenness is not per se the subject of legislative prohibition."

However, the court in the Dunson case, supra, specifically points out that the law is not concerned with the nature of the offense. The object of the law is to punish the liberating of prisoners without authority.

In Missouri it has been held that the violation of a city ordinance is not a criminal offense, and the question might be raised that the rule is different in the State of Louisiana.

In the case of Meredith v. Whillock, 158 S. W. 1061, 1. c. 1063, the court said:

"The real question in this case is whether the violation of a city ordinance is a criminal offense as contemplated by the statute.

"Since the case of Kansas City v. Clark, 68 Mo. loc. cit. 589, was decided, it has been uniformly held in this state that the violation of a city ordinance is not a crime. The proceeding is only a civil suit and has the incidents and attributes merely of a quasi criminal character. City of St. Louis v. Knox, 74 Mo. loc. cit. 81. In Ex parte Hollwedell, 74 Mo. loc. cit. 401, the Supreme Court said: 'If the violation of the ordinance for which petitioner was fined is to be regarded as a criminal

offense in the sense of the Constitution, there would be much plausibility in the position taken by counsel. Such offenses, however, have never in this state been regarded as criminal.' In *Kansas City v. Neal*, 122 Mo. loc. cit. 234, 26 S. W. 695, 696, the court used this language: 'In *Ex parte Hollwedell*, 74 Mo. 395, it was held that the violation of a city ordinance is not a criminal offense within the meaning of the Constitution,' etc. The law is well established that a prosecution for a violation of a city ordinance is a civil action, and this court has often so held."

In the case of *State v. Boneil*, 42 La. Annual Reports 1110, 1. c. 1112, the court said:

"Violations of municipal ordinances are not usually or properly regarded as crimes, in the sense in which that word is commonly used, which embraces only offences against the public criminal statutes of the State, and the laws regulating forms of proceeding and the constitutional provisions relating to the latter do not generally apply to the former. *State vs. Henchert*, 42 An. 270; *Nener vs. Monroe*, 35 An. 1192; 1 *Dillon Munc. Corp.*, Sec. 432, et seq."

It is thus apparent from the reading of the latter two cases that violations of municipal ordinances are not regarded in Missouri and Louisiana as criminal offenses.

We are therefore of the opinion that although the person liberated in the instant case was not lodged in the city jail for an offense denounced by the statutes of this state, the person having liberated him without authority may be properly prosecuted under Section 3903, *supra*.

Section 3909, R. S. Mo. 1929, provides:

"Every person who shall, by any means whatever, aid or assist any prisoner lawfully committed to any jail or place of confinement, in any case other than a felony, to escape therefrom, whether such escape be effected or not, shall be adjudged guilty of a misdemeanor."

The question arises whether the person charged with having liberated the prisoner may also be charged under Section 3909, supra. This section uses the words "in any case", and the court in the case of *Litton v. Commonwealth*, 44 S. E. (Va.) 923, 1. c. 927, in construing the above words as used in a Virginia statute, said:

"When the statute says 'in any case,' it includes the only two classes of cases we have, viz., civil and criminal; and doubtless it was in the legislative mind that, having used the words 'in any case,' the words 'either civil or criminal' would be mere surplusage.

"If the words 'in any case' are to be construed as not applying both to civil and criminal cases, which class is to be excluded? Would it not be as grave an evasion of the province of the Legislature to say, by judicial interpretation, civil cases only were in the contemplation of the framers of the statute, as it would be to hold that criminal cases only were within its purview? Is it not safer to do no violence to the language employed, to give to the words used their natural meaning and effect, and to hold that the phrase 'any case' covers all cases to be tried by a jury?"

We are of the opinion that the words "in any case" as used in Section 3909, supra, were intended to include both civil and criminal cases with the exception of felonies, and inasmuch as our courts take the position that the prosecution of a violation of an ordinance is in the nature of a civil action, the person having liberated the prisoner without authority may also properly be charged under Section 3909, supra.

Section 3916, R. S. Mo. 1929, provides:

"If any person lawfully imprisoned or detained in any county jail or other place of imprisonment, or in the custody of any officer, upon any criminal charge, before conviction, for the violation of any penal statute,

shall break such prison or custody and escape therefrom, he shall, upon conviction, be punished by imprisonment in the penitentiary for a term not exceeding two years, or in a county jail not less than six months."

Section 4474, R. S. Mo. 1929, defines the term "criminal offense", thus:

"The terms 'crime,' 'offense,' and 'criminal offense,' when used in this or any other statute, shall be construed to mean any offense, as well misdemeanor as felony, for which any punishment by imprisonment or fine, or both, may by law be inflicted."

In the Meredith case, supra, the court in construing the above section held that the term "criminal offense", which may be said to be synonymous with "criminal charge", did not include the violation of a city ordinance, and cited (l. c. 1064) the case of Koch v. State, 126 Wis. 470; 106 N. W. 531, to the effect that:

" * * * it was held that upon principle and authority the term 'criminal offense' used in the statute includes misdemeanors as well as felonies, but that conviction under a municipal ordinance is not a conviction of a 'criminal offense' within the meaning of the statute."

We are of the opinion that it can not be said that a person who is being held in a city jail for violation of a city ordinance can be said to be in custody upon a "criminal charge" as used in Section 3916, supra, and hence the person charged with escaping the city jail must be punished by some city ordinance, if any, and not under any state law.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

FALSE PRETENSES

FIVE DAYS NOTICE

INSUFFICIENT FUND CHECKS

) Five day notice statute, 4306 R. S.

) Mo. 1929, applies to misdemeanors covered

) by 4305, and not to felonies covered by
Section 4304.

February 10, 1937

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
First National Bank Bldg.
Versailles, Missouri



Dear Sir:

We have your request of February 3, 1937 for an opinion
of this office reading as follows:

"It has been my practice to file under
section 4304-1929 in cases where and when
bogus checks are given in this county, and
the checks are returned marked 'No Account.'
or 'No Funds.' In those felony cases, I
have not notified the defendant before hand
of the bogus check. Several strangers have
floated checks for large amounts, and their
present whereabouts are unknown. It would
be impossible for the taker of the check to
give notice as required in section 4306-1929,
if such was the law.

In several preliminary hearings, the question
has been seriously raised that before com-
plaint is made the maker of the check must
be notified that the check has been returned
unpaid for any cause as per the terms of
section 4306-1929, even though the complaint
is filed as per the terms of sections 4304-
1929.

Do you understand this notice must be served
before the prosecution would be good under
section 4304-1929?"

February 10, 1937

We call your attention to the apparent difference in the statutes involved:

"Sec. 4304. Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain****any money, property or valuable thing****by means or by use of any trick or deception, or false and fraudulent representation, or statement or pretense,***or by means, or by use, of any false or bogus check or by means of a check drawn with intent to cheat and defraud, on a bank in which the drawer of the check knows he has no funds, *****"

"Sec. 4305. Any person who, ***shall make or draw or utter or deliver, with intent to defraud any check, draft or order, for the payment of money, upon any bank,***knowing at the time of such making, drawing, uttering or delivering, that the maker or drawer has not sufficient funds in, or credit with, such bank****"

It is apparent that Section 4304 R. S. Missouri 1929, is aimed at the writer of a check who has no funds in the bank, while Section 4305 R. S. Missouri 1929 is leveled at the maker of a check who has an account with the bank, but which account or credit is not sufficient for the payment of the check.

Under the felony statute (4304) the information, among other things must allege that the party defrauded relied upon and believed in the truth of the pretenses made by the defendant and was thereby induced to and did part with his property. State vs. Loesch, 180 S. W. 875, 878; State vs. Mills, 272 Mo. 562; State vs. Burton, 213 S. W. 424; State vs. Robinson, 14 S. W. (2) 452.

A felony indictment for false pretenses must allege (1) what the pretenses were, (2) to whom they were made, (3) that he to whom they were made relied upon them and acting upon such reliances was induced to and did part with his property, (4) that by means of such pretenses said property was obtained, (5) that the property so obtained was owned by the person named, (6) that its value was a named sum, (7) that said pretenses were made by defendant designedly and feloniously with intent to cheat and defraud, and (8) that said pretenses were false and that defendant knew that they were false when he made them. State vs. Young 266 Mo. 723.

The word "designedly" as used in Section 4095 R. S. Missouri 1929, relating to obtaining money by false pretenses, must be used in the indictment. State vs. Pickett, 174 Mo. 663. The word "designedly" as used in Section 4095 does not appear in Section 4304, and for that reason the indictment under Section 4304 need not contain such allegation. A pretense, to form the basis of a prosecution must be a fraudulent representation of an existing or past fact. State vs. Houchins, 46 S.W. (2) 891.

Under the misdemeanor statute (4305) we find that the maker or drawer of the check must have either credit or sufficient funds in the bank for the payment of the check upon its presentation--which is always a future act. A person may be convicted under the misdemeanor statute for giving a post dated check. State vs. Taylor, 73 S. W. (2) 378.

We now come to a consideration of the applicability of Section 4306 R. S. Missouri 1929. This section among other things provides:

"As against the maker or drawer thereof, the making, drawing, uttering, or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, such bank***, Provided, such maker or drawer shall not have paid the drawee thereof****together with all costs and protest fees, within five days after receiving notice that such check, draft or order has not been paid by the drawee."

We point out the similarity of Sections 4305 and 4306 wherein both acts are leveled at those who "make, draw, utter or deliver" insufficient fund checks. The felony statute (4304) was first enacted in 1879. Sections 4305 and 4306 were first enacted in this state in 1917, Laws of Missouri 1917, page 244, and together with Section 4307 were a part of House Bill 726.

February 10, 1937

There is nothing in the statute to indicate that the legislature ever intended that Section 4306 should apply to Section 4304. This question seems to have been raised in *State vs. Mullins*, 237 S. W. 502, but not passed upon by the court.

CONCLUSION

It is therefore the opinion of this office that Section 4304 was intended to apply to persons drawing or passing checks upon a bank in which the drawer had no funds; that Section 4305 was intended to apply to persons who had an account or credit with a bank but who drew checks thereon at a time when his funds or credits at such bank were insufficient to pay the check on presentation, and that Section 4306 was passed as an aid to Section 4305, in affording makers of insufficient fund checks a reasonable time, five days, in which to pay the check and thereby conclusively establish that it was not drawn with any intent to defraud. It is the further opinion of this office that Section 4306 does not apply to offenses covered by Section 4304.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

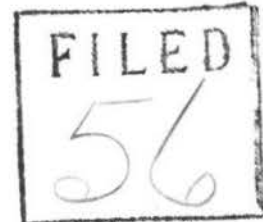
J. E. TAYLOR
(Acting) Attorney General

FER:MM

COOPERATIVES: Under Article 29 or Chapter 87, R. S. Mo. 1929,
must be organized primarily for agriculture.

February 25, 1937

2-26



Hon. Russell Maloney,
Corporation Commissioner,
Capitol Building,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of
January 27th, wherein you state as follows:

"Section 12748, Revised Statutes of
Missouri, 1929, provides as follows:
'Any number of persons, not less than
twelve (12), may associate themselves
together as a co-operative associa-
tion, society or exchange, having all
the incidents, powers and privileges
of corporations, for the purpose of
conducting any agricultural or mer-
cantile business on the co-operative
plan, including the buying, selling,
manufacturing, storage, transportation
or other handling or dealing in or with
by associations of agriculturists, of
agricultural, dairy or similar products,
and including the manufacturing trans-
formation of such articles into
products derived therefrom, and for
the purpose of the purchasing of or
selling to all shareholders and others
groceries, provisions and all other
articles of merchandise.'

"The department requests the favor of
an opinion from your office as to whether
or not by the use of the words 'or mer-
cantile business on the co-operative plan',
as used in the above section, extends the

2/16/37

right, on the part of individuals, to incorporate under that act a mercantile business not directly connected or incident to agricultural activities.

"In connection with the above query, we call your attention to Section 12761, Revised Statutes of Missouri, 1929, which provision extends only to cooperative agricultural corporations heretofore organized the legal right to come within the provisions of this act. It would seem, by this section, that it was the intent of the Legislature to restrict cooperative companies to agricultural enterprises or such enterprises that extend aid to agriculturists.

"The Department has had applications on the part of incorporators who desire to operate oil stations under the cooperative act which prompts this request for an opinion."

Section 12748 of Article 29 of Chapter 87, Revised Statutes of Missouri, 1929, permits the organization of cooperatives by associations of agriculturists for the purpose of conducting any agricultural or mercantile business.

In determining the meaning of the above section, we ask the question, how many persons may associate themselves together as a cooperative, and the answer is, any number of persons not less than twelve. For what purpose? Conducting any agricultural or mercantile business. What does this include? The buying, selling, manufacturing, storage, transportation or dealing in or with of agricultural, dairy or similar products. By who? By associations of agriculturists. What else does it include? The manufacturing and transformation of such articles into products derived therefrom. And for what other purpose? The purchase and selling to all shareholders and others groceries, provisions and all other articles of merchandise.

A comma after the word "with" would have clarified the intent of the Legislature that the persons associating themselves for the purpose of conducting a mercantile or agricultural business on the cooperative plan must be agriculturists, reading thus:

"* * *including* * *the handling
or dealing in or with, by associations
of agriculturists, of agricultural,
* * *."

In the case of State vs. Mooneyham, 253 S. W. 1098, 1. c. 1100, 212 Mo. App. 573, the court in holding that if the intent of the Legislature was reasonably clear, errors in punctuation would be corrected, said:

"If the intent of the Legislature is reasonably clear, then all grammatical errors and errors in spelling and punctuation are disregarded or corrected."

Section 12761, R. S. Mo. 1929, lends further emphasis to the conclusion that Article 29 extends only to cooperatives organized by agriculturists:

"All co-operative agricultural corporations, companies or associations, coming within the purview of this law, and heretofore organized and doing business under prior statutes and which have attempted so to organize and do business, shall have the benefit of all provisions of this law and be bound thereby on filing with the secretary of state a written declaration, signed and sworn to by the president and secretary, to the effect that such cooperative company or association has, by a majority vote of its shareholders, decided to accept the benefits of and to be bound by the provisions of this law."

In the case of Charleston Oil Co. vs. Poulnot, 141 S.E. 454, 1. c. 456, 457, the court in holding that the term "merchandise" included gasoline and motor oil, said:

"(714) Sec. 2. Penalty for Selling Goods on Sunday. - No person or persons whatsoever shall publicly cry, show forth, or expose to sale, any wares, merchandise, fruit, herbs, goods, or chattels whatsoever, upon the Lord's Day, or any part thereof, upon pain that every person so offending shall forfeit the same goods so cried, or showed forth, or exposed to sale."

"Does the word 'merchandise,' as used in Section 714, include gasoline and motor oils? In Webster's New International Dictionary, the word 'merchandise' is defined as follows:

"The objects of commerce; whatever is usually bought or sold in trade, or market, or by merchants; wares; goods; commodities."

"In the well-recognized authority, 2 Bouv. Law Dict. p. 2195, the following definition is given to the word:

"A term including all those things which merchants sell, either wholesale or retail: as, dry goods, hardware, groceries, drugs, etc. It is usually applied to personal chattels only, and to those which are not required for food or immediate support, but such as remain after having been used, or which are used only by a slow consumption.* * *

"It may be and often is used as the synonym of 'goods,' 'wares' and 'Commodities.'"

2/16/37

"Under the definitions referred to in the authorities above cited, and in line with the former decisions of this court, we think there can be no doubt that gasoline and motor oils are embraced in the term 'merchandise' as used in the statute."

From the foregoing, we are of the opinion that not less than twelve persons engaged primarily in agriculture may organize under Article 29 of Chapter 87 of the Revised Statutes of Missouri, 1929, and as an incident to their business purchase and sell to their members and others groceries, provisions and all other articles of merchandise, including gasoline and motor oil.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR.

APPEALS--From Justice Court to Circuit Court--Case to be
tried De Novo.

April 6, 1937

4-7

Hon. Douglas Mahnkey
Prosecuting Attorney
Taney County
Forsyth, Missouri



Dear Sir:

We have your request of April 5, 1937, for an
opinion which reads as follows:

"I have just obtained a conviction in
Justice Court for disturbing religious
worship. The case had been continued
once and then a change of venue taken
from the Township. When the trial day
came defendant's attorney filed motion
for continuance on the ground that due
to no fault of defendant important
witnesses for defense are not present
and had not been subpoenaed. Justice
overruled all these motions on the ground
that defendant had not used due dili-
gence, having had twenty days to get
witnesses. We went to trial and obtained
a conviction.

Defense attorney appealed to Circuit Court.
He informs me that he will argue the motions
anew before the Circuit Court and that the
Circuit Court has the right to send the
case back to the original Justice of the
Peace to be heard anew.

I do not believe that to be the law or pro-
per procedure. I maintain the case is tried
de novo in the Circuit Court regardless
of any irregularities in the Justice Court."

April 6, 1937

In answer to your letter we refer you to Section 3448, Laws of Missouri 1931, page 202, which refers to appeals from the Justice Court in misdemeanor cases to the Circuit Court. This Section provides that the appellant must enter into a recognizance, conditioned

"that the defendant shall appear at the next term and from day to day and term to term thereafter, of the said circuit court, and prosecute his appeal with due diligence to a decision, and obey every order, sentence and judgment,*".

A complete scheme of transferring the entire case and proceedings to the Circuit Court is found in the statutes. Section 3451 R. S. Missouri 1929, requires the justice of peace to cause all material witnesses to enter into a recognizance, conditioned for their appearance to testify in the Circuit Court.

Section 3452 provides that when the appeal is properly lodged in the Circuit Court the cause shall be heard on the merits. It shall be triable at the first term of the Circuit Court, and the costs of both courts unless otherwise ordered by the circuit court, shall abide the event of the trial in the Circuit Court.

Section 3453 provides that if the judgment be affirmed or if upon a trial in the Court, the defendant shall be convicted and execution shall issue. The cases in which the judgment would be affirmed are those in which the defendant absents himself or otherwise fails to appear for trial. In such cases the judgment is to be affirmed. This statute was so construed in *City vs. Murphy*, 24 Mo. 41. If the defendant appears in the Circuit Court then the case is to be tried de novo. *State vs. Gowing*, 27 Mo. App. 389. Errors committed in the Justice Court are not reviewable in the Circuit Court on Appeal. Other remedies may be available to the defendant at the time the errors are committed. *State vs. Brumley*, 53 Mo. App. 126.

Hon. Douglas Mahnkey

-3-

April 6, 1937.

Section 3448 as amended by laws 1931, page 202, provides that upon an appeal in a misdemeanor case from the Justice Court to the Circuit Court

"such appeal shall operate as a stay of execution thereon, until trial of the case anew has been had in the Circuit Court."

It is therefore the opinion of this office that appeals from the Justice of Peace Courts to the Circuit Courts in misdemeanor cases should be tried de novo, without regard to any errors that may have been committed by the Justice of Peace in the trial of the case.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General

FER:MM

BOND ELECTION: Voters residing in a special road district which includes a part of a township may vote *on* bonds for township road purposes.

June 4, 1937. 614

Mr. Geo. E. Mapes,
Clerk, County Court,
Grundy County,
Trenton, Missouri.



Dear Sir:

We wish to acknowledge your letter of recent date wherein you state as follows:

"I have the honor, at the direction and request of the County Court of Grundy County, Missouri, to seek an opinion concerning a township bond issue involving the facts hereinafter set forth.

Grundy County is under township organization. Jefferson township is located in Grundy County. Gees' Creek Road District includes a portion of Jefferson township--this special road district has never issued bonds, and has no bonded indebtedness.

The required number of voters of Jefferson township, have presented a petition to the County Court, requesting that an election be held for the issuance of bonds--this petition was properly submitted in accordance with the terms and provisions of Section 7960 of the Revised Statutes of (1929).

The election is to be held May 15th.

Will you please inform us as to the following questions. (1) Can voters residing in both Jefferson township and that portion of Gees' Creek District

located in the township, vote on the bond issue, or should the voters be confined to those who reside in that portion of Jefferson township not included in the Gees' Creek District? (2) Is it proper for the County Court to treat all of that portion of Jefferson township, which is not in the Gees' Creek District, as a separate township for all road purposes; and to deal with it as though it were a separate township and did not include the Gees' Creek Road District?"

Section 7960, R. S. Mo. 1929, provides that road bonds may be issued by the board of commissioners for special road districts and by county courts for townships, in part, as follows:

"The board of commissioners of any special road district organized and incorporated under the laws of this state, for and on behalf of such district, and the county courts of the several counties, on behalf of any township in their respective counties, are hereby authorized to issue road bonds * * *."

Section 7961, R. S. Mo. 1929, provides how an election shall be held for the issuance of road bonds, in part, as follows:

"Whenever the board of commissioners of any special road district proposes to issue bonds for road purposes, they shall order an election to be held for that purpose; and whenever twenty legal voters of any township shall file with the clerk of the county court wherein the township is located a petition in writing asking that bonds for road purposes be issued for and on behalf of such township, it shall be the duty of the court to order an election to be held in such township upon the question of issuing bonds."

* * * * Provided, that no person shall be permitted to vote at such election who would not be qualified to vote at a general election were a general election held on that day. If it shall appear that two-thirds of the voters voting at such election on said question shall have voted in favor of the issuance of said bonds, the board of commissioners of the special road district, or the county court, as the case may be, shall order and direct the execution of the bonds for and on behalf of such special road district or township, and shall provide for the levy and collection of a direct annual tax upon all the taxable property in said district or township sufficient to provide for the payment of the principal and interest of the bonds so authorized as they respectively become due."

Section 7964, R. S. Mo. 1929, provides as follows:

"The four next preceding sections, to-wit: sections 7960, 7961, 7962 and 7963, R. S. 1929, shall not apply to any township, the whole or any part of which is included in a special road district that has issued bonds, the whole or any part of which are outstanding and unpaid; nor shall said sections apply to any special road district which includes the whole or any part of any township which has issued bonds for road purposes, the whole or any part of which bonds are outstanding and unpaid, nor shall said sections apply to any special road district which includes the whole or any part of the territory of any other special road district which has incurred an indebtedness evidenced by an issue of bonds, the whole or any part of which are outstanding and unpaid."

June 4, 1937

Section 9764, supra, recognizes that a township may include the whole or any part of a special road district by specifically providing that Sections 7960 and 7961, supra, among others, shall not apply to any township, the whole or any part of which is included in a special road district that has issued bonds. We are advised that Gees' Creek Road District, which includes a part of Jefferson township, has never voted bonds, so that Sections 7960 and 7961, supra, among others, clearly apply.

In calling an election to issue bonds for road purposes it is necessary that the Grundy County Court, on behalf of Jefferson township, have filed with the Clerk of the Court a petition of twenty legal voters of the township, and that two-thirds of the voters voting at such election on the question vote in favor of the issuance of the bonds.

We are of the opinion that the voters residing in both Jefferson township and that portion of the Gees' Creek Road District located in the township should vote on the bond issue, since a qualified voter, under the aforementioned statute, does not forfeit his privileges and duties under the township organization law by also coming within a special road district.

We are further of the opinion that the County Court should not treat that portion of Jefferson township that is not in Gees' Creek Road District as a separate township for all road purposes. Jefferson township and those that come within its operation as a political unit do not lose their identity by also being a part of the special road district.

Yours very truly,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

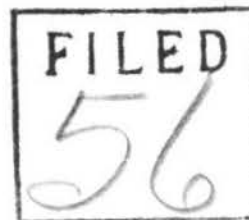
J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

CO-OPERATIVE ASSNS. - DEFINITION OF WORDS - MERCANTILE BUSINESS OR
CO-OPERATIVE PLAN

July 16, 1937.

11/20



Honorable Russell Maloney
Corporation Commissioner
Capitol Building
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your letter of
July 9th, wherein you state as follows:

"Section 12748, Revised Statutes of
Missouri, 1929, provides as follows:

"Any number of persons, not less than
twelve (12), may associate themselves
together as a co-operative association,
society or exchange, having all the
incidents, powers and privileges of
corporations, for the purpose of con-
ducting any agricultural or mercantile
business on the co-operative plan,
including the buying, selling, manu-
facturing, storage, transportation or
other handling or dealing in or with by
associations of agriculturists, of
agricultural, dairy or similar products,
and including the manufacturing trans-
formation of such articles into products
derived therefrom, and for the purpose
of the purchasing of or selling to all
shareholders and others groceries, pro-
visions and all other articles of
merchandise."

"The department requests the favor of
an opinion from your office as to whether
or not by the use of the words "or mercan-
tile business on the co-operative plan",
as used in the above section, extends the
right, on the part of individuals, to

incorporate under that act a mercantile business not directly connected or incident to agricultural activities.

"In connection with the above query, we call your attention to Section 12761, Revised Statutes of Missouri, 1929, which provision extends only to cooperative agricultural corporations heretofore organized the legal right to come within the provisions of this act. It would seem, by this section, that it was the intent of the Legislature to restrict cooperative companies to agricultural enterprises or such enterprises that extend aid to agriculturists."

"The department has heretofore submitted the above inquiry to your office but due to the many recent requests that we again submit the question to your office for further consideration accounts for our resubmission of this question for further consideration on the part of your office."

Section 12748, supra, states that,

"Any number of persons, not less than twelve (12), may associate themselves together as a co-operative association, society or exchange, having all the incidents, powers and privileges of corporations, for the purpose of conducting any agricultural or mercantile business on the co-operative plan, * * * *."

The statute reads, "Any number of persons, not less than twelve (12)." No limitation here that they be engaged in agricultural pursuits. "May associate themselves together as a co-operative * * * for the purpose of conducting any agricultural or mercantile business on the co-operative plan." They may engage in the agricultural "or" in the alternate, mercantile business. Were we then to halt here, there would still be no limitation that the twelve or more persons must be engaged in agricultural pursuits.

The statute then reads further and provides that the agricultural or mercantile business on the co-operative plan is "including the buying, selling, manufacturing, storage, transportation or other handling or dealing in or with by associations of agriculturists, of agricultural, dairy or similar products, and including the manufacturing transformation of such articles into products derived therefrom, and for the purpose of the purchasing of or selling to all shareholders and others groceries, provisions and all other articles of merchandise."

In an opinion directed to you under date of February 16, 1937, we took the position that the statute restricted the organization of co-operatives for agricultural or mercantile business to "associations of agriculturists," however, our attention has been called to the fact that the word "including," as used in the statute, is a word of enlargement and not of limitation. Generally speaking, this may be said to be true, but an examination of the Journals of the Legislative Assembly showing the original bill and amendments thereto reveals a different intent on the part of the Legislature.

The statute being of doubtful meaning we may resort to the journals of the Legislative Assembly to ascertain the intent of the Legislature. Thus, in the case of *Ex parte Helton*, 93 S. W. 913, 117 Mo. App. 609, l.c. 620, we find the following language of the court:

"Sutherland says: 'The proceedings of the Legislature in reference to the passage of an act, may be taken into consideration in construing the act. Thus reports of committees made to the Legislature have been held to be proper sources of information in ascertaining the intent or meaning of the act. Amendments made or proposed and defeated may also throw light on the construction of the act as finally passed and may properly be taken into consideration.'
(2 Sutherland on Construction of Statutes, sec. 470.)

"In *Edgar v. Board of Commissioners*, 70 Ind. l. c. 338, the court said: 'Where as in this

July 16, 1937.

case a statute has been enacted, which is susceptible of several widely different constructions, we know of no better means for ascertaining the will and intention of the Legislature than that which is afforded in this case by the history of the statute as found in the journals of the two legislative bodies."

A further guide in ascertaining the intent of the Legislature is to examine the title to the act, it being an essential part thereof. The court in the case of *Sharp v. Producers Produce Company*, 47 S. W. (2d) 242, 226 Mo. App. 189, 1. c. 192, in declaring this principle, states that,

"Since the title to an act is essentially a part of the act and is itself a legislative expression of the general scope of the bill, it may be looked to as an aid in arriving at the intent of the Legislature."

The House Journal, Vol. 1, 50th General Assembly (p. 502) shows that the original bill was introduced on February 26, 1919, by Mr. Wagner and entered upon the calendar as "House bill No. 845." The title to the bill as introduced reads as follows:

"An act to provide for the formation of co-operative agricultural or horticultural associations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, and for other purposes;"

On March 5th the bill was read a second time and referred to the Committee on Agriculture (H. J. p. 616).

On March 12th the bill was reported by the Committee with the recommendation that the bill "do pass" with committee substitute as follows (H. J. pp. 732, 733):

"An act to provide for and authorize the incorporation of agricultural co-operative associations for the purpose of conducting any agricultural business on the co-operative plan, including the

buying, selling, manufacturing, storage, transportation or other handling or dealing in or with by associations of agriculturists of agricultural, dairy or similar products, and including the manufacturing transformation of such articles into products derived therefrom,"

On March 20th the bill was placed on special order of business for 2 p. m. Monday, March 23, 1919 (H. J. p. 841).

On March 24th the committee substitute for the bill was taken up for engrossment and the following proceedings had (H. J. pp. 880, 881, 882):

"On motion of Mr. Wagner, committee substitute for House bill No. 845 was taken up for engrossment.

"Committee substitute for House bill No. 845, entitled

"An act to provide for and authorize the incorporation of agricultural co-operative associations for the purpose of conducting any agricultural business on the co-operative plan, including the buying, selling, manufacturing, storage, transportation, or other handling or dealing in or with by associations of agriculturalists, or agricultural, dairy or similar products, and including the manufacturing transformation of such articles into products derived therefrom.

"Mr. Wagner offered the following amendment to committee substitute for House bill No. 845:

"Amendment No. 1.

"Amend the title to committee substitute for House bill No. 845 by inserting in line 5 before the word 'associations' the word 'by;' also, amend the said title by changing the word 'agriculturalists' to read 'agriculturists.'

"Which was read and adopted.

"Mr. Wagner offered the following amendment to committee substitute for House bill No. 845:

"Amendment No. 2.

"Amend section 1, line 9 of committee substitute for House bill No. 845 changing the word 'agriculturalists' to 'agriculturists.'

"Which was read and adopted.

"Mr. Warren offered the following amendment to committee substitute for House bill No. 845:

"Amendment No. 3.

"Amend committee substitute for House bill No. 845 by inserting before the word 'business' in line 6 of section 1 of the printed bill the following words: 'or mercantile,' and by striking out the period in line 11 of section 1, inserting a comma and the following words: 'and for the purpose of purchasing or of selling to all shareholders and others groceries, provisions, and all other articles of merchandise.'

"Which was read and adopted.

"Mr. Wagner offered the following amendment to committee substitute for House bill No. 845:

"Amendment No. 4.

"Amend committee substitute for House bill No. 845 by inserting before the word 'co-operative' in line 2 of the title and before the word 'business' in line 3 of the title the following words: 'or mercantile,' and by striking out the period at

the end of the title, inserting a comma and the following words: 'and for the purpose of the purchasing of or selling to all shareholders and others groceries, provisions, and all other articles of merchandise.'

"Which was read and adopted.

"On motion of Mr. Wagner, committee substitute for House bill No. 845 was ordered engrossed and printed as amended.

"On motion of Mr. Whitaker, the vote by which the committee substitute for House Bill 845 was ordered engrossed and printed was reconsidered.

"On motion of Mr. Wagner, committee substitute for House bill No. 845 was read and adopted.

"On motion of Mr. Wagner, committee substitute for House bill No. 845, as amended, was ordered engrossed and printed."

On March 31st the Committee on Engrossed Bills reported the following entitled bill as correct (H. J. p. 992):

"An act to provide for and authorize the incorporation of agricultural or mercantile co-operative plan, including the buying, selling, manufacturing, storage, transportation, or other handling or dealing in or with by associations of agriculturists, of agriculture, dairy or similar products, and including the manufacturing transformation of such articles into products derived therefrom, and for the purpose of the purchasing or of selling to all shareholders and others groceries, provisions, and all other articles of merchandise,"

On April 2d Mr. Wagner called up Committee substitute for the bill for third reading and final passage, entitled (H. J. p. 1036):

"An act to provide for and authorize the incorporation of agricultural or mercantile co-operative associations for the purpose of conducting any agricultural or mercantile business on the co-operative plan, including the buying, selling, manufacturing, storage, transportation, or other handling or dealing in or with by associations of agriculturists, of agricultural, dairy or similar products, and including the manufacturing or transformation of such articles into products derived therefrom, and for the purpose of the purchasing of or selling to all shareholders and others groceries, provisions and all other articles of merchandize,"

Bill was read third time and passed with an emergency clause (H. J. 1036, 1037).

On May 2d a message was received from the Senate adopting the above entitled bill (H. J. Vol. II, p. 1979).

On May 7th Committee on "Enrolled Bills" reported the following entitled bill (H. J. 2131):

"An act to provide for and authorize the incorporation of agricultural or mercantile co-operative associations for the purpose of conducting any agricultural or mercantile business on co-operation plan, including the buying, selling, manufacturing, storage, transportation, or other handling or dealing in or with by associations of agriculturists, of agricultural, dairy or similar products, and including the manufacturing transformation of such articles into products derived therefrom, and for the purpose of purchasing of or selling to all shareholders and other groceries, provisions and all other articles of merchandise, with an emergency clause,"

which was signed by the Speaker (H. J. p. 2135).

July 16, 1937.

An examination of the bill as introduced reveals that it was the intent of the Legislature to restrict formation of co-operatives to "associations of agriculturists" (H. J. p. 732), the word "including being a part of the title of the act before the words "or mercantile" were included by committee substitute. If the title to the act as introduced had included the authorization to organize any agricultural or mercantile business on the co-operative plan and then it followed with the word "including," there would be merit to the contention that the word as used is merely one of enlargement and not restriction. However, such is not the case.

Further emphasis to the contention that the Legislature was primarily interested in the welfare of those engaged in agricultural pursuits is lent by the emergency clause of the act, which provides as follows (Laws of Missouri, 1919, Sec. 18, pp. 119, 120):

"This act being for the immediate preservation of agricultural products and the like, and being necessary for the immediate conservation of the welfare of the agricultural part of the state, an emergency is hereby declared to exist within the meaning of the Constitution, and therefore, this act shall go into effect immediately upon its passage and approval."

It is evident from the foregoing that the Legislature's intent was to permit associations of agriculturists to organize co-operatives for agricultural or mercantile purposes in order to preserve their products and was not interested nor did it authorize, as far as this particular act is concerned, the creation of co-operatives by groups of individuals for the purpose of purchasing and selling groceries, gasoline, et cetera.

The act was originally placed under the chapter entitled "corporations" and at present is under the heading of "agriculture." However, as pointed out by the court in the case of State v. Maurer, 164 S. W. 551, 255 Mo. 152, the headings of chapters, articles and sections in the revised statutes are merely arbitrary designations inserted for convenience of reference and

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have no legislative authority to lessen or expand the letter or meaning of the law.

Further evidence of legislative intent is Section 12761, R. S. Mo. 1929, as follows:

"All co-operative agricultural corporations, companies or associations, coming within the purview of this law, and heretofore organized and doing business under prior statutes and which have attempted so to organize and do business, shall have the benefit of all provisions of this law and be bound thereby on filing with the secretary of state a written declaration, signed and sworn to by the president and secretary, to the effect that such co-operative company or association has, by a majority vote of its shareholders, decided to accept the benefits of and to be bound by the provisions of this law."

The specific mention that agricultural cooperatives organized prior to the act could avail themselves of the benefit of the law, clearly implies the exclusion of prior cooperatives engaged in the mercantile business. The court in the case of *Kansas City, Mo., v. J. I. Case Threshing Mach. Co.*, 87 S. W. (2d) 195, 1. c. 205, 337 Mo. 913, said:

"It is a general rule of (statutory) interpretation that the mention of one thing implies the exclusion of another thing; *expressio unius est exclusio alterius*." 25 R. C. L. 981, Section 229; 25 C. J. 220; 59 C. J. 980-986, Sections 580-583."

We are not unmindful of the fact that the Corporation Department has permitted co-operatives to be organized for mercantile business by individuals other than those engaged primarily in agricultural pursuits and that courts will give weight

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to the construction placed upon laws by departments administering same. However, the court will not sustain such construction if same is obviously wrong. Phelps v. Scott, 30 S. W. (2d) (Mo.) 69, 1. c. 71.

Upon reconsideration we are still of the opinion that not less than twelve (12) persons engaged primarily in agriculture may organize under Article 29 of Chapter 87 of the Revised Statutes of Missouri, 1929, and as an incident to their business purchase and sell to their members and others groceries, provisions and all other articles of merchandise.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney-General

APPROVED:

(Acting) J. E. TAYLOR
Attorney-General.

MW:EG

GAMBLING: Shooting gallery

September 3, 1937

FILED
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Honorable Douglas Mahnkey
Prosecuting Attorney
Taney County
Forsyth, Missouri

Dear Sir:

We have your request of August 31, 1937, for an opinion, which reads as follows:

"The operator posts \$5.00. He charges 10 cents for three shots. At every 40 cents taken in the operator adds 5 cents to the "Pot" that is the original \$5.00. The party who is able to make a certain mark receives the "pot" and the fund is allowed to run until someone achieves the mark."

From the above and foregoing it would appear that the shooting gallery is a gambling device and, therefore, prohibited by law.

In *Commonwealth v. Plissner*, 4 N. E. (2d) 241, the Supreme Court of Massachusetts held a grabbing machine played by the skill of the operator was a gambling device. Other so-called games of skill, such as throwing a ball on a dart game, have been held to be gambling devices. *People v. Baddaty*, 30 Pac. (2d) 634, and *State v. Schwenter*, 60 Pac. (2d) 938.

It is, therefore, the opinion of this office that the machine described in your letter as a shooting gallery is a gambling device.

Respectfully submitted

APPROVED:

FRANKLIN E. REAGAN
Assistant Attorney General.

J. E. TAYLOR
(Acting) Attorney General

FER:AH

PRACTICE OF LAW: Before State Boards; Blue Sky Commissioner,
etc.

October 1, 1937. 10/2

Honorable Russell Maloney,
Commissioner of Securities,
Secretary of State's Office,
Jefferson City, Missouri.



Dear Mr. Maloney:

We have your request of February 25, 1937, for
an opinion of this office, reading as follows:

"This department is desirous of obtaining from you an opinion regarding the practice before this commission by persons not licensed as Missouri lawyers. Of course, it is understood that any person may appear in his own behalf and this office does not intend to restrict that privilege in any way and your opinion is sought only as to persons appearing in a representative capacity.

"If you will permit me I would like to offer the following which will give you some idea of our attitude in the matter. We are frequently confronted with a problem of having a stock deal brought here for registration where the issuing corporation is a foreign corporation, the assets behind the securities are in another state, the underwriters and the brokers are residents of other states and the attorneys representing the corporation are not licensed to practice in Missouri and not residents of this state. In such a case it is our personal feeling that none of these parties owe to this commission or to the state of Missouri any moral obligation from any standpoint nor are they subject

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control or regulations by us other than for violation of some part or provision of the securities law.

"It would be much to our liking if every issue coming to this department could at least be presented to us by a resident lawyer of Missouri. We would like to have your opinion cover the following points.

- FIRST: Practice before the Commissioner of Securities constitute the practice of law, and is restricted to attorneys,
- SECOND: The restriction of practice before this commission to members of the Missouri Bar holding the Bar enrollment receipt from the circuit clerk of their county as is otherwise required of all lawyers in this state,
- THIRD: The Commissioner of Securities may by rule require the certificate of a reputable lawyer licensed to practice in Missouri."

For the purpose of this opinion we shall treat each of the foregoing divisions separately.

I.

Practice before the Commissioner of Securities constitutes the practice of law, and is restricted to attorneys.

An examination of the statutory law of Missouri reveals that securities may or may not be exempt from "the Missouri Securities Act." If not exempt they may be registered

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either by (1) notification, or (2) qualification. Both methods of registration require the preparation of statements and applications in conformity with state law and the rules of the commissioner of Securities. Sections 7728, 7729 and 7730 R. S. Missouri, 1929. When Securities are registered by qualification, one of the rules of the Commissioner of Securities is as follows:

"Form Q is to be used for all applications for registration by qualification, except investment corporations. This includes manufacturing corporations, mining, oil royalties and drilling, real estate and cemetery promotions where bonds, stocks or debentures are involved, installment investment certificates not supported by a portfolio of stocks (portfolio issues must use Investment Trust form), breweries and distilleries, sale of oil ahead of the drill, etc. We require the certificate of a reputable lawyer that the issue is valid and legal, and the corporation, express trust or association has been legally formed and is in good standing. Mining and oil deals must furnish geological report signed by Dr. H. A. Buehler, State Geologist of Missouri, Rolla, Mo. See that every exhibit required by Form Q is filed, each exhibit signed by the president and secretary of the applicant. Avoid riders on Form Q, and use additional exhibits instead of riders. Actual balance sheet and pro forma balance sheet must be signed by the accounting concern, and in addition to the firm name, the name of the resident partner should be signed."

The application of dealers and salesmen must be in writing. Section 7744 R. S. Missouri 1929. Even though forms are provided for all the necessary steps in the registration of securities, and all that is required is the filling out of such forms, yet such practice calls for legal skill and training and is the preparation of written instruments within the practice of law. In re: Matthews (Idaho 1936) 62 Pac. 578.

Honorable Russell Maloney.

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The commissioner is required to hold hearings, Sections 7729, 7736, 7737, 7743, 7745, R. S. Missouri 1929, and appeals from the final order of the commissioner are authorized, 7729, 7743 R. S. Mo. 1929. Witnesses may be subpoenaed by either the party or the commissioner of securities, and may be compelled to testify under oath. Depositions may be taken as in civil cases. 7737 R. S. Mo. 1929.

These powers are similar to those delegated to and exercised by the Public Service Commission of Missouri. There hearings may be held, witnesses examined and questions of law and of fact passed upon and the decision of the Public Service Commission reviewed by the Courts. Sections 5232, 5233, 5234 R. S. Mo. 1929.

These activities before the Public Service Commission have been held to constitute the practice of law, and laymen who engaged in such practices held guilty of contempt by the Supreme Court of this State in Clark vs. Austin, et al. 101 S.W.(2d) 977. In that opinion the Supreme Court, en banc, said, l.c. 982:

"It would be difficult to give an all-inclusive definition of the practice of law, and we will not attempt to do so. It will be sufficient for present purposes to say that one is engaged in the practice of law when he, for a valuable consideration, engages in the business of advising persons, firms, associations or corporations as to their rights under the law or, appears in a representative capacity as an advocate in proceedings pending or prospective, before any court, commissioner, referee, board, body, committee or commission constituted by law or authorized to settle controversies, and there, in such representative capacity, performs any act or acts for the purpose of obtaining or defending the rights of their clients under the law. Otherwise stated, one who, in a representative capacity, engages in the business of advising clients as to their rights under the law, or while so engaged, performs any act or acts either in court or outside of court for that

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purpose, is engaged in the practice of law. Rhode Island Bar Association et al. vs. Automobile Service Association, supra; People ex rel. Illinois Bar Association et al. v. Peoples Stock Yards State Bank, supra; Fitchette vs. Taylor (Minn.), 254 N.W. 910, 94 A.L.R. 336, In Re: Duncan, 83 S.C. 186, 65 S.E. 210, 24 L.R.A. (N.S.) 750; Boykin vs. Hopkins, 174 Ga. 511, 162 S.E. 796."

In the Austin case, supra, the three opinions of the Court are exhaustive of research, unanswerable and fundamentally sound in principle. There can no longer be any doubt that the practice before a state commission, such as outlined above, is the practice of law.

It is the opinion of this office that to practice as herein outlined before the Commissioner of Securities is limited to licensed attorneys.

II.

The restriction of practice before this commission to members of the Missouri Bar holding the Bar enrollment receipt from the circuit clerk of their county as is otherwise required of all lawyers in this state.

The answer to this question principally involves the right of non-resident attorneys to practice law in this state. No such right exists and the appearance of non-resident attorneys in this state for the purpose of practicing law is a bare and limited courtesy extended by this state to such non-residents. In Mason vs. Pilkes, 59 Pa. (2) 1087, 1.c. 1097, an Idaho Court said:

"The privilege of appearing as counsel in our courts is granted to non-resident attorneys, not as a right, but as a courtesy* * *."

Honorable Russell Maloney.

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To the same effect is *In re: Dobbs*, 285 N.Y.S. 24.
This same general rule is applicable to Missouri.

Considerable investigation has been made with reference to the treatment of this subject in other states. In some states little or no restriction is imposed on non-resident attorneys who wish to practice occasionally or frequently in that state. This is particularly true in the states of North Dakota, Nebraska, Oklahoma, Kentucky, Maine, Maryland, Utah, Ohio and Wisconsin. Other states permit non-resident attorneys having occasional business to be admitted pro hac vice (for this occasion) in the discretion of the Court before whom the non-resident attorney appears. This is the rule in New Jersey and Delaware. In a receivership sale of assets of a corporation one of the bidders appeared in Court in New Jersey by a New York attorney. ~~The New Jersey Court held that the New York attorney.~~ The New Jersey Court held that the New York attorney being in court alone, not having associated with him a New Jersey Solicitor, had no audience in the court and was not entitled to be introduced pro hac vice. In *Re: New Jersey Refrigerating Company*, 126 Atl. 174.

Other states have reciprocity provisions wherein non-resident attorneys are extended the same comity as their home state extends to resident attorneys from other states. This is the rule in Louisiana, North Carolina and Florida. In West Virginia non-resident attorneys may practice law by submitting to the court certain evidence of the attorney's authority to practice in his home state. Other states require non-resident attorneys who wish to appear occasionally in litigation to associate with them some resident counsel. This appears to be true in California, New York, New Mexico, Virginia, Washington, Idaho and is the general practice in South Dakota. Other states deny to non-resident attorneys the privilege of signing pleadings. This is true in Nevada, Minnesota and Pennsylvania. On this question the Supreme Court of Minnesota in *Verry vs. Barnes*, 191 N.Y. 589, 31 A.L.R. 707, 1.c. 709, said:

"But they have no authority to commence actions in courts of this state (*Francis vs. Knerr*, 149 Minn. 122, 182 N.W. 988), and hence the prevailing practice is to associate a resident attorney as the attorney of record."

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The State of Oregon divides practitioners into two groups, (1) attorneys, (2) counselors. Attorneys must be resident practitioners of Oregon. Counselors are not permitted to sign pleadings, and consist chiefly of non-resident attorneys appearing occasionally in that State. Thus Oregon by such classification requires non-resident attorneys to associate with them resident attorneys of the State of Oregon in all matters wherein pleadings or writings are required.

In South Dakota it appears that only licensed members of the State Bar in good standing are permitted to engage in practice. In that State, Chapter 126, Laws 1933, the code section relating to attorneys' fees and non-resident attorneys, contains the following:

"In all cases where the owner and holder of any mortgages is a non-resident of this state, the foreclosure of such mortgage must be conducted by a licensed attorney, resident of the State of South Dakota."

The above law went into effect July 1, 1933. *Hanson v. Federal Land Bank of Omaha, Nebraska*, 262 N.W. 228.

Under Section 2330, Revised Code, South Dakota, 1919, a summons shall be subscribed by the plaintiff or his attorney and the defendant shall serve a copy of his answer on the person whose name is subscribed to the summons at a place within South Dakota. The Supreme Court of South Dakota in *Jacobs v. Queen Insurance Company of America*, 213 N.W. 14, at l.c. 15 said:

"Manifestly, a summons signed only by a Minnesota attorney who has not been admitted to practice in the courts of this State, was not signed 'by the plaintiff or his attorney.' The so-called summons was a nullity and of no more force than if signed by a mere layman. *Francis v. Kneer*, 159 Minnesota 122, 182 N.W. 988."

This question of comity has not escaped the Federal Courts. The Circuit Court of Appeals, Ninth Circuit (1923)'

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in Tuppela vs. Mathison, 291 Fed. 728, had before it a situation wherein the plaintiff, an attorney, was employed by the defendant in the State of Oregon for the purpose of recovering certain mining properties in Alaska. After the plaintiff had performed part of his services in preparing the case for trial in the Alaska Court, he was arbitrarily discharged by the defendant, and when this suit was instituted to recover attorneys' fees one of the defenses set up was that the plaintiff, an Oregon Attorney, was not admitted to practice in the Courts of Alaska. The Court of Appeals in passing upon the case, l.c. 730, said:

"The plaintiff had been admitted to practice in the courts of Oregon, both State and Federal. He was a regularly licensed attorney at the place where the contract was made. In drafting the contract, he made special provision for the appointment of local counsel in Alaska if he should deem it advisable. To carry out his contract it was not necessary that he should have been licensed to practice in the territory of Alaska."

In State ex rel. Boynton v. Perkins, 28 Pacific(2d) 765, the Supreme Court of Kansas had for consideration the question of whether or not a Missouri attorney was entitled to practice law in Kansas without being admitted to the Bar of Kansas. The court held that he was not so entitled to practice law and he was enjoined from doing so.

In passing it may be observed that the right to practice law in the state courts is not a privilege or immunity within the meaning of Section 1 of the 14th Amendment of the Constitution of the United States. The power of the state to choose who shall practice at its Bar is beyond the reach of the 14th Amendment and the Supreme Court of the United States is without authority to inquire into the reasonableness or propriety of the rules prescribed by the State. Bradwell v. Illinois, 83 U.S. 644. It therefore follows that the practice of law is not and cannot be a property right.

Thus by comity -- reciprocity, a courtesy is awarded, allowed or extended. It bestows as a favor that which cannot be claimed as a right. It persuades but does not command, Its

Honorable Russell Maloney.

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goal a kind intercourse between the states. To brother attorneys from sister states it extends the gracious hand of the host. This comity is bottomed upon occasional as distinguished from regular appearances. Non-resident attorneys who regularly accept employment to "Blue Sky" securities in Missouri do not come within this comity privilege, but are to be treated as regularly engaged in the practice of law in this state and therefore must qualify as resident attorneys or associate with them as resident counsel.

It is therefore the opinion of this office that non-resident attorneys who regularly appear before your department are doing so in violation of the spirit and purpose underlying the regulation of the Bar and the doing of law business in Missouri.

III.

The Commissioner of Securities may by rule require the certificate of a reputable lawyer licensed to practice in Missouri.

Section 7724 R. S. Missouri 1929, in part provides:

"Said commissioner, under the direction of the secretary of state, is hereby authorized to make all needful rules and regulations, and from time to time to amend and supplement the same, to carry this chapter into full force and effect."

This rule making power is similar to that vested in the Interstate Commerce Commission, U.S.C.A. T49, Section 17 (1). Under that rule the Interstate Commerce Commission has adopted rules with reference to hearings, personal appearances, permission to practice, oath of practitioners and disbarment of practitioners. Interstate Commerce Acts Annotated, Vol. 4, page 3437.

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The inherent power to define and regulate the practice of law is vested in the courts. In re: Richards, 333 Mo. 907, 63 S.W. (2) 672. This includes the power to disbar. In re: Sparrow, 90 S.W. (2) 401.

Under the above statute the commissioner of securities would have authority to make any rules not inconsistent with the rules of the Supreme Court or judicial decisions interpreting those rules relative to the regulation and practice of law. Under this rule making power you are vested with authority to exclude any person from practicing law before your department who is not a licensed attorney as heretofore pointed out, and you have the power to make such rules, consistent with the Supreme Court rules, which are necessary for expediting the transaction of business and the practice of law before your department.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

SECURITIES ACT: Bond of dealer and salesmen.

October 13, 1937.

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Honorable Russell Maloney,
Commissioner of Securities,
Jefferson City, Missouri.

Dear Sir:

This is to acknowledge receipt of your letter of October 5, 1937, in which you request the opinion of this department relative to the bond required by Section 7744, R. S. Mo. 1929. Your letter is as follows:

"Section 7744 Revised Statutes of Missouri 1929 requires that every applicant having a license to engage in the business as dealers in securities, file a bond, 'in the sum of five thousand dollars (\$5,000) running to the people of the state of Missouri in such form as the commissioner may designate, such bond to be conditioned upon the faithful compliance with the provisions of this act by said dealer and by all salesmen registered by him while acting for him. Such bond shall be executed as surety by a surety company having a net worth of not less than \$1,000,000 and authorized to do business in this state.'

"The same section further provides that every registration under this section shall expire on the 31st day of December in each year, but that a new registration for the succeeding year shall be granted upon application and payment of the fee, 'without filing of further statements or furnishing any further information, unless specifically required by the Commissioner.'

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"In the past it has been the practice of this department to permit the dealers registration to be granted for such succeeding years and the bond approved wherein the bonding company filed with this department a continuation certificate of the bonding company of the preceding year. It was our opinion that the bonding company was liable in the sum of five thousand dollars (\$5,000) for each year. Upon this already being taken to court it was decided that the bonding company was liable only for \$5000 in the aggregate. Upon the statement of this department that we would require a new bond to be filed each year, there arose certain difficulties to that plan.

"We, therefore respectfully request an opinion from your office as to whether or not the department must require from dealers in securities a bond of \$5000 each year or whether the law contemplated only that the dealer post a \$5000 bond which would continue for the entire time of his license with this department."

According to your letter, the main question you desire to determine is whether or not, under Section 7744, R. S. Mo. 1929, you should require a new bond on each registration. In a recent case, Maryland Casualty Company, a corporation v. Camilla Driemeyer, et al., decided in the United States District Court for the Eastern Division of the Eastern Judicial District, Cause No. 11683 (quoting from memorandum of the Court), the Court said:

"The questions to be decided are, first, did the renewal certificates only continue in force the original bond or were they the assumption of a new liability, and second, is the plaintiff liable for interest on the amount of the bond from the date when the defalcations of the principal were discovered.

"The contract of the parties is clear. The plaintiff agreed, by express words in the continuation certificates, to be bound in the sum of \$5000. The court cannot change the obligations of the parties even though it may be true that the plaintiff company struck a hard bargain. It has been repeatedly held that a continuation certificate of this kind does not extend the surety's liability beyond the penalty specified in the bond. Grand Lodge U. B. of F., etc. v. Mass. B. & Ins. Co., 25 S. W. (2d) 783; State v. New Amsterdam Casualty Co., 236 Pac. 603; United States Fidelity & Guaranty Co. v. First National Bank, 233 Ill. 475, 84 N. E. 670."

In this case the court held that the continuation certificates each year on the bond did not create cumulative liability and did not create a new contract on each renewal, for the reason that each renewal certificate expressly provided that it was not cumulative and should not under any circumstances or in any event exceed the sum of \$5000. This continuation certificate was used by your office in 1936, and there is no question but that the extent of the liability of the surety company cannot, in any event, under your present procedure, be more than \$5000. In an opinion from this office dated August 26, 1933, your office was informed that the maximum amount that could be collected under the bond provided in the Act was \$5000. This opinion was given your office previous to the filing of the case of Maryland Casualty Company v. Camilla Driemeyer, et al.

The next question in point is whether or not a new bond is required after December 31st of each year, when the insurer or dealer desires to renew his registration, in accordance with Section 7744, R. S. Mo. 1929. This section provides that after the commissioner has received and filed an application in writing from the dealer or salesman of certain securities, he shall require a bond of \$5000 running to the people of the State of Missouri in such form as the commissioner may designate, such bond to be conditioned upon the faithful compliance with the provisions of this act by said dealer and by all salesmen registered by him while acting for him.

As you notice, nothing is said any place in the section or Act concerning anything about the renewal of the same bond. The section does set out how the registration may be renewed, but does not mention the bond in connection with renewal. It says: "Applications for renewals must be made not less than thirty (30) nor more than sixty (60) days before the first day of the ensuing year, otherwise they shall be treated as original applications." In the renewal the section specifically says, "without filing of further statements or furnishing any further information, unless specifically required by the commissioner." There is nothing said in this connection about the bond.

The same section provides that, "every registration under this section shall expire on the 31st day of December in each year," but provides for renewal. The question now is, did the bond on the 31st day of December expire or was it renewable, and what was the intention of the Legislature in setting the expiration date of the registration.

In 59 C. J., page 952, it is said:

"The intention of the legislature is to be obtained primarily from the language used in the statute. The court must impartially and without bias review the written words of the act, being aided in their interpretation by the canons of construction. Where the language of a statute is plain and unambiguous, there is no occasion for construction, even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning," citing *Gendron v. Dwight Chapin & Co.*, (App.) 37 S. W. (2d) 486; *Betz v. Kansas City So. R. Co.*, 284 S. W. 455, 314 Mo. 390; *Grier v. Kansas City, C. C. & St. J. Ry. Co.*, 228 S. W. 454, 286 Mo. 523.

In *Betz v. Columbia Telephone Co.*, (App.) 24 S. W. (2d) 224, the Court said:

"To get at the true meaning of the language of the statute the court must look at the whole purpose of the act, the law as it was before the enactment, and the change in the law intended to be made."

The purpose of the whole Securities Act was to protect the people of the State of Missouri from any fraudulent or illegal practices or transactions. The \$5000 bond was required to reimburse the people of the State of Missouri for any fraudulent or illegal practices or transactions. If the \$5000 bond was not cumulative at each renewal, the bond in a number of years would not be sufficient to cover any fraudulent or illegal practice of the dealer or salesman. This situation occurred in the case of *Maryland Casualty Company v. Camilla Driemeyer, et al.*, cited above.

59 C. J., at page 961, sets out the following:

"In construing a statute to give effect to the intent or purpose of the legislature, the object of the statute must be kept in mind, and such construction placed upon it as will, if possible, effect its purpose, and render it valid, even though it be somewhat indefinite. To this end it should be given a reasonable or liberal construction; and if susceptible of more than one construction, it must be given that which will best effect its purpose rather than one which would defeat it, even though such construction is not within the strict literal interpretation of the statute, and even though both are equally reasonable. Where there is no valid reason for one of two constructions, the one for which there is no reason should not be adopted. The legislature cannot be held to have intended something beyond its authority in order to qualify the language it has used," citing *Betz v. Columbia Telephone Co.*, (App.) 24 S. W. (2d) 224.

10/13/37

In the case of New Amsterdam Casualty Co. v. Hyde, (Ore., 1934) 34 Pac. (2d) 930, and 35 Pac. (2d) 980, the Court held such a bond as a continuing bond, and not a separate bond for each period of registration which ended each year. In that case the Blue Sky Commissioner had not requested a new bond, but allowed them to renew, as your office is now doing.

Under the Securities Law of the State of Missouri, Section 7724a provides:

"Said commissioner, under the direction of the secretary of state, is hereby authorized to make all needful rules and regulations, and from time to time to amend and supplement the same, to carry this chapter into full force and effect."

In conclusion, we will say that in view of the purpose of the Securities Act and the intention of the Legislature, this office is of the opinion that the Commissioner may require a new bond for each renewal, under Section 7744 of the Securities Act.

Respectfully submitted,

W. J. BURKE,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

WJB:HR

SHERIFFS - Liability of sheriff and sureties for embezzlement, and method of proceeding against same, particularly as to escheats. - Time when breach of bond occurs where more than one sheriff involved.

February 4, 1937. 2-11

Hon. G. Logan Marr,
Prosecuting Attorney Morgan County,
First National Bank Building,
Versailles, Mo.

FILED

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Dear Sir:

Request for an opinion has been received from you under date of January 20, 1937, such request being in the following terms:

"When A. S. Ball, took office as Sheriff of Morgan County, Mo., he received from the outgoing sheriff about \$1706.63 which has been passed on from sheriff to sheriff for years. The books and the accounts of the sheriff were audited and this amount was set up against the sheriff in the report of the auditor of 1934. Under the escheat law sec. 620-1929 \$158.34 escheated to the State of Missouri, and that amount was sent to the State of Missouri, leaving a balance of \$1,548.29.

A. S. Ball on account of his mental derangement brought about by his excessive drinking of intoxicating liquor was adjudged insane by the county court Dec. 5, 1936, and Sheriff Ball was confined in the state institution for treatment by the county court.

After Jan. 1, 1937, Met Hughes took over the office of sheriff, and of course nothing was turned over to Sheriff Hughes by Ex-sheriff Ball.

Sheriff Ball's accounts has not been audited since he went out of office. The balance in his account as sheriff is about \$165.00. Which seems to make his shortage about \$1,383.29.

Sheriff has a very good bond. Are his bondsmen liable on the bond for this fund? This fund consisted of \$329.40 remaining in hands of sheriff for old tax sales, where the surplus was never claimed by interested parties, and \$718.89, left in hands of sheriff from old partition, execution and judicial sales. (As an afterthought -

Hon. G. Logan Marr

February 4, 1937.

it is very apparent that the tax surplus should have escheated under sec. 9959-1929, and the balance unclaimed from judicial sales escheated under sec 620-640-1929.)

If the bondsmen are liable, who should order action against the bondsmen? Who should pursue the bondsmen? What would be the best remedy?"

R. S. Mo. 1929, section 620 provides in part as follows:

"* * * if upon final report of any sheriff to the court, it is shown that the interests in the proceeds of the sale of land in partition of certain parties, who are absent from the state, who are non-residents, who are not known or named in the proceedings, or who, from any cause, are not in a situation to receive the same, are in his hands unpaid and unclaimed * * *, in each and every such instance such real and personal estate shall escheat and vest in the state, subject to and in accordance with the provisions of this chapter."

Section 622 provides as follows:

"The court having the settlement of the accounts of such executor or administrator, assignee, sheriff or receiver upon the production of the receipt of the state treasurer, shall give credit for the amount thereof; but, if said moneys, as aforesaid, are not paid into the state treasury, the prosecuting attorney of the county in which such executor or administrator, assignee, sheriff or receiver resides shall, upon giving ten days' previous notice of his intention so to do, move the court to enter judgment against such executor or administrator, assignee, sheriff or receiver, and his sureties, or either of them, for such moneys in his possession, together with eight per cent per annum thereon from the time the same should have been turned into the state treasury until the rendition of the judgment. The court shall determine the case in a summary manner, and if it finds the facts as stated in the motion to be true, and no valid and reasonable excuse for the delay is offered, shall enter judgment accord-

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ingly and adjudge the said executor or administrator, assignee, sheriff or receiver to pay all costs of the proceedings."

Section 640 provides, in part, as follows:

"All moneys realized from the sale of any real estate, after paying all costs of such proceedings, and such compensation to the prosecuting attorney as shall be allowed by the court in which such order of sale is made, shall be paid by the sheriff into the state treasury within ninety days after the receipt thereof; and if said sheriff fail to pay said money into the state treasury within ninety days after the receipt thereof, he shall be proceeded against in the same manner as is provided in section 622 of this chapter."

From the foregoing statutes it is apparent that the proper procedure with respect to the funds which were in the hands of the sheriff and derived from the sources mentioned in such statutes, would be for you as prosecuting attorney to move the court in which the settlements of the sheriff were made or should have been made to enter judgment against such sheriff and his sureties in accordance with the provisions of section 622.

There is some question about the liability of Sheriff Ball under the facts mentioned in your letter. Although in attachment suits the liability of a sheriff for failure to turn over the attachment proceeds does not accrue until the court orders them turned over, in an execution or partition sale the breach of the sheriff's bond for failure to turn over the funds in his hands is not postponed until the court orders them turned over. This conclusion is based on the case of *State ex rel Knapp, Stout & Co. v. Finn*, 23 Mo.App. 290 (1886), in which the court said:

"The defendants contend that the cause of action accrued when the sheriff made his return showing what funds were in his hands, and claim that the point is thus decided by the ruling of this court and of the supreme court in analogous cases of sales on execution and in partition. The *State ex rel. v. Minor*, 44 Mo. 373; *Kirk v. Sportsman*, 48 Mo. 353; The

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State ex rel. v. Lidwell, 11 Mo. App. 567. There is, however, a marked difference between the two cases. In the latter the execution creditor, or the distributee in partition, has a vested interest in the fund, which gives him a right in one case to demand its immediate payment to him, and in the other to intervene at once for its protection. It is not so in attachment proceedings. The interest of parties to the attachment suit is contingent upon the termination of the controversy." 23 Mo.App. 294.

To the same effect is State to use of Blacker, Gerstle & Co. v. O'Neill, 114 Mo. App. 611, 90 S.W. 410 (1905).

It should be noted that under the attachment statutes involved in the foregoing cases, it was provided that the sheriff should turn over the proceeds of the attachment to the court or to such persons as the court should order, and the theory of the court was that no breach of a sheriff's bond could occur until the court had made such an order and it had been disobeyed by the sheriff. It might also be noted that section 621 of R. S. Mo. 1929 provides that "within one year after the final settlement of any * * * sheriff * * *, all moneys in his hands unpaid or unclaimed, as provided in section 620, shall, upon the order of the court in which such settlement is made, be paid into the state treasury". From this section it might be inferred that no breach of the bond of a sheriff for failure to turn over money held by him as proceeds of a partition suit, could occur until an order of court might be made, but the contrary has been held in the case of State ex rel Adkins v. Grugett, 228 Mo. App. 3, 63 S.W. (2d) 413 (1933), the opinion in which contains the following:

"It is urged that this suit cannot be maintained because there was no final order of distribution in the original partition suit. The decree of the circuit court in that case set forth the interest of the minors; the sale by the sheriff was ordered, and after the sale his report thereof was approved. The sale was therefore legal and binding on all parties to the suit, and the money in the hands of the sheriff derived from that sale was the property of the parties to that suit in proportion to their respective interests, as determined by the court. The fund in controversy was the property of these minor plaintiffs and was paid

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out by the sheriff to other persons. He is in no position to raise the point that no order of distribution was made, since he admits he has disbursed this particular fund. The judgment should be affirmed. It is so ordered." 63 S.W. (2nd) 416.

If the meaning of the case last cited is that the sheriff and his sureties become liable prior to an order of distribution of the court, so that section 863 of R. S. Mo. 1929 fixing a three year statute of limitations on sheriffs' bonds, begins to run even though the court has made no order of distribution, then under the facts in your letter it may be that a predecessor of Sheriff Ball and the sureties of such predecessor were the persons liable for failure to turn over this fund to the state treasury, and that the statute of limitations has run with respect to this liability. Under the decision in *State ex rel Knapp, Stout & Co. v. Finn*, 23 Mo.App. 290 (1896) only the sureties who were on a sheriff's bond at the time of the defalcation are liable.

"No principle of law is better established than that where an officer proves a defaulter, and has held the office under different appointments, with several sets of sureties, the sureties will be responsible who were on the bond at the time the defalcation occurred."

State to use of *Pace v. McCormack*, 50 Mo. Rep. 568 (1872).

In this last case a suit was brought against a sheriff and his sureties for the proceeds in a partition sale. During the sheriff's first term of office he had sold the lands by order of court, but the money sued for was not collected by him until his second term as sheriff, and there was no order of court made transferring the business touching the matter of this partition suit to the new sheriff as his own successor, and the defense was made that the sureties on the sheriff's first bond only were liable and not the defendants who were sureties only on his second. The court said, at page 571:

"Had a new sheriff come into office, instead of the old one being re-elected, it is manifest that he could not have received the money, and his sureties would not have been bound for it if he did, unless the court by an order had directed the business to be transferred to him." (Emphasis ours)

Hon. J. Logan Marr

February 4, 1937.

You make no mention in your letter of whether or not the courts in which the settlements involved were due had ordered the funds and business touching these suits turned over by earlier sheriffs to their predecessors and ultimately to Sheriff Ball. In this connection R. S. Mo. 1929, sec. 1588, in the article dealing with partition suits, becomes pertinent. This section provides as follows:

"If any sale be made by any sheriff before he goes out of office, and the business be not completed when he ceases to be sheriff, he may do all subsequent acts, collect and pay over the money, and make the deed, in the same manner as if he continued to be sheriff, unless the court shall by order direct the business to be transferred to the next sheriff; in which case all acts remaining to be done by the sheriff, at the date of such order, shall be done by the sheriff then in office."

This section and the case of State to use of Pace v. McCormack, supra, might justify the conclusion that if no such orders have been made transferring the business from sheriff to sheriff, that Sheriff Ball and his sureties are not liable even though Sheriff Ball did get this money. However, it is clear that a sheriff who does receive money by virtue of his official capacity and embezzles it, is not faithfully performing his duties as sheriff in the common usage of those terms, and in view of the fact that the statute of limitations has doubtless run against the predecessor sheriff whose duty it originally was to turn over these moneys to the state treasurer, and against his sureties, it would seem to be best to attempt to proceed in the manner above suggested against Sheriff Ball's guardian and his sureties.

As to the proceeds of tax and judicial sales, R. S. Mo. 1929, section 9959 as repealed and re-enacted by Laws of 1933, page 426, provides in part as follows:

"When real estate has been sold for taxes or other debt by the sheriff * * * and the same sells for a greater amount than the debt or taxes and all costs in the case, and the owner or owners, agent or agents, cannot be found * * * the sheriff * * * making the same shall pay the said surplus money into the county treasury, * * * and there-

Hon. J. Logan Marr

February 4, 1937.

upon the court shall charge said treasurer with said amount."

The county treasurer, therefore, would be the person to bring suit for the failure of the sheriff to turn over these moneys to him, and R. S. Mo. 1929, section 2855 provides for suits in the name of the state at the relation and to the use of the person entitled. It might be noted that section 11507, providing for the giving of bond by a sheriff, requires said bond to be given "to the state".

A suit by the county treasurer to recover proceeds of tax or judicial sales might under the facts stated in your letter be subject to the same difficulties as to the statute of limitations as are involved and suggested with respect to the partition suit proceeds mentioned above, but it would seem in this case also that the best method of proceeding would be against Sheriff Ball and his sureties.

If any of the funds stated in your letter as constituting Sheriff Ball's shortage were not subject to escheat, then, in our opinion, the person entitled to such funds could pursue the same remedy as suggested for the county treasurer under section 2855.

In conclusion it is our opinion that where a sheriff is liable for the embezzlement of funds collected as the proceeds of tax, judicial and partition sales, his sureties at the time of his defalcation are liable, and that the person entitled to such funds can bring a suit against the sheriff and his sureties in the name of the state at the relation and to the use of the person so injured; that where the state treasury is entitled to such funds by escheat, the prosecuting attorney of the county in which such sheriff resides can move the court for judgment against the sheriff and his sureties as provided in R. S. Mo. 1929, section 522; that where the county treasurer is entitled to receive such funds under R. S. Mo. 1929, section 9959 as repealed and re-enacted by Laws 1933, page 428, that a suit can be brought in the name of the state at the relation and to the use of such county treasurer against the sheriff and his sureties at the time of the defalcation.

APPROVED:

Very truly yours,

J. E. TAYLOR
(Acting) Attorney General

EDWARD H. MILLER,
Assistant Attorney General.

TAXATION & REVENUE: Power and authority of county court to compromise with tax attorneys in suits against railroad companies.

March 30, 1937.

3-31
FILED
57

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of March 18th, relative to the compromise and settlement with the attorneys in the collection of taxes against the Rock Island Railroad, in Bankruptcy.

We note fully what you say relative to the history of this litigation and the employment of counsel to represent the county, and that the attorneys have secured for Morgan County the sum of \$1,052.62, by reason of a judgment secured in the Federal Court, as interest at the rate of six per cent from January 1, 1934 to November, 1934. No doubt the attorneys for the county rendered service to the county in securing this sum of \$1,052.62 and under the Bankruptcy Act, U. S. C. A., Title 11, Section 93, subdivision (j), penalties could not be collected, but under an opinion of this office rendered March 26, 1935, to the Prosecuting Attorney of Platte County, we were of the opinion that interest could be collected at the rate of six per cent. per annum.

We note in your letter that the attorneys for the county filed suit for the taxes, penalties, fees, commissions and attorneys' fees against the trustees of the Railroad Company, and that in view of the Bankruptcy Act cited above, they were foreclosed from collecting the penalties, fees, commissions and attorneys' fees. No doubt, in the prosecution of this suit, the attorneys have rendered service to the county for which the county court and collector should pay them for reasonable fees, and we are quite sure that all of the counties have not been so successful in collecting interest on these taxes as Morgan County.

Mar. 30, 1937.

It is our opinion that the county court and collector have the power and authority to pay them a reasonable fee for these services, and the fee should be taken out of the \$1,052.62, and the collector's books should be adjusted accordingly.

It is our opinion that you, as Prosecuting Attorney, may advise the county court to adjust and compromise the differences between the county court and their attorneys. We, of course, think that any settlement which might be made would be entirely outside any contract which may be in existence between the county and the attorneys, and not under the contract itself.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

CRH:EG

COUNTY TREASURER: Not entitled to fees for drawing warrant
for school fund loans.

May 25, 1937.



Hon. Thomas A. Mathews
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

We have your request for an opinion of this office
reading as follows:

"On February 25, 1937, you very promptly
mailed me an opinion in regard to an
inquiry that I had written you on February
3, 1937, with reference to construction
of Section 9266 R. S. Missouri, 1929.

After receiving your letter and copy of
the opinion mailed Prosecuting Attorney
of Boone County; Clerk of County Court,
Carthage, Missouri, and Treasurer of Miller
County, I find that this opinion does not
answer the question desired. It is this:

To know whether or not the former County
Treasurer would be entitled to fees as
outlined in the Statute on 'permanent
school moneys made up of fines and loaned
on real estate and drawn by warrant by
the county court and not drawn by the
respective representatives of school
districts.'"

May 25, 1937.

Section 9266 R. S. Missouri 1929, covers "moneys for school purposes, belonging to the different districts." The county treasurer is to be custodian until said moneys are paid out on warrants duly issued by order of the board of directors or to the treasurer of some town, city or consolidated school district. The compensation for such services is fixed by the same statute, Section 9266.

The County school fund is created by Section 9243 R. S. Missouri 1929, and is to be securely invested and sacredly preserved; the income to be devoted to free public school purposes.

Sections 9245 and 9250 R. S. Missouri 1929, authorize the County Court to loan said funds. This act of loaning is not a payment by order of the board of directors, or to a school district treasurer contemplated by Section 9266; therefore the county treasurer is not entitled to the compensation provided in Section 9266 on the issuing of warrants for the loaning of such school fund moneys.

It is therefore the opinion of this office that the county treasurer is not entitled to fees as outlined in Section 9266 for the payment of warrants drawn by the county court for the purpose of loaning school fund moneys.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

CREAM STANDARDS:-Section 12406 fixes minimum standards for various grades of cream.

July 19, 1937

7/20



Honorable Jewell Mayes,
Commissioner
Department of Agriculture
Jefferson City, Missouri

Dear Mr. Mayes:

We have your request for an opinion of July 13, 1937, relative to a construction of that portion of Section 12406 R. S. Missouri 1929, which deals with the various grades of cream. In answer to your inquiry we desire to point out certain portions of other statutes applicable to this question.

Section 12395, Laws of Missouri 1933, page 171, makes it the duty of the Commissioner of Agriculture

"to prescribe such reasonable rules and regulations for their operation as he deems necessary to fully carry out the provisions of this article, or any other law relative to the production, manufacture, transportation, sale or consumption of dairy products,* * *".

The above and other sections are all a part of Article V, relating to the Bureau of Dairying, Dairy Products and Imitations.

It is made the duty of the Commissioner to inspect and license milk and cream gathering stations. Section 12396 R. S. Missouri 1929.

In the application for such license the purchaser of cream shall furnish certain facts to the commissioner, and

"such other facts as the state--
commissioner, shall require concerning
the character, financial responsibility
and good faith of the applicant* * *."

For a violation of any of the provisions of the article
this license may be revoked. Section 12397 R. S. Missouri 1929.

Section 12398 provides that the Commissioner shall license
the use and operation of milk or cream testing apparatus. The
statute specifically refers to the Babcock tester.

Section 12405 makes it a criminal offense for any creamery
or cheese or butter factory to manipulate or under-read or
over-read the Babcock test or contrivance used for determining
the quality or value of milk or cream. It also makes it an
offense for the creamery

"to pay for such milk on the basis of
any measurement except the true measure-
ment as thereby determined."

That portion of Section 12406 dealing with cream is
as follows:

"1. Cream is that portion of milk, rich
in fat, which rises to the surface of milk
on standing, or is separated from it by
centrifugal force, is fresh and clean, and
contains not less than eighteen per cent.
(18%) of milk fat.

2. Evaporated cream, clotted cream, is
cream from which a considerable portion of
water has been evaporated.

3. Three grades of cream are hereby estab-
lished, to be known and described as follows:

Extra. Extra grade cream is sweet cream suitable for table use, and such as will not curdle in hot water, tea or coffee. First grade. First grade cream shall consist of cream that is clean to the taste and smell, slightly sour, containing not to exceed four-tenths of one per cent. acid, and to contain not less than twenty-five per cent. butter fat, and shall be free from lumps, curd, dirt, and of foreign matter. Second grade. Second grade cream is cream that is too sour to grade as first grade and having curdy or undesirable flavors or odors. Cream that is old, rancid, molded, dirty or curdy, or that is produced by unclean separators or stored, handled or transported in unclean cans, or that has been produced, handled, separated, stored or transported in violation of this article, and all other creams not coming within any of the three grades above established is hereby declared to be illegal, and its production, transportation and sale for human food is hereby prohibited. Any person who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor and punished as provided by law."

We call your attention to the above part of Section Three, "Three grades of cream are hereby established". Giving to the statute its plain and ordinary meaning, the word "established" means to set up, fix, determine, etc. This is the meaning that is ascribed to it by the terms of Section 655 R. S. Missouri 1929.

We find in the dairy law a complete scheme for the handling and classification of dairy products. No person or creamery may use a testing apparatus without a license therefor. The testing apparatus is primarily for the purpose of determining the percentage of fat. There would be no need of such regulatory statutes if there were no fixed standards or definitions of cream. Without the definitions of extra, first grade and second grade cream as contained in Section 12406 these other statutes relating to the licensing of testers, etc.,

"would be without life, mere sound and fury signifying nothing--the mischiefs would abide, the remedy be lost--".

Shohoney vs. Railroad Company, 231 Mo. 131, 1. c. 156.

When the legislature fixed these standards for cream it was clearly intended, for example, that cream which would curdle in hot water, tea or coffee was not to be classified as extra cream. It was equally true that by the definition of first grade cream the legislature intended to exclude therefrom cream which contained, among other things, less than 25% butter fat. If a cream does not contain among other things 25% butter fat it is not first grade cream. A cream containing only 23% butter fat cannot be purchased as first grade cream under the above statutory definition unless the person or creamery giving the Babcock test overreads the test itself and finds as a fact that the cream actually contains 25% butter fat. To so misread the tester is made a criminal offense by Section 12405. The true quality of the cream purchased must be found prior to purchasing and Section 12405 makes it a misdemeanor to purchase cream on any basis other than the true measurement as determined by a test.

The above and foregoing deals primarily with statutes passed under the police power of this state for the protection of the public. Similar regulatory laws have been upheld. In *St. Louis vs. Ameln* (1911), 139 S.W. 429, 235 Mo. 669, a city ordinance against the sale of adulterated milk--consisting of a mixture of milk and water--was upheld. A similar ordinance was upheld forbidding coloring of milk and cream. *City of St. Louis vs. Polinsky* (1905) 89 S.W. 625, 190 Mo. 516. In *City of St. Louis vs. Renter*, (1905), 89 S.W. 628, an ordinance forbidding the sale of cream containing less than 12% butter fat was held to be a valid exercise of police power. In *Hutchinson Ice Cream Company vs. State of Iowa*, (1916), 242 U.S. 153, an Iowa law forbidding the sale or offering for sale of ice cream not containing butter fat in reasonable proportion was held to be a valid exercise of the state police power. Kansas City by ordinance prohibited the sale of skimmed milk. *City of Kansas City vs. Cook*, 38 Mo. App. 660.

July 19, 1937.

The primary object of such legislation is to secure pure food and to prevent fraud, deception and deceit. State vs. Packing Company (1904), 124 Iowa 323, 1. c. 328; State vs. Holton, Gray and Company, (1910), 148 Iowa 724; Day-Bergwell Company vs. State, 190 Wis. 8. When a creamery advises its customers that they are purchasing extra cream or that extra cream has been used in the making of some product the public are entitled to rely upon the fact that such cream is "sweet cream suitable for table use and such as will not curdle in hot water, tea or coffee." This is the standard which the legislature says that the public are entitled to rely upon. To sell to the public or use in the manufacture of a product first grade cream under the representation that extra grade cream is being sold or has been used would amount to fraud, deception and deceit on the part of the seller which the legislature possesses full power to prevent. People vs. William-Henning Company (1913) 260 Ill. 554.

CONCLUSION

It is therefore the opinion of this office that the State Dairy Law requires that cream be bought or sold on a graded basis after a test by a competent operator of a testing machine.

It is further the opinion of this office that all cream bought and sold must be on the quality basis as defined by the statute, and that the statutory definitions of extra, first grade and second grade cream are but the minimum standards.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

AGRICULTURE - Fees under Section 12635, R. S. Mo. 1929, to be deposited in the State Treasury; no authority to pay U. S. Department of Agriculture any part of said fees.

August 5, 1937

8-7

Honorable Jewell Mayes, Commissioner
Department of Agriculture
Jefferson City, Missouri



Dear Sir:

We have your request of August 5, 1937, for an opinion as follows:

"1. Does the Commissioner of Agriculture have authority to comply with the non-deposit provision of Section 12635, Revised Statutes of Missouri, 1929, in view of the General Fee Statute of 1933 on page 415 of the Laws of 1933?

2. If your opinion on Question 1 is NO, then does the Commissioner of Agriculture have authority to enter into an agreement with the United States Department of Agriculture, which will provide that the Federal Department be paid half the profits on hand at the termination of the agreement, or prior to the end of each biannual Period?"

We shall treat these questions separately.

I.

The Commissioner of Agriculture has authority to carry out provisions of Section 12635, R. S. Missouri, 1929, except those relating to the disbursement of fees.

The legislature in 1933, (Laws of 1933, page 415), passed the following statute:

"All fees, funds and moneys, from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this section, and any person who shall wilfully violate any provision hereof, shall be deemed guilty of a misdemeanor;"

In an opinion written by this office relative to the effective date of the above statute, which opinion was written by Harry G. Waltner, Jr., Assistant Attorney General, under date of September 1, 1933, it was held as an opinion of this office:

August 5, 1937

"It is our further opinion, that all fees collected subsequent to July 24, 1933, should be kept in a separate fund by you and paid into the credit of the Board at stated intervals."

We adopt and reaffirm the holding of that opinion to the effect that all fees, including such fees as authorized by Section 12635, R. S. Missouri, 1929, must be paid into the State Treasury by the Commissioner of Agriculture, in order to comply fully with the terms of the 1933 Law, supra. In addition thereto, the 1935 legislature, blackest law of 1935, page 189, enacted Section 12355-a, which reads as follows:

"All moneys collected by or through the Commissioner of Agriculture of the State Department of Agriculture from fees, licenses, permits or other earnings under any law, other than the business of the Missouri State Fair, shall be deposited daily in the state treasury to the credit of the "Agricultural Fees Fund," which shall be subject to appropriation by the General Assembly."

It is therefore, the opinion of this office that all fees collected by the Department of Agriculture must be deposited in the state treasury to the credit of the "Agricultural Fees Fund".

II.

The Commissioner of Agriculture has no authority to enter into an agreement with the U. S. Department of Agriculture to divide the profits, if any, resulting from shipping point inspection fees.

August 5, 1937

We have heretofore pointed out how all fees collected by the Commissioner of Agriculture are deposited in the state treasury.

These fees having been placed in the state treasury, automatically become subject to the constitutional provisions of this state. Article 10, Section 19, of the Missouri Constitution, provides:

"No money shall ever be paid out of the treasury of this state, or any of the funds under its management, except in pursuance of an appropriation by law."

It is within the realm of possibilities that the next legislature could appropriate to the U. S. Department of Agriculture, one-half of such profits, if any, as may be accumulated from shipping point inspection fees, but this is purely a legislative matter and rests in the discretion of the legislature.

It is therefore, the opinion of the office that the Commissioner of Agriculture has no authority to disburse any fees collected under Section 12635, R. S. Missouri, 1929, and has no authority to pay or agree to pay any portion of said fees to the U. S. Department of Agriculture.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER MR

AGRICULTURE: Shipping point inspection--Cooperation with
Department of Agriculture.

August 9, 1937

8-9



Honorable Jewell Mayes
Commissioner
Department of Agriculture
Jefferson City, Missouri

Dear Mr. Mayes:

We have your request of August 5, 1937, for an opinion relative to cooperating with the Federal Government through the United States Department of Agriculture in the matter of shipping point inspection. With reference to the contract between the Federal and State Governments your inquiry for an opinion is as follows:

"It is proposed that the following financial arrangement be incorporated in this contract or agreement:

1. That the State Department of Agriculture collect and deposit all fees in the Agricultural Fees Fund, and pay all salaries and expenses from the appropriations from the Agricultural Fees Fund.
2. Pay the salary and expenses of the Federal Supervisor for such times as he spends in Missouri assisting with this work.
3. Pay an overhead charge per car to the Federal Department to cover certain Federal overhead expense connected with the work; the State Department of Agriculture to pay the United States Department of Agriculture such overhead fee in two parts, as

August 7, 1937

follows: the first payment to be fifteen cents (15%) per car inspected, to be paid upon proper billing at the ending of each seasonal deal, the balance of eighty-five cents (85%) per car to be paid upon proper billing prior to the ending of each biennium, provided that the total of this second payment to the United States Department of Agriculture shall not exceed the balance unexpended from earnings from the said Federal-State inspection service in the State of Missouri.

In your opinion, do the laws of the State of Missouri, in any way, prohibit or restrict the Commissioner of Agriculture from signing a contract providing for the above?"

Section 12636 R. S. Missouri 1929, being a part of Article XIX, Chapter 87, relating to the inspection of agricultural products provides in part as follows:

"The Commissioner may employ employees and agents to assist in carrying out the provisions of this Article, and may fix their compensation."

The "provisions of this article" refer to that portion of Section 12631 which reads as follows:

"***in carrying out the provisions of this article the commissioner is authorized to cooperate with the United States or any department thereof in accomplishing the matters and things provided for herein."

It therefore appears that by statutory enactment it is the duty of the Commissioner to fully cooperate with the United States Government in shipping point inspection of agricultural products. It would appear that this cooperation should partake of a joint undertaking, and it is actually referred to in Section 12635, R.S. Missouri 1929, as "under the joint authority of the said bureau and the U.S. Department of agriculture."

August 7, 1937

The next question that arises is whether or not the Legislature has made any funds available for this purpose. Section 52 of House Bill 509 appropriates out of the State Treasury, chargeable to the agricultural fees fund, the sum of \$199,000.00 to pay the salaries, wages and per diem of the officers and employees and other expenses of the Department of Agriculture for the years 1937-1938. This appropriation is broken down into four parts, the first of which provides for the payment of salaries, wages and per diem of various named officers, "and other necessary employees".

It is therefore the opinion of this Department that you are authorized to pay all salaries and expenses of inspectors from the above appropriation out of the Agricultural Fees Fund; that under the provisions of Section 12636 the Federal Supervisor for such time as he spends in Missouri assisting in this work is in fact an agent or employee of the State Department of Agriculture, and as such employee is entitled to be paid compensation and expenses; that you are authorized to enter into an agreement, within but not to exceed the amount of inspection fees collected, with the United States Department of Agriculture wherein certain overhead charges are partly paid for from fees collected.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

"Change of Venue" in criminal) State may ask for substitution of
case by State:) Judge in criminal case.

PROSECUTING ATTORNEY:

) Prosecuting Attorney not required to
deposit \$10 docket fee for substitution
of Judge.

September 24, 1937.

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Mr. Marr:

This is to acknowledge your letter as follows:

"Is there anything in the law or the cases that gives me, as prosecuting attorney, the right to take a change of venue away from the judge in the circuit court on account of the bias and prejudice against the state is a state criminal case? I realize that I have no right to take a change of venue away from the county, but what about the bias and prejudice of the judge on the bench, against the State of Missouri, in a criminal case pending for trial in the Circuit Court? These demurrers to the evidence at the close of all evidence substitutes the judgment of the court for my judgment, for the judgment of the sheriff, and the jury. It seems to me that these too common demurrers to the evidence as against the state handicaps the prosecution, and there should be some remedy afforded the state in case of such bias and prejudice. Would the state of Missouri have to put up a \$10.00 filing fee, in case of a change of venue against the judge? As the prosecuting attorney does not have a contingent fund, out of whose pocket would such a \$10.00 change of venue come?"



While your letter asks the right of the state to take a change of venue, yet what you really desire is a substitution of judges to sit in a criminal case. The difference between a change of venue and a substitution of a trial judge was pointed out by the Supreme Court in *State v. Rosegrant*, 93 S. W. (2) 961, wherein the Court said (p. 966):

"While the application is technically one for the substitution of a trial judge * * * the statutory designation of the application as one for a change of venue is a legislative assignment of such applications to the class of applications designated applications for a change of venue."

Change of venue, as well as a substitution of judges, is one of statutory enactment and the statute must be strictly complied with. *State v. Bryant*, 24 S. W. (2) 1008, 1010; *State v. Duckworth*, 297 S. W. 150, 151.

In *State v. Bryant*, supra, the court said (p. 1010):

"Defendant's affidavit was not supported by the affidavit of two reputable persons as sections 3991 and 3992 provide. These two sections relate to the disqualification of the judge of the court in criminal causes. If the statute is complied with, the judge must disqualify himself. On the other hand, he must deny the application where it does not comply with the statute."
(Emphasis ours)

Sections 3991 and 3992, referred to by the Court in the above case, are Sections 3648 and 3649, R. S. Mo. 1929. Sections 3648 and 3649 relate to the disqualification of the judge when the defendant seeks to disqualify him. When the state seeks to disqualify the judge, then only Section 3648 applies and Section 3649 has no application. *State ex rel. v. Slate*, 214 S. W. 85, 278 Mo. 570.

Section 3648, R. S. Mo. 1929, reads in part as follows:

"When any indictment or criminal prosecution shall be pending in any circuit court or criminal court, the judge of said court shall be deemed incompetent to hear and try said cause in either of the following cases: First, when the judge of the court in which said case is pending is near of kin to the defendant by blood or marriage; or, second, when the offense charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him by blood or marriage; or, third, when the judge is in anywise interested or prejudiced, or shall have been counsel in the cause; or, fourth, * * *"

The case of State ex rel. v. Slate, supra, was an original proceeding in prohibition before the Supreme Court of Missouri, in banc, and was decided June 14, 1919. The facts in said case reveal that the state announced ready for trial and subsequently obtained leave of Court to withdraw its announcement, and the state then filed "a formal, verified motion alleging the disqualification and incompetence of respondent to sit in the trial of the case of State v. Scott on account of the alleged prejudice of said respondent against the state (p. 86)." The trial court ruled the motion for substitution against the state and thereupon a writ of prohibition was applied for. The Court held that the state was entitled to a substitution of a trial judge in a criminal proceeding. The Court said (p. 89):

"Which brings us to the point of law strenuously and most ably presented by respondent's learned counsel. This point, as forecast supra, is not whether the state is ever entitled to a change of venue. There is no question of a change of venue in this case. The question of law is: Can a trial judge, absent his

own voluntary disqualification. lose jurisdiction of a criminal case because of his interest or prejudice therein against the state? We agree with the conclusion of law upon this point of our learned commissioner, and are constrained upon both reason and authority to hold the affirmative of the question stated."

The Court also analyzed Section 3648 by adopting the reasoning of its commissioner as follows (p. 91):

"Our learned commissioner in his conclusions upon the law construing Section 5196 (8) says: '* * * * The language of the section is general, and there is nothing stated expressly or impliedly that limits the first three subdivisions of the section to applications on behalf of a defendant. It is remembered that the fourth subdivision expressly relates to application upon the part of the defendant.'"

It is therefore seen that only the first three subdivisions of Section 3648, R. S. Mo. 1929, are applicable to the State when it seeks a disqualification of a trial judge. Subdivision 4 of Section 3648 and all of Section 3649, R. S. Mo. 1929, particularly relate to defendant when he files an application for a substitution of judges.

The Court in *State ex rel. v. Slate*, supra, concluded its opinion as follows (p. 92):

"No difficulties or embarrassments can arise in the administration of the criminal law from the view that a circuit judge may be disqualified by reason of prejudice against the state from sitting in the trial of any criminal case, and that, being so disqualified, such judge may be by our writ of prohibition prevented from sitting therein. The situation thus brought about by a compulsory disqualification is in no wise different than the situation which would have existed had the learned respondent of his own volition

Sept. 24, 1937.

declared his own disqualification. Automatically the applicatory statutes will, as in case of a voluntary disqualification, apply and solve all the problems presented, and thus the resultant situation presents no difficulties either insuperable or insolvable."

From the above and foregoing it is our opinion that when the prosecuting attorney files a formal verified motion alleging the disqualification of the trial judge for any of the reasons enumerated in the first three subdivisions of Section 3648, R. S. Mo. 1929, that the trial judge does not have further jurisdiction to proceed to sit in the trial of a criminal case. It is our further opinion that the state may, by complying with Section 3648, supra, be entitled to a substitution of judges in any criminal case.

Your second question relates to the paying of a \$10.00 "change of venue fee." Section 3651, R. S. Mo. 1929, relates to the compensation to be paid when there is a substitution of judges. Nowhere in said section is it provided that either the state or the defendant has to advance any fee. There is a fee allowed to the person taking the trial judge's place, but such fee is taxed as costs and "paid out of the state treasury upon the certificate of the clerk of the court in which such cause is pending" or "is tried."

Therefore, it is our opinion that the prosecuting attorney or the State would not have to advance any fee to a substituted trial judge in the event of a disqualification of the trial judge.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

CITIES - Cities of the third class operating under an alternative form of government shall elect a Mayor and Council at the regular biennial municipal election.

November 23, 1937

11-29



Honorable D. S. Mayhew
City Attorney
Monett, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion reading as follows:

"As City Attorney I am interested in Section 6723 of 1937 Session Acts at page 385 which repealed Section 6723 of the Revised Statutes of 1929 pertaining to the term for Mayor in Cities of the Third Class, which changes the term of the Mayor from 2 to 4 year term. We are under the Alternative Form of Government for Cities of the Third Class Section 6909 governs us and we have less than 12000 population and elect two Councilmen and a Mayor for 2 years.

"Does the Repealing of Section 6723 Revised Statutes of 1929 also repeal Section 6909 by implication and do we under the alternative form of government elect for 2 years under Sec. 6909 or are governed by Sec. 6723, Page 385 of Session Acts of 1937.

"This has been put up to me as City Attorney which causes me to ask for an opinion. In Bryant vs. Russell, 127 Mo. 422, 30 S. W. 107, we have this language in the opinion of that case, on Construction of Statute. 'It is a general rule of construction of laws that a later Statute covering the subject matter of a former one, will repeal it to the extent that

they conflict, whether any reference is made by the latter to the older statute or not.' "

We have considered Section 6723, as amended by the Laws of Mo. 1937, at page 385, and find that the repealing act referred to only changes the term of the Mayor of a city of the third class from two years to four years. This conclusion is obvious when you consider that Section 6723 as amended, *supra*, is to be found under the provisions of Article IV of Chapter 38, R. S. Mo. 1929 relating to cities of the third class.

We note from your request for an opinion that your city is operating under an alternative form of government for cities of the third class, as provided for by Article VI of Chapter 38, R. S. Mo. 1929. In effect and substance, any city of the third class operating under a special charter or having a population entitling such city to become a city of the third class may be organized as a city under the provisions of Article VI, *supra*, by proceeding as provided for in said Article. Section 6906.

If such a city has elected to operate under an alternative form of government, which cities may do if they have the required population and are a city of the third class, then the Mayor and Councilmen of such city or cities must be elected as provided by Section 6909. It is provided in this section, Section 6909, R. S. Mo. 1929, in substance and effect, that every such city organizing under the alternative form of government shall elect, at the regular biennial municipal election, a Mayor and two Councilmen in cities having a population of over 3,000 and less than 12,000. This is a situation as exists in your city we necessarily assume from what you have stated relative to your city.

The sections to which you have referred us need not be construed, because where the language of the statute is plain and unambiguous and conveys a clear and definite meaning, there is no need of resorting to auxiliary rules in the construction of the same. From this, it follows that the statute must be given its plain and obvious meaning. *State ex rel. Jacobsmeyer vs. Thatcher*, 92 S. W. (2d) 640; *Columbia Weighing Machine Company vs. Rockwell*, 38 S. W. (2d) 508.

CONCLUSION

In view of the above, it is the opinion of this department that Section 6723 of R. S. Mo. 1929, as amended by the Laws of Mo. 1937, at page 385, does not repeal Section 6909, R. S. Mo. 1929 relating to cities of the third class operating under an alternative form of government. Cities operating under an alternative form of government shall continue to elect a Mayor and Councilmen at the regular biennial municipal election.

Yours very truly,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS:FE

TAXATION:

SALE FOR TAXES:

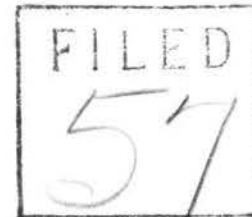
COLLECTOR AND DEPUTY:

RIGHT TO PURCHASE:

Collector or his deputy prohibited
from purchasing land sold for
delinquent taxes

November 30, 1937

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri



Dear Sir:

This office acknowledges yours of October 16, 1937, requesting an official opinion from this Department as to whether or not the county collector or his deputy are permitted to bid on and purchase the lands which the county collector sells for delinquent taxes, by virtue of the provisions of Section 9952-c of the Session Acts of Missouri, 1933, page 431.

By Section 9952 of the Session Acts of Missouri, 1933, page 429, the collector is required to record the delinquent tax list of lands and lots upon which the taxes are unpaid.

By Section 9952-a of said Act, page 430, it is provided that all lands and lots upon which the taxes are delinquent shall be recorded and shall be subject to sale for such taxes, penalty and interest. Said section further provides that;

"The entry of record by the county collector listing the delinquent lands and lots as provided for in this act shall be and become a levy upon such delinquent lands and lots for the purpose of enforcing the lien of delinquent and unpaid taxes, together with penalty, interest and costs."

Section 9952-c of the Act directs the collector to sell such lands as are delinquent and upon which a lien for delinquent taxes, penalty and interest exists, by virtue of the provisions of said sections 9952 and 9952-a of the Act.

Under the tax statutes which were in effect prior to what is known as the Jones-Munger Act, Missouri Session Acts, 1933, at page 425, et seq., lands were not sold for delinquent taxes until a judgment had been rendered in the circuit court and the sale of the land for such taxes was made by the sheriff under an execution issued on such judgment. Sections 9953 and 9958, Revised Statutes Missouri 1929.

By the provisions of Section 1206, Revised Statutes of Missouri 1929, which are as follows,

"No officer to whom any execution shall be directed, or any of his deputies, or any person for them, shall purchase any goods or chattels, real estate or other effects, or bid at any sale made by virtue of such execution, and all purchases so made shall be void."

the officer, or his deputy, who is selling the land were prohibited from purchasing or bidding at any such sale, and the Act further provided that any such purchase was void.

The duties of the county collector as to the sale of lands for delinquent taxes under the Jones-Munger Act are similar to the duties of the sheriff under the old law.

In the case of Walcott, et al. v. Hand, 122 Mo. 621, the question of the right of the collector to purchase land sold for taxes was up, but this was a case in which the sheriff was selling under an execution issued upon a judgment rendered for delinquent taxes as provided in the old law.

In the case of Walcott, et al. v. Hand, supra, many cases were cited holding that the collector or his deputy had no authority to purchase lands sold by the collector for delinquent taxes. Among the cases cited in the case of Walcott v. Hand, supra, was the case of McLeod v. Burkhalter, et al. 57 Miss. 65, 66, in which the court said:

"There seems to be some difference in the authorities as to the right of a tax collector to purchase at his own sale land sold for taxes. We deem it to be the better opinion to deny such right. We see no reason why the ordinary rule, which condemns a sale when the purchaser is the person who makes the sale, should not apply to a sale made by a tax collector. The duty of a seller is inconsistent with the interest of a purchaser. As seller, it is the duty of the tax collector to get the highest possible price for the land he offers for sale; and, as a purchaser, it is his interest to secure it at the lowest price he can. When there is this conflict between duty and interest, the temptation is great to subordinate the former to the latter. It is the duty of a tax collector to give proper notice, and to collect the taxes, by a distress and sale of the personalty of the owner, before he proceeds to sell land for taxes; and when he makes a sale, it is his duty to realize the taxes by a sale of as little of the land as practicable. To allow him to

bid at the sale would place him under a temptation to violate these duties. Besides, persons charged with the administration of the fiscal affairs of the people must be content with the gains provided for in the fees and salaries allowed by law, and should not be permitted to augment them by speculations in the funds or property which come under their official control. The decree of the Chancellor is in accordance with these views, and is, therefore, affirmed."

The above case also cites Cooley on Taxation, Section 1447, which is as follows:

"In order that there may be free competition, it is essential that the officer who makes the sale should act as salesman only, and not become interested in the purchases. He cannot be allowed to occupy the inconsistent positions of purchaser and seller, in which his cupidity would draw him in one direction and his duty in another. The law cannot safely intrust the securities which are devised for the protection of private parties to the care of those who are interested to prevent their accomplishing the purpose for which they are provided. No provision of law, it is believed, would ever be made which would

allow official integrity to be subjected to the trial of such conflicts between interest and duty as would be sure to arise if the officer were allowed to bid at a sale where his duty would be to obtain the highest practicable bid in the interest of another, while his interest would be so to manage as to obtain the lowest. For the officer voluntarily to put himself in that position is regarded as a fraud on his part upon the law; and on grounds of general public policy, the sale which he makes to himself is void. On no other principle can integrity and good faith be secured in proceedings of this ex parte character."

The Missouri Supreme Court, in the case of Walcott v. Hand, supra, l. c. 628, in reference to the contention that the collector could not purchase at his own sales of land for delinquent taxes, said:

"Counsel correctly assumes that a public officer charged with the duty of selling property for the best price can not himself become the purchaser, and that a sale made by an agent or trustee to himself will not be sustained by the courts."

We find that the appellate court of the State of Washington, where it was the duty of the treasurer to sell land for delinquent taxes, said, in the case of Coughlin v. Holmes, et al. 102 Pac. 772, that

"A sale of land by the county treasurer to himself or a deputy in his office is invalid

as against public policy."

In the case of Payson v. Hall, 30 Maine, 319, 326, the court said:

"The collector is required to sell to the best bidder. A collector can not faithfully perform his duties who is both seller and purchaser."

In the case of Pendleton v. Letzkins, 114 S.E. 246, the West Virginia appellate court said:

"When county officers or their deputies having duties to perform in relation to the sale of delinquent lands for taxes become the purchasers of such lands at a delinquent sale, their conduct in relation thereto will be carefully scrutinized, particularly where their official duties conflict with their personal interest."

In the case of Shotwell v. Munroe, 42 Mo. App. 669, 678, the St. Louis Court of Appeals, in passing upon a Missouri statute, which is now Section 1206, Revised Statutes Missouri 1929, prohibiting an officer or a deputy from bidding or purchasing property at his own sales, said:

"These provisions are merely declaratory of the common law, resting on the soundest principles of public policy, which prohibit any trustee from becoming directly or indirectly interested in a

sale made by him."

In the case of Ownby v. Ely, 58 Mo. 475, the court said:

"Not that every such case would necessarily be fraudulent, but it would furnish an inducement and temptation, which the wisest policy is to utterly prohibit."

While there is no particular statute in this State prohibiting the county collector or his deputies from bidding or purchasing lands sold by the county collector for delinquent taxes, it seems that public policy and the provisions of Section 1206, Revised Statutes Missouri 1929, would prohibit such bidding and purchases by the collector or his deputies.

CONCLUSION

From the foregoing authorities and rulings of the courts, this office is of the opinion that the county collector or his deputies are not authorized to bid at sales or purchase lands offered for sale for delinquent taxes by the collector.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

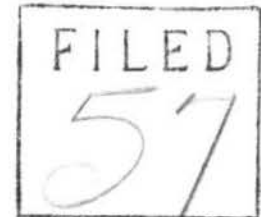
J. E. TAYLOR
(Acting) Attorney General

TWB LC

SEED LAW:--Construction of Section 12609-b, Laws of Missouri 1937.

December 16, 1937

12-17



Honorable Jewell Mayes
Commissioner of Agriculture
Jefferson City, Missouri

Dear Sir:

We have your request of recent date asking for an opinion, which is in words and figures as follows:

"We need a ruling as to the meaning of the first six words of Section 12609-b of the 1937 enactment of the Seed Law, as follows, 'Each separate container of vegetable seeds.'"

This request calls for a construction of Section 12609-b, Laws of Missouri 1937, page 184, which is as follows:

"Each separate container of vegetable seeds as defined in Section 12609-a of this article except as herein otherwise provided, shall be clearly and plainly labeled in the English language as follows:

(a) The kind of seed, variety and number of permit.

(b) The approximate percentage of germination together with the month and year said seed was tested; provided the germination is less than the standard of germination fixed by the State Department of Agriculture for that kind and variety.

(c) Full name and address of the person or firm who put up or packed and labeled the same.

Hon. Jewell Mayes

-2-

December 16, 1937

(d) Provided that no label shall be required on vegetable seed which is sold and delivered, directly to the purchaser from a container which is labeled as required herein."

The above language is so clear that we need not resort to outside construction, or comparison with other similar statutes in order to arrive at the legislative meaning. It is apparent that the legislature intended that seed containers should be properly labeled. We are therefore of the opinion that each separate container of vegetable seeds, whether of thimble or barrel size must be clearly and plainly labeled in the English language, setting forth the requirements of (a), (b), (c) and (d) as provided in this act.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

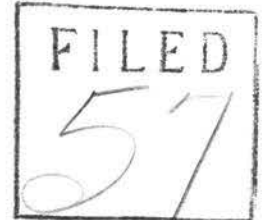
J. E. TAYLOR
(Acting) Attorney General

FER:MM

MOTOR VEHICLES: Attempted sale of motor vehicle without transfer of certificate of title is a crime, subjecting both buyer and seller to prosecution.

December 18, 1937

Hon. C. Logan Marr
Prosecuting Attorney, Morgan County
First National Bank Building
Versailles, Missouri



Dear Sir:

This department is in receipt of your letter of December 7 in which you say:

"In this county where there are quite a few model T. Fords left, there is car trading without a transfer of the certificate of title. After reading section 7774 of the 1929 statutes, the question has been raised as to whether the failure to assign and transfer the certificate of title to a car sold and possession is a crime? The transaction as such is unlawful and the same fraudulent and void, but does that create a crime? Who would you prosecute, if the failure to assign the certificate of title, is a crime, the buyer or the seller? If the State prosecuted both, how could a sale be proven, and then the failure to assign the title be proven?"

Your first question is whether the attempted sale of a motor vehicle without an assignment of the certificate of title as required by subdivision (c) of Section 7774, R.S. Missouri, 1929, is a crime.

A crime has been defined as "an act or omission which is prohibited by law as injurious to the public and punished by the state in a proceeding in its own name or in the name of the people or the sovereign". Words and Phrases, Third Series, page 693.

In the early case of *City of Kansas v. Clark*, 68 Mo. 588, 1.c. 589, the Supreme Court of Missouri defined a crime in the following language:

"A crime is an act committed in violation of a public law; 4 Black. Com., a law co-extensive with the boundaries of the State which enacts it'."

This definition has been quoted with approval in the later cases of *City of St. Louis v. Tielkemeyer*, 226 Mo. 130, 1.c. 141, 125 S.W. 1123; *State v. Mills*, 272 Mo. 526, 1.c. 537.

In a later case of *State v. Thomas*, 318 Mo. 605, 1.c. 610, 300 S.W. 823, the Supreme Court of Missouri defined a crime as follows:

"A crime is an offense against the state, directly or indirectly affecting the public, to which the state has annexed certain punishments and penalties, and which it prosecutes in its own name in what is called a criminal proceeding."

Section 4474, R.S. Missouri, 1929, defines "crime" when used in the Statutes of Missouri, as follows:

"The terms 'crime', 'offense', and 'criminal offense', when used in this or any other statute, shall be construed to mean any offense, as well misdemeanor as felony, for which any punishment by imprisonment or fine, or both, may by law be inflicted."

Words and Phrases, Second Series, page 691, reads as follows:

"An offense, in its legal signification, means the transgression of a law."

Looking to subdivision (c) of Section 7774, under consideration, we find the following:

"In the event of a sale or transfer of ownership of a motor vehicle or trailer for which a certificate of ownership has been issued the holder of such certificate shall endorse on the same an assignment thereof, with warranty of title in form printed thereon, and prescribed by the commissioner, with a statement of all liens or encumbrances on said motor vehicle or trailer, and deliver the same to the buyer at the time of the delivery to him of said motor vehicle or trailer.

* * * * *

Four months after this law takes effect and thereafter, it shall be unlawful for any person to buy or sell in this state any motor vehicle or trailer registered under the laws of this state, unless, at the time of the delivery thereof, there shall pass between the parties such certificate of ownership with an assignment thereof, as herein provided, and the sale of any motor vehicle or trailer registered under the laws of this state, without the assignment of such certificate of ownership, shall be fraudulent and void."

Subdivision (d) of Section 7786, R.S. Missouri, 1929, provides the penalty for violation of the provisions of subdivision (c) of Section 7774, said subdivision reading as follows:

"Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than

five dollars (\$5.00) or more than five hundred dollars (\$500.00) or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment."

We are unable to find where the appellate courts have passed upon any criminal conviction under this statute. (subdivision (c), Section 7774, supra). In the case of State ex rel. v. Cox, 306 Mo. 537, 1.c. 546, 268 S.W. 87, the Supreme Court in commenting upon the above section of the statutes, used the following language:

"The above Act of 1921 not only required Robertson to make an assignment on the back of his certificate of title as a condition precedent to his making a valid sale of the machine, as above quoted, described an attempted sale without a compliance with the requirements aforesaid as fraudulent and void. In addition to foregoing, Section 29 of said act makes the violation of the requirements aforesaid, a criminal offense."

While the above case was a civil case and the statement by the court as above set forth was somewhat obiter, yet we think that that portion of the opinion has some weight in determining the question we are now considering, namely, whether the attempted sale of a motor vehicle without delivery of certificate of title properly assigned, is a crime.

From the above authorities, we conclude that the attempted sale of motor vehicles in Missouri without there passing between the parties a certificate of ownership with an assignment thereof, as provided by Section 7774, is a crime, subjecting both the buyer and seller to the penalties prescribed by subdivision (d) of Section 7786, supra.

We think the foregoing answers your second question as to who should be prosecuted. Both buyer and seller are subject to the penalty, and if sufficient evidence of such attempted sale and violation of Section 7774 could be established, we see no reason why either or both of the parties should not be prosecuted.

As to how a sale might be proved if both buyer and seller were being prosecuted, we could not definitely say. Each case would have to be proved from the evidence available, just as any other case might be proved. We might suggest that the delivery of a check in payment of

December 18, 1937

the consideration for a sale, the delivery of the possession of the motor vehicle sought to be sold, admissions by either of the parties, or evidence of bystanders, might be circumstances which would tend to prove the attempted sale of the motor vehicle.

CONCLUSION

It is, therefore, the opinion of this department that the attempted sale of a motor vehicle without there passing between the buyer and seller a certificate of title properly assigned by the seller in accordance with subdivision (c) of Section 7774, R.S. Missouri, 1929, is a crime; that both buyer and seller participating in such attempted sale are subject to prosecution; and that either or both the buyer and seller against whom, in the judgment of the Prosecuting Attorney, a case could be made, should be prosecuted.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED by:

J.E. TAYLOR
(Acting) Attorney General

HHK:VAL

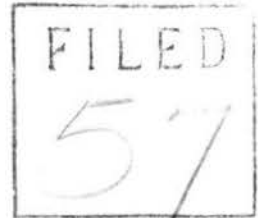
FEES: County Clerks

County clerk accountable to State Auditor
for the fees earned for use of seal in
witnessing signatures for Warehouse License.

December 20, 1937

Mr. Jewell Mayes,
Commissioner of Agriculture,
Jefferson City, Mo.

Dear Sir:



This office acknowledges your request dated December 17, 1937, for an official opinion pertaining to fees of the county clerk in connection with the application and issuance of a warehouse license, which request is as follows:

"Section 2 of House Bill 79, enacted by the Special Session of 1933, provides that the County Clerk of the County shall be paid a fee of 25¢ for each Farm Warehouse License which he issues. The Application for such license is to be under oath.

County Clerks have requested that it be determined whether or not they will be held accountable to the State Auditor for the usual fees for use of seal in the event they witness signatures on the applications for licenses.

In other words, is the County Clerk to witness the signature on an Application and issue the Warehouse License for one fee of 25¢, or for two fees of 25¢ each?"

Section 11781 R. S. Mo. 1929, sets out the fees which are allowed to the county clerk for services as such clerk. One of these fees is "for oath and certificate to affidavit, 25¢."

Section 11811, page 441 Laws of Missouri, 1937 requires the county clerk to make monthly returns of all fees received by him, from whom received and for what services.

Section 2 of House Bill 79, passed at the extra session of the Missouri Legislature in 1933, and found at page 168 Laws

of Missouri Extra Session provides that:

"Any person coming under the provisions of this act, and desiring to avail himself of the provisions thereof, shall file with the County Clerk of the county wherein said warehouse or warehouses are located an application for a license, stating the exact **** and if it shall appear from such application that said building or buildings are suitable structures in which to store wheat and other grains, the applicant shall receive from the County Clerk of the county a license *****. Such application shall be made under oath by the party or the agent of the party to whom the license is to be issued. The application shall be accompanied by a license fee of twenty-five cents, which shall be paid to the County Clerk."

Your inquiry goes to the question of whether or not the county clerk shall account to the State Auditor for the fee of twenty-five cents that they charge and collect in the event they witness the signature on the application for license. As the act does not provide that the application be signed before the county clerk, and therefore could be signed and sworn to before a notary public or any other person authorized to administer an oath, it would seem to the writer that the twenty-five cents charge mentioned in said Section 2 of the act applies only to the fee, the county clerk is entitled to for issuing the license.

Mr. Jewell Mayes

-3-

December 20, 1937

CONCLUSION

It is, therefore, the opinion of this department that in the event the county clerk witnesses the signature of the applicant for a warehouse license, he is to charge the usual fee of twenty-five cents therefor and this fee is in addition to the twenty-five cents he is to charge for issuing the license and that both fees should be reported to the County Court as fees received as provided by 11810 R. S. No. 1929.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

BUILDING & LOAN; Supervisor must fix maximum for board and lodging; examiners exempt from provisions of the statute and are allowed maintenance while at headquarters if given to them by supervisor.

March 11, 1937.



Honorable J. W. McCammon
Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McCammon:

This is to acknowledge your letter dated March 9, 1937, as follows:

"This is to request a ruling from your department relative to allowing examiners of the Bureau of Building and Loan Supervision \$1.00 per diem allowance while working on home base.

"It has been the policy of the previous administration to allow the examiners \$1.00 for expenses while on home territory and we would like to have your opinion as to the legality of such an allowance."

Section 5580, Laws of Missouri, 1931, page 143, reads in part as follows:

"The supervisor of building and loan associations, with the approval of the governor shall appoint such assistants including not to exceed nine examiners, * * *. All employees of the bureau of building and loan supervision shall perform such duties as shall be required * * *, shall devote all of their time to their official duties, * * *"

Section 5583, Laws of Missouri, 1931, page 144, reads in part as follows:

"* * * The examiners shall each receive a salary to be fixed by the supervisor of building and loan associations, but in no case to exceed the annual sum of Twenty-four Hundred Dollars (\$2,400.00) for each of such other examiners. * * * In addition thereto the actual and necessary traveling and other departmental or office expenses of the supervisor of building and loan associations, the examiners, and other assistants herein provided for, shall be paid out of the state treasury upon vouchers approved and audited by the supervisor * * *, with warrants drawn on the treasurer by the state auditor on the building and loan supervision fund."

We thus start with the premise that examiners may be appointed by the supervisor, with the approval of the governor, not to exceed nine in number, and that said examiners shall receive a salary of not to exceed \$2400.00 per annum. Necessary and actual traveling and other expenses may be paid to the examiners when rendering service to the department or on official business.

Section 5583, supra, in no uncertain terms fixes the salary. The allowing of traveling expenses is not salary. You state that the examiners have been allowed by your predecessor \$1.00 per diem and if said allowance was not for traveling expenses, then it could only be a subterfuge for increasing the salary of the examiners, and such is prohibited. Examiners are entitled to traveling expenses when performing official duties.

Section 11405, R. S. Mo. 11405, R. S. Mo. 1929, relates to official travel and provides that before a person travels that such shall receive the authority therefor from the head of the department. Paragraph "(b)" of said section

provides in part as follows:

"This written authority shall state the maximum amount per diem that may be expended for board and lodging. The head of the department shall fix this amount at a just and reasonable figure based upon the duties of the person traveling and the nature of the duties to be performed * * *"

Paragraph "(c)" prescribes a form that must be filled out and sworn to, and provides in part as follows:

"Before any payment or reimbursement is made to any person on account of any traveling expenses, the original written authority provided herein shall be filed with the state auditor. * * * The form shall contain the following information and in addition such other information as the state auditor may deem necessary and shall be uniform for all departments: Date and place expense was incurred. If account is for more than one day, it shall be itemized showing the amount of each day's expenses and the purpose for which each day's expense was incurred. Transportation charge, sleeping-car fare, lodging and meals shall each be shown as separate items and the amount for each stated. * * *"

Examiners when traveling, in order to perform the official duties of their employments, should receive reimbursement for actual expenses. That is to say, the supervisor of the bureau of building and loan supervision must authorize, in writing, the examiners to travel at public expense and the supervisor must also state the maximum amount that may be expended for board and lodging per day. Section 11405, supra, means actual expenses, with the right given to the head of the department to set the maximum as to board and lodging. Railroad fare or transportation would be turned in at the actual cost. Each day's expense would be separate and distinct.

Section 11406, R. S. Mo. 1929, reads in part as follows:

"Every employee or official of the State of Missouri, who is on a regular salary or per diem, shall have a designated place as headquarters and no such official or employee shall be entitled to, or receive, any compensation or reimbursement for subsistence expense (meals or lodging) while at headquarters. Provided, that the heads of all departments in charge of statewide activities shall have headquarters at Jefferson City, unless otherwise provided by general laws, or unless, in the opinion of the governor, or the elective officer appointing the official or employee, the public interest will best be served by having the headquarters at some other place, to be designated by the governor, or the elective officer appointing such official or employee * * Provided further, this section shall not apply to inspectors and examiners whose duties are in no respect administrative but wholly that of inspection and examination."

Thus, while Section 11406, supra, prohibits the paying of subsistence to any employee or official on a regular salary or per diem, while at headquarters, and that such employees or officials shall have Jefferson City designated as headquarters, unless otherwise designated by the governor or elective state officials, yet, examiners are exempt from the provisions of Section 11406. Thus, Section 11406 would not be a bar to the examiners receiving subsistence while at headquarters and such could have their headquarters other than at Jefferson City. However, Section 11405, R. S. Mo. 1929, provides that in the oath that a person takes when submitting an expense account that "the expense was necessary to the public business of the state" and "the above claim is correct and just."

March 11, 1937.

It is our opinion that the Supervisor of the Bureau of Building and Loan Supervision may allow examiners, while at headquarters, expenses for traveling and for board and lodging and place the maximum allowed if the examiners expend such money while in the performance of official duty, and that the expending of the travel was necessary to the public business of the state. It is our further opinion that the flat allowance of \$1.00 per diem for expenses while at headquarters would be unwarranted, unauthorized, and illegal as such. However, if you as Supervisor allow the maximum of \$1.00 to examiners while at headquarters, if such amount is spent by them and itemized, then the paying of that sum for reimbursement to the examiners while at headquarters, would be legal and within your authority. You will understand that the allowing of a flat \$1.00 per diem would be merely a subterfuge to increase the salary of the examiner, and the salary is fixed definitely, at not to exceed \$2400.00 per annum.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

JLH:EG

BUILDING & LOAN: Supervisor may not give a copy of annual examination of building and loan associations to anyone other than the Governor.

April 29, 1937. 57

FILED

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Honorable J. W. McCammon
Supervisor
Bureau of Building & Loan Supervision
Jefferson City, Missouri

Dear Mr. McCammon:

This is to acknowledge your letter dated April 28, 1937, as follows:

"The inclosed copy of a letter I have received from Hon. R. J. Richardson, president of the Federal Home Loan Bank of Des Moines, is self-explanatory.

"Will you please let me have a letter advising whether, under the Missouri law, I am permitted to furnish the confidential information that is contained in reports made to us by our examiners.

"You will note that Mr. Richardson's request covers state chartered associations that are members of the Bank other than insured associations."

The copy of Mr. Richardson's letter, dated April 1, 1937, reads in part as follows:

"When your Department examines a member of the Bank in Missouri, other than insured associations, will you please have an extra copy made of the examination report and forward it to the Bank?

"We need information contained in such reports for statistical purposes and, of course, such information is only for the Bank's use."

By virtue of Section 5607, Laws of Missouri, 1933, page 180-181, building and loan associations may become members of the Federal Home Loan Bank and comply with the provisions of the Act of Congress known and cited as "The Federal Home Loan Bank Act." A building and loan association is not compelled to become a member of the Federal Home Loan Bank. However, if such wishes, and provides therefor in its by-laws, it becomes a member upon the approval of the Supervisor. The purpose for which an association would become a member of the Bank would be in order to borrow money. Said section provides in part as follows:

"If the board of directors of an association declare that an emergency exists in the affairs of the association and make application to the supervisor to borrow an amount in excess of the above limitation, the supervisor if in his opinion it is for the best interests of the association so to do, may authorize in writing the association to borrow such amount and amounts as he deems advisable.

Any such association shall have the power to pledge, assign and transfer in trust or otherwise as the board of directors thereof may determine, its borrowers' notes, bonds, mortgages or other assets of the association, and to repledge the shares of stock of its borrowers pledged to it as collateral security, as security for money borrowed from or advances made by said Federal Home Loan Bank, and the supervisor of Building and Loan Associations shall make any and all reasonable rules and regulations not inconsistent herewith to accomplish the purpose of this Act. "

You will note that Section 5607, supra, does not permit of any examination by the Bank. The association merely borrows money from the Bank and pledges collateral for the repayment thereof. Before an association may borrow money it

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must so provide in its by-laws and obtain the consent of the supervisor, in writing.

Mr. Richardson wishes a copy of the bureau's examination made of the associations that are members of the Bank for statistical and other purposes, and in view of the cooperation between Federal agencies and the Missouri Bureau we would unhesitatingly rule that you could give the Bank a copy of the examination if it were not for the provisions of the Missouri statutes, which will hereinafter be quoted and discussed.

Section 5624, Laws of Missouri, 1931, page 161, makes it the duty of the supervisor, or by some person or persons appointed by him "to make a full and careful examination of the affairs of any and all associations in the state as often as, in the discretion of the supervisor, the condition of any association may require and the funds of the bureau may permit." Said section further provides:

"In every such examination, inquiry shall be made as to the nature and resources of the corporation generally, the mode of conducting and managing its affairs, the action of its directors, the investment of its funds, the security offered its members and those by whom its engagements are held, and whether the requirements of its charter and the law have been complied with in the administration of its affairs. The supervisor shall, as soon as practicable, after such examination, forward a report of the result of such examination, together with such suggestions as to him may seem proper, to the president of such association."

You will note from a reading of Section 5624, supra, that the examination required goes into every phase of the association's business, its management, action of the directors, the security given by members, etc. In other words, it is an examination of far-reaching importance and no doubt would entail matters that would be other than for statistical purposes. The

supervisor, when the examination is completed, forwards a copy to no one other than the president of such association.

Section 5581, Laws of Missouri, 1931, page 143, requires examiners and other employes to take an oath and enter into a bond before discharging any of their duties. The condition of the bond is that they will fairly and impartially discharge their duties. Note these mandatory provisions of said section:

"The supervisor of building and loan associations, assistants, and examiners, and the other employes shall each, before entering upon the discharge of his or her duties, take and subscribe the oath of office containing the usual provisions, and, in addition, that he or she will not reveal the condition of affairs of any building and loan association, or any facts that may pertain to the same, that may come to his or her knowledge by virtue of his or her official position, unless required by law so to do in the discharge of the duties of his or her said office or as a witness in a criminal prosecution, and said supervisor of building and loan associations, assistants, and examiners shall further execute to the State of Missouri good and sufficient bonds to be approved by the governor and attorney-general, conditioned that they will fairly and impartially discharge the duties of their offices."

Section 5584, Laws of Missouri, 1931, page 144, reads as follows:

"The supervisor of building and loan associations shall preserve all records, reports, and papers pertaining to the bureau of building and loan supervision and shall make a report in writing to the governor on or before the first day of December of each year, which report shall

Apr. 29, 1937.

set out in detail the condition and work of the bureau during the year preceding and he shall make such further reports at any time that shall be required by the governor."

Nowhere in the statutes do we find where the supervisor may give a copy of the examination to anyone other than to make a report to the Governor, if required by him. Section 5581, supra, specifically prohibits the revealing of the condition of affairs of any association. Said section is mandatory to the extent that if conditions of an association are revealed that perhaps a suit on the official bond of the examiners or the supervisor could be maintained.

It is our opinion that, owing to the provisions of the statutes relating to building and loan supervision, you may not give a copy of the examination to the Federal Home Loan Bank or to any other person, except if required to do so by the Governor or if required to do so by law.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

JLH:EG

BUILDING AND LOAN
ASSOCIATIONS:

To segregate assets of an association it is not necessary to have a temporary receivership; supervisor may dismiss the temporary Receivership proceeding; intervening shareholders would have right to protect their property only when the supervisor is engaged in wrongful acts or is guilty of fraud or collusion. Several methods proposed for obtaining voice of shareholders as to management of the associations. Permanent receivership cannot be dismissed by supervisor.

June 3, 1937

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Honorable J. W. McCammon
Supervisor, Bureau of
Building & Loan Supervision
Jefferson City, Missouri

Dear Mr. McCammon:

This is to acknowledge your letter as follows:

"I will appreciate your answer to the following questions--

"1. Is it a fact that Mr. Catlett is correct, as indicated in the Kansas City newspaper clippings herewith attached, in asserting that there is a Missouri statute which permits building and loan associations to segregate assets for the purpose of obtaining federal insurance and effecting reorganization without going through the formality of temporary receivership?

"2. What would be our next legal procedure in the event the circuit court of Jackson County should act unfavorably on a motion I might file to take certain associations out of temporary receivership?

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"3. What would be the legal status of any "group" of intervening shareholders who might have in mind court procedure in opposition to any plan of re-organization I might submit for court approval? Would the ending of such receivership disarm any "group" of intervening shareholders or could they still proceed?

"4. What is the most practicable way, within the law, to obtain expression from a representative body of shareholders as to the choice of a majority in the matter of ousting one management and electing a substitute management? And, what would constitute a representative body of shareholders? Inasmuch as some of the associations have from two to three thousand shareholders widely scattered as to location, it would be a prolonged task to reach every one of them with a letter and await their reply which would probably dribble in with reference to their choice of a board of directors. Moreover, because of distance, it would be impossible almost to organize a mass meeting that would be attended by all of the shareholders. Since an association belongs to its shareholders, it is my thought that such shareholders have a right to do whatever they please with such association in the matter of choosing official personnel, etc. It is the tendency, of course, for certain "groups" in each association to obtain as many proxies as possible and vote

their own "group" plans into effect. Thus, in final analysis, permitting a "group" minority to dictate a plan which might be objectionable to a majority of shareholders were it possible to get a complete vote of all shareholders within a reasonable length of time.

"There can be no possible doubt that the Kansas City associations herein under discussion should be fumigated and reorganized, but is temporary receivership actually necessary to such reorganization? What I would like to do, if it is legally possible, would be to immediately end all receiverships, but in so doing not surrender to the crippled associations nor make any concessions whatever in the matter of personnel of management where such personnel is not entirely in the clear as to the administrative methods.

"Now I come to another question as follows:

"Where a temporary receivership has already been made permanent-- as in the case of the Merchants Association, for example-- what could we do, if anything, in the way of dismissing such receivership inasmuch as it is no longer temporary, although the former Supervisor is quoted as promising that the receivership would be only temporary for the purpose of segregation of assets as a preliminary to obtaining insurance?

"After I get your answer to the legality of the foregoing proposition, I will then look further into the administrative practicability of my tentative proposition of dismissing temporary receiverships by way of wiping the slate clean of Mr. McBride's administrative acts and starting over again toward speedy reorganization of distressed associations."

Honorable J. W. McCammon

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June 3, 1937.

The newspaper clippings appended to your letter quote Mr. Catlett as saying:

"There is a statute in your (Missouri) state which permits such reorganizations without receiverships. We have felt that it was unwise to go through Court procedure to achieve this result, because it was difficult to live down the stigma of even a temporary receivership."

The statement of Mr. Catlett was made when he addressed an audience of Building and Loan executives. In Kansas City there are several building and loan associations in receivership, some temporary and others permanent. The purpose of said receiverships was primarily to segregate assets in order to obtain insurance of shares with the Federal Insurance Corporation.

We will answer your questions in the order presented.

I.

You inquire if there is a statute in this state which would permit reorganization of building and loan associations, particularly to segregate assets without the necessity of a court proceeding.

There is a statute in Missouri which in our opinion permits of the segregation of assets. Said statute is Section 5593, Laws of Missouri, 1935, p. 201. This statute is quite lengthy, but we are going to quote the pertinent part because it is all inclusive, and for the further reason that we have not found any court decision interpreting said part of said statute. We quote:

"And any building and loan association shall have the power to provide in its by-laws for the creation and establishment from time to time of a 'participating reserve fund', in which may be placed any or all real estate owned by the association and any loans and/or other assets of doubtful value, the same to be selected by the board of directors, the book value of the assets in said reserve fund to be apportioned pro rata in reduction of the book value of the stock of the association then outstanding, subject to the approval of the supervisor of building and loan associations. Such reserve fund shall be and remain a separate (separate) fund from the other assets of the association to be liquidated and shall be represented by a class of stock to be known as 'participating reserve shares' of the association to be issued to those stockholders of the association pro rata, the book value of whose stock has been reduced by the creation of such reserve fund. In the liquidation of said reserve fund all the proceeds from the sale of said real estate or collection or liquidation of said loans or other assets shall be paid to the holders of said participating reserve shares, at such times as the board of directors shall determine. All losses, if any, that may occur in said reserve fund shall be absorbed by the holders of said participating reserve shares. The association, if so provided by by-law, may transfer and/or convey title to the assets in said reserve fund, or any part thereof, to three trustees selected by the board of directors, who may be officers of the association, under a trust agreement defining the powers and duties of the trustees, who may issue 'participating reserve certificates', instead of participating reserve shares', to said stockholders entitled thereto, as provided above, giving all the rights and subject to all the liabilities herein pro-

vided as to 'participating reserve shares'. And upon the surrender to the association of the outstanding stock in the hands of a member of such association there shall be issued to such member new stock certificates of the association evidencing the reduced value of the stock surrendered, and in addition to such new stock certificates the reserve shares or reserve certificates to which such member is entitled, as above provided. Such reserve shares or reserve certificates issued to a borrowing member who had his stock up as collateral for a loan shall be pledged as additional collateral for such loan, and the borrowing member shall continue to make installment payments on his loan, as provided in the note or bond and deed of trust securing said loan, and upon payment of the loan in full the directors may apply as a credit on the loan the then value of the reserve shares as determined by the board of directors, after taking into consideration any estimated losses sustained in such reserve fund. In making reports and statements to the supervisory department of the state, the value of such a reserve fund undistributed shall be included as a part of the assets of the association and be classified as 'participating reserve fund.' Provided, however, that any building and loan association may in the discretion of the board of directors create more than one such participating reserve fund under the provisions of this act. And any building and loan association may in the sale of its real estate take stock in the association in payment of the purchase price or any part thereof, at such price and upon such terms and conditions as the board of directors by resolution may approve."

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Assuming the constitutionality of the above statute, it is our opinion that a building and loan association may segregate its assets without the necessity of going into either temporary or permanent receivership.

While we assume the constitutionality of said statute, we do not wish to be understood as even intimating that it may be unconstitutional for the reason that a building and loan association is a "quasia public financial institution", and the state by an exercise of its police power regulates and controls such association. State ex rel. vs. Farm & Home Savings & Loan Assn. of Missouri, 90 S. W. (2d) 93.

II.

The legal procedure to be taken in the event the Circuit Court of Jackson County acts unfavorably on a motion you might file to take associations out of temporary receiverships, does not bother us. What is perplexing to us is whether or not the Circuit Court has any discretion other than to grant a motion filed by you to dismiss a temporary receivership. If the Circuit Court has no discretion, but must enter an order of dismissal at your request, then, of course, a writ of prohibition would be a legal procedure in order to protect your rights; or a writ of mandamus could be employed to compel the court to enter an order of dismissal.

Directing our attention to the premise of your right to have a motion to dismiss sustained by the Circuit Court, we find that by virtue of Section 998 R. S. Mo. 1929, the Court, or Judge thereof in vacation, has power to appoint receivers; also by virtue of Section 5627, Laws of Missouri, 1931, pp. 163, 164, the court must appoint the Supervisor temporary receiver if action is instituted in the Circuit Court by the Supervisor. Therefore it is the court

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that appoints the Supervisor as receiver, and whether the Supervisor can thereafter control the dismissal of the suit is a close question. Corpus Juris Vol. 53, Article 572, p. 353, has the following to say as to the dismissal of pending litigation:

"The general rule that the right of a plaintiff to dismiss his action is not an absolute right, but may be denied in the discretion of the court, applies to actions by receivers."

Corpus Juris Vol. 18, Article 11, pp. 1151, 1152, has the following to say:

"Plaintiffs who act in an official capacity for the public in bringing a suit, as for instance selectmen, overseers of the poor, etc., being the only parties plaintiff before the court, may discontinue such suit, during the continuance of their term of office, where they all concur in such discontinuance."

The only case we have been able to find in Missouri analogous to the present question is State ex rel. vs. Flitercraft, 36 S. W. 675. The above case was a proceeding by mandamus to compel a Judge of the Circuit Court to reinstate a receivership filed by the then ex officio Supervisor of building and loan associations which was dismissed by him without the consent of the attorney-general. The Supervisor, after instituting the receivership with the attorney-general representing him, as provided by statute, dismissed said receivership without the knowledge and consent of the attorney-general and filed another receivership involving the same association in a different Division of the Circuit Court of St. Louis City. The attorney-general filed a motion to reinstate the first receivership, and upon a hearing of said motion the Circuit Court dismissed

same, and then a writ of mandamus was brought in the Supreme Court to compel the reinstatement of the first receivership proceedings. The Court in its opinion succinctly states the position of the various parties litigants:

"It is insisted by the attorney-general, the relator herein, that as the suit affects the public interests, the state is the real party in interest; that respondent is merely a nominal party, and as, in such proceedings, it is made the relator's duty by the act to represent the state, that respondent had no authority to have the suit stricken from the docket; that the order to that effect was without authority, and that the case should be reinstated on the docket. This position is controverted by the respondent, who contends that the supervisor is not a mere nominal party having no interest or control of suits instituted by him, under said act against building and loan associations, but that it is for him to determine whether any such action shall be begun and when. Ordinarily, a person in whose name a suit is instituted has the right to dismiss it any time before its final submission, and, unless actions brought by the supervisor under said act against building and loan associations be an exception to this general rule, the demurrer to the return must be overruled and the peremptory writ denied."

The Court held that the Supervisor had a right to dismiss, and that his bringing of the action under the statute was not an exception to the general rule that a person instituting a suit had the right to dismiss it. The Court said: (p.678)

"By the express terms of the act the supervisor is clothed with discretionary power to determine whether the suit shall be to enjoin the association from prosecuting its business temporarily or perpetually, or for injunction and its dissolution, and the settling and winding up of its affairs, or for any and all of said remedies combined, as he may deem necessary; and it seems to logically follow that if, after the institution of such a suit, he should be satisfied that it had been improvidently brought, or for any other cause that it should be dismissed or stricken from the docket, he might have it done, without the knowledge or consent of the attorney-general. To the supervisor belongs the power to investigate the affairs of building and loan associations under said act, and to institute actions against them for the purposes under the circumstances therein named; and, while the attorney general is required to conduct such actions in the name of the state as plaintiff at the relation of said supervisor, the manifest intention of the legislature was to furnish a lawyer of known ability to conduct such suits, but not to confer upon him the power to take charge of and manage the same to the exclusion of the supervisor, but rather subject to the right of the supervisor to have any such actions dismissed or stricken from the docket or disposed of

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as might seem to him to be expedient. We therefore conclude that the suit in question is not an exception to the general rule, and that the supervisor had the right to dismiss it in disregard to the wishes of the relator."

The above case has never been overruled or discussed, but was cited by the St. Louis Court of Appeals in *Corbett vs. Lincoln Savings & Loan Association*, 223 Mo. App. 329, 339.

In the *Corbett* case the holding intimates that if the Supervisor (Finance Commissioner) for the purpose of shielding an association from being molested by courts when the association was conducting its affairs wrongfully, that the Supervisor could not preclude a private citizen or shareholder to seek a remedy in the courts to have his wrongs remedied.

In *Hackler vs. Farm & Home Savings & Loan Assn.*, 6 Fed. Sup. 610, the District Judge said the following: (p.615)

"It is conceivable that upon the disability of the state supervisor or his wrongful unwillingness to proceed, a shareholder might, with appropriate averments, obtain the favorable consideration of a chancellor. Such was the intimation in *Corbett v. Lincoln Savings & Loan Association*, 223 Mo. App. 329."

However, the District Court in the *Hackler* case, *supra*, had the following to say concerning the Supervisor: (p. 616)

* * * * * The statute contemplates the appointment of the building and loan supervisor as receiver. Such was its entire object.

* * * *

"In view of the foregoing, it must be held that complainants as shareholders or simple contract creditors do not possess the right or have the capacity to ask this court to appoint a receiver."

The Court further held: (p.613)

"Neither can it be contended that the complainants have rights equal to that of the building and loan supervisor in bringing about a receivership. It does not seem reasonable that it was the intention of the Legislature to clothe the building and loan supervisor with no greater authority than that possessed by a shareholder or a creditor.

* * * *

"In the exercise of its police power, the sovereign state of Missouri has undertaken the supervision and regulation of building and loan associations. There has been created the office of building and loan supervisor. Such officer is clothed with express power to inquire, by full and complete examination, into the operation of each of the associations organized within the state and doing business under his supervision. He has authority to correct illegal practices, or, as an alternative, he may take over the management and control of the association. In case of insolvency, and for the purpose of enabling

him to secure an adjudication upon the rights of all interested parties, he could, acting through the attorney general and in the name of the state of Missouri, procure his own appointment as receiver. This is the remedy provided by the state under its regulatory power for the protection of the rights of all persons whomsoever." (p. 613)

The Supreme Court of Missouri, Division No. 2, in State ex rel. Wagner vs. Farm & Home Savings & Loan Association et al, 90 S. W. (2d) 93, said the following concerning building and loan associations: (p.96)

"Building and loan associations are quasi public financial institutions, and for the protection of them the state of Missouri has by the act of 1931, provided special inquisitorial, supervisory, and regulating laws which are specific, adequate, complete, and therefore exclusive. State ex rel. Moberly v. Sevier, Judge (Mo. Sup.) 88 S. W. (2d) 154, not yet reported (in State reports). Building and loan associations, like banks, trust companies, insurance companies, and railroads are quasi public corporations as to which the state may exercise its police power and may assert its sovereign rights of regulation and control in the preservation and furtherance of public well-being. Section 5 of article 12, of the Constitution of Missouri; Hackler v. Farm & Home Savings & Loan Association of Missouri (D.C.) 6 F.Supp. 610; Koch v. Missouri-Lincoln Trust Co. (Mo.Sup.) 181 S.W. 44; State ex rel. Missouri State Life Insurance Co. v. Hall, 330 Mo. 1107, 52 S.W. (2d) 174."

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See also 78 A. L. R. 1090, 1104, incl.; State ex rel. vs. Hall, 52 S. W. (2d) 174, 177.

From the above it is our opinion that as Section 5627 gives to the Supervisor the right to institute proceedings in the Circuit Court to have himself appointed temporary receiver, and as the Supreme Court of Missouri in State ex rel. vs. Flitcraft, supra, held that the right to dismiss by the Supervisor was not an exception to the general rule, we conclude that the Supervisor absent fraud or collusion or wrongful act on his part, would be entitled to dismiss a temporary receivership in which he was party plaintiff. If a temporary receivership is to be dismissed a motion should be filed by the Supervisor stating the reasons for dismissal, and we are certain that if the reasons are good and sufficient that the Circuit Court will entertain the motion and dismiss the action. If the Circuit Court does not dismiss the temporary receivership upon proper motion and showing, then the Supervisor could apply to a superior court for relief, and if it was shown that a temporary receiver was not needed, we are certain that the Appellate Court would command the lower court to follow the wishes of the Supervisor.

III.

If a receivership is dismissed then intervening shareholders cannot further proceed, in our opinion. As stated in the second point of this opinion, the courts will not entertain petitions of intervening shareholders unless there be fraud or collusion on behalf of the Supervisor so as to deprive a shareholder of his rights. Hackler vs. Farm & Home Savings & Loan Assn, 6 Fed.Sup. 610; Corbett vs. Lincoln Savings & Loan Assn., 223 Mo. App. 329.

IV.

We agree with you that the permitting of a group minority to dictate the management of a reorganized building and loan association should not be tolerated. However, the obtaining of an expression from a representative body of shareholders, or the choice of the majority thereof, is a matter attended with some difficulty. We suggest several plans that could be used:

- a. Give notice to the shareholders of the meeting by mail, stating the purpose of the meeting, date, and place, and also notice in a newspaper which would likely be read by a majority of the shareholders. The letter could outline your difficulty and the reason for selecting new management.
- b. You could call a representative group of shareholders- say perhaps forty or fifty- and ask them to appoint a shareholders committee for the purpose of selecting a management, and obtaining proxies from shareholders to vote for the management they select.
- c. You could select fifteen or more names which would be acceptable to you as the management, and ask each shareholder to indicate his or her choice. At the same time you could request them to signify whether they would be present and vote thusly, or if not present to sign a proxy to the individuals such desire.

June 3, 1937.

The Supervisor is charged with the duty of exacting proper administration of building and loan associations by its officers; Section 5624, Laws of Missouri, 1931, p. 161, specifically requires the Supervisor to make an examination into "the mode of conducting and managing its affairs * * * the action of its directors". And Section 5627 permits the removal of officers and directors upon application of the Supervisor. Thus it is your duty to insure proper management of building and loan associations. However, as the association belongs to the shareholders their wishes in the matter should be the determining factor, providing they are apprised of all the facts concerning the actions, past history and character of the management. In other words, as far as the shareholders may know an officer of an association may be acceptable to them, but if they knew his background their decision would be otherwise.

V.

Section 5627, Laws of Missouri 1931, p. 163, reads in part as follows:

"The Supervisor may at any time after he takes charge of the assets and affairs of an association, institute proceedings in the Circuit Court in the city or county in which said association has its principal office, and have himself appointed temporary receiver until it is determined whether or not such association can resume business; or appointed receiver for the purpose of winding up its affairs.

* * * * *

Honorable J. W. McCammon

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June 3, 1937

Thus, when you are appointed permanent receiver it would be for the purpose, we assume, of winding up and liquidating the association. Therefore it is our opinion that you would not have the right to dismiss a permanent receivership. Of course you can reorganize the association or sell all of its assets to another association.

If it was represented to the associations that the receiverships would be only temporary and solely for the purpose of segregation of the assets as preliminary to obtaining insurance, we believe your motion, if you decide to dismiss the temporary receiverships, should so state that fact, coupled with the further pleading that the associations can segregate by virtue of statute at less expense and to the best interests of the associations.

Trusting that the above answers your questions, and that if you have further need of elaboration upon that which we have written kindly communicate with us and we shall write further.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JLH/R

BUILDING AND LOAN: If by-laws provide, free shares of stock may be accepted for real estate only.

June 14, 1937. 6-16

Honorable J. W. McCammon
Supervisor, Bureau of
Building & Loan Supervision
Jefferson City, Missouri



Dear Mr. McCammon:

This is to acknowledge your letter dated
June 9, 1937, as follows:

"You are familiar, of course, with Dr. Skinner's effort to withdraw his investment from the Gateway Savings and Loan Association, Kansas City, a subject we have discussed verbally several times. And, as I understand it, it is clearly legal for me to approve a proposition for Dr. Skinner to accept real estate owned of the Gateway Association in payment of the money he unsuccessfully invested, provided Dr. Skinner and officers of the Gateway can agree as to price of the real estate and also provided Dr. Skinner is willing to accept real estate.

"As you already know, I have made several efforts to contact Dr. Skinner for the purpose of laying this tentative proposition before him, but on each occasion he has been out of his office or too busy with his patients to be interrupted.

"I am now asking you to let me have a letter formally approving from a legal standpoint, the proposed exchange of

June 14, 1937.

"real estate for the building and loan shares Dr. Skinner holds, it being impossible, under the Missouri law, for him to withdraw these shares in cash from the association."

A building and loan association is a quasi public financial institution, and is supervised by the State through the Bureau of Building and Loan Supervision. State ex rel. v. Farm and Home Savings and Loan Association of Missouri, 90 S. W. (2d) 93. A building and loan association may only operate as is provided by its by-laws and the statutes. While the supervisor is given full, adequate and complete authority to inquire into the method and management of associations, yet the duty does not rest upon him to insure each shareholder against bad investments. In other words, the supervisor does not have the duty placed upon him to guarantee to all shareholders that investments made in building and loan associations will be secure. No doubt Dr. Skinner made an investment into an association, which it turns out is a bad one. Section 5604, Laws of Missouri, 1931, page 155, provides how a shareholder may withdraw, and limits the association as to the amount that can be paid to withdrawing shareholders. Note this provision which restricts building and loan associations:

"* * * * and when the demands of withdrawing shareholders exceed the moneys applicable to their payment, the funds applicable to the payment of the withdrawing shareholders shall be pro-rated among the members who have filed notice of withdrawal upon the following basis:"

We assume that there are many withdrawing shareholders in the Gateway Savings and Loan Association of Kansas City, and, therefore, it will be some time before Dr. Skinner can receive his money. You suggest a possible way in which a quick realization of the withdrawal value of Dr. Skinner's shares can be consummated, i.e. accepting real estate owned in lieu of the book value of his certificates.

Section 5600, Laws of Missouri, 1931, page 153, reads as follows:

"Any corporation created by or under this article is hereby authorized and empowered to purchase at any sheriff's sale or at any other sale, public or private, judicial or otherwise, any real estate upon which such corporation may have or hold any mortgage, deed of trust, judgment, lien or other encumbrance, or in which such corporation may have an interest, and to sell, convey, lease or mortgage, at pleasure the real estate so purchased to any person or persons whatsoever."

You will note the above section permits an association to sell, convey, lease or mortgage, at pleasure, real estate owned or purchased to any person or persons whatsoever. The Legislature sanctions the exchange of certificates of stock for real estate owned, because by virtue of Section 5593, Laws of Missouri, 1935, page 201, it provided for the segregation of good assets and bad assets into a participating reserve fund, and specifically provided for the exchange of stock for real estate owned. We quote the pertinent provision, as follows:

"* * * * And any building and loan association may in the sale of its real estate take stock in the association in payment of the purchase price or any part thereof, at such price and upon such terms and conditions as the board of directors by resolution may approve."

From the above and foregoing it is our opinion that if the by-laws of the Gateway Savings and Loan Association so provide, then the association may accept shares of stock owned

Honorable J. W. McCammon

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June 14, 1937.

by Dr. Skinner in exchange for real estate owned. However, the accepting by the association of certificates of stock in exchange for real estate only applies as to free shares. An association is not permitted to accept shares in payment of any loan that might be held by the association. As to the latter, we have written you previously an opinion in which it was held that shares of stock could not be used as a setoff or in payment of an indebtedness.

Yours very truly,

James L. HornBostel
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

JLH/R

BUILDING AND LOAN: Associations with sufficient funds must pay members withdrawing; persons who buy stock with note which is non-participating are not members; persons who collect rents and sell land for Associations are employees and must give bond.

7/20
July 6, 1937.



Honorable J. W. McCammon
Supervisor, Bureau of
Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McCammon:

This Department is in receipt of your request for an opinion which reads as follows:

"Inclosed is a letter dated June 12th from J. L. Moore, examiner, setting forth four questions pertinent to building and loan operation. These questions must be answered if this department is to properly supervise the operation of state chartered associations. Therefore, we respectfully submit, for your opinion, the following:

1. Is an association entitled to operate under Section 5604, of the Missouri building and loan association laws, when it has funds available to pay in full all withdrawal notices on file?
2. Does the mere issuance to a borrower of a certificate of stock upon which no dues are paid and which does not participate in the earnings of the association, comply with Section

July 6, 1937.

5597 of the Missouri building and loan association laws in the case of a direct reduction or straight loan?

3. Does Section 5591, of the Missouri building and loan association laws, include agencies or parties other than the regular officers and employees of the association when such other agencies or parties handle funds belonging to the association?"

I.

Section 5604, Laws of Missouri 1931, page 155, provides as follows:

"Any shareholder, or the legal representative of a deceased shareholder, wishing to withdraw from the said corporation, shall, subject to the provisions of the by-laws, and his certificate of stock and the limitations hereinafter mentioned, have power to do so, upon giving one month's written notice of his intention so to do, delivered to the association at or before a stated meeting of the directors, or at such other

July 6, 1937

time as the by-laws may provide. If given before a stated meeting, the time of such notice shall not be deemed to have commenced to run until the first stated meeting thereafter. The member so withdrawing, or, if deceased, his legal representative, shall, if his stock be withdrawable according to the terms of the certificate and by-laws of the association, be entitled to receive the amount actually withdrawable at the time of making application for withdrawal according to the by-laws of the corporation and the provisions of the certificate of stock. At no time, however, shall more than one-half of the receipts of the corporation for any fiscal month, and, when the corporation is indebted on matured shares of an earlier series, not more than one-third of said receipts, be applicable to the demands of the withdrawing shareholders, or of shareholders, whose stock has been forfeited in the manner hereinafter provided, without the consent of the directors; and when the demands of withdrawing shareholders exceed the moneys applicable to their payment, the funds applicable to the payment of the withdrawing shareholders shall be pro-rated among the members who have filed notice of

July 6, 1937

withdrawal upon the following basis: All shares on which notice of withdrawal have been filed for a period of 30 days, shall receive their pro-rata share of the funds available for withdrawal at the end of the preceding fiscal month, based upon the withdrawal value of the shares at the time distribution is made. Such notice of withdrawal shall not, however, make such withdrawing shareholder a creditor of the association, but his status shall be and remain that of a shareholder."

The right of the above statute allowing the shareholder to withdraw is a fundamental right. "The right is an absolute one and cannot be arbitrarily withheld." 9 C.J. 938.

In State v. Redwood Falls Bldg. & L. Ass'n. 45 Minn, 154, 47 N.W. 540, the rule is stated thus:

"So long as funds remain on deposit in the hands of the association, members who are not borrowers may avail themselves of the right to withdraw their proper share of the same, upon complying with the conditions laid down in the by-laws."

It is therefore our opinion that a shareholder may withdraw when funds are available and all the requirements of the statute are complied with. It must be noted that we do not deal in this opinion with the situation when no funds are available.

July 6, 1937

II.

The facts that apply to your second question are given in the letter attached to the request, and are as follows:

"This association is now operating considerable loans on the Direct Reduction basis. When a loan is made say in the amount of \$1000, ten shares of stock, par value \$100 per share, is proportioned to such loan. The borrower signs a note wherein is incorporated the fact that stock pledged does not participate in the earnings, also the assignment on stock certificates clearly states that stock is non-participating, and all payments received on loan are credited to principal after interest payment due is deducted, at no time does the element of stock dues enter into the transaction. In other words the stock has no status inasmuch as no dues is ever paid on same neither is any earnings credited to same."

Section 5597, Laws of Missouri 1935, page 204, provides in part as follows:

"And provided further, than any association shall be permitted to make real estate loans to its members on a plan or plans requiring periodical direct re-

July 6, 1937

duction of the principal of the loan; and that any loan so made with which any number of shares of stock of the association is pledged shall be for all purposes a loan to a member, and that the proportion that the number or total amount in dollars of all such loans may bear to the number or total amount in dollars of all loans shall not impair or affect mutuality."

Kimball v. Dave, 32 Mo. App. 194, states

"The word {stockholders' as employed in the statute in its application to corporations must be construed to mean a member who has a direct financial interest in the business of the corporation with power to participate in the conduct of its affairs."

In Bertche v. Equitable Loan & Investment Association of Missouri, 147 Mo. 343, 48 S. W. 954, the Supreme Court of Missouri, en banc, said:

"All members must participate equally in the profits and bear the losses, if any, in the same proportion."

Also as is stated in 9 C. J. 949,

"Dues are generally payable only in cash and officers of the

corporation have no authority to accept anything else such as checks."

It was held in *Grohmann v. Brown*, 68 Mo. App. 630, that the issuance of a certificate of stock does not of itself make the person a shareholder.

The scheme described above seems to partake of a straight loan and the so-called selling of stock is only a subterfuge to allow the borrower to come in as a member and take advantage of the benefits and privileges accorded to members of building and loan associations.

For the reasons stated above, the borrower is not shareholder and therefore comes within the provisions of Section 5594, Laws of Missouri, 1931, amended Laws of Missouri, 1933 Extra Session, which provides that surplus money may be loaned to non-member on the posting of certain collateral.

III.

Your third question deals with whether the bond required of officers and employees of building and loan association who handled money, must be given by those who are not regular officers or employees but collect and handle money of the association only in a collateral way. The specific example given in the accompanying letter is that the A Co. of Tulsa, Okla., looks after the property of the association in that city, renting and selling said property, collecting rents, attending to repairs and other matters.

Section 5591, Laws of Missouri 1931, page 147, provides in part as follows:

July 6, 1937

"All officers and employees of any building, loan and savings association doing business in this state, whether created under this article, or any previous laws of this state, who may have the custody or handling of any of the funds or securities of such association, or who sign or endorse checks of said association, shall give such security for the faithful performance of their duties as the by-laws may require, and no such officer shall be deemed qualified to enter upon the duties of his office until such security is approved by the board of directors and the supervisor of building and loan associations. All such bonds shall be filed with the supervisor of building and loan associations, or some depository designated by the supervisor of building and loan associations."

The question is therefore whether the term 'employee' as used in the above section is broad enough to include persons who collect rents, sell the property and carry on the business of the associations.

In 59 C. J. 1106, it is said

"Laws for the prevention of fraud should be liberally construed with a view to promote the object in the mind of the Legislature."

The word "employee" therefore should be liberally construed so as to effectuate the purpose of the Legislature.

The purpose of a building and loan association 'is to enable persons of limited means and income to build homesteads and pay for them by small installments in keeping with their incomes'. *Hammerslough v. Kansas City Bldg. L. & S. Assn.*, 79 Mo. 80.

The object of Section 5591, supra, which requires employees handling money to give a bond, manifestly was to protect that class of investors upon whom any defalcation or misdirection of funds would fall heavily.

An "employee" is defined in *Employers' Indemnity Co. vs. Kelly Coal Co.*, 149 Ky. 712, 149 S. W. 992, as "one who works for and under the control of his employer; and the mode of payment, while a circumstance to be considered in determining the question, is not decisive."

In *Ocean Accident & Guarantee Corp. v. Industrial Accident Comm.*, 262 P. 38, 87 Cal. App. 290, the Court held a person collecting monthly dues for which he received a commission was an employee.

It is therefore our opinion that a person who rents and sells property for a building and loan association, and collects the money on such transactions, even though he is not regularly or full-time employed, is an employee within the meaning of Section 5591, supra, and must give a bond.

Honorable J. W. McCanmon -10-

July 6, 1937

CONCLUSION.

It is therefore the opinion of this Department that building and loan associations which have sufficient funds on hand shall pay members who wish to withdraw, said members complying with the statutes and by-laws relating to withdrawal. It is further the opinion of this Department that a person who pays for his stock with a note and receives stock under an agreement that said stock is to be non-participating is not a member and cannot borrow as such. Thirdly, under Section 5591, persons who collect rents and sell land for a building and loan association are 'employees and must give a bond'.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

AO'K/R

BUILDING AND LOAN:

Contingent fund required by
Section 5602 may be designated as
the Federal Insurance Reserve Account.

11/2
July 21, 1937



Honorable J. W. McCammon
Supervisor, Bureau of
Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McCammon:

This Department is in receipt of your
request for an opinion which reads as follows:

"There has come to my attention a requirement set forth by the Federal Savings and Loan Insurance Corporation whereby an insured association must designate a reserve for the sole purpose of absorbing losses, such reserve to be set up as the Federal Insurance Reserve account.

"We are in receipt of the enclosed resolution adopted by the board of directors of the Greene County Building and Loan Association of Springfield, Missouri, which resolution designates the contingent fund of the association as the Federal Insurance Reserve account.

"The question arises as to whether or not such resolution destroys the idea of the contingent fund and wipes out this reserve and the purpose it is to serve under Section 5602, whereby a contingent fund is created.

"Therefore, we respectfully request your opinion on this matter."

July 21, 1937

Section 5602 Laws of Missouri 1935, page 206, provides as follows:

"Every building and loan association, whether heretofore or hereafter organized, shall accumulate from its earnings a contingent fund for the payment of contingent losses, and at least five per cent of the net earnings made in its previous six months shall be set aside semi-annually in February and August of each year to such fund until it reaches at least five per cent of the total assets. Whenever the amount in the contingent fund falls below five per cent of the assets, it shall be replenished by semi-annual appropriations of at least five per cent of its net earnings until it again reaches such amount. All losses or reserves for losses shall be charged to the contingent fund or the undivided profits fund or other general reserves until the same are exhausted, and any losses thereafter shall be apportioned so that each member shall bear his proportionate part thereof. Any sums heretofore transferred to the contingent fund of any such association shall constitute its contingent fund, when this act takes effect."

Section 11. (a) of the Rules and Regulations of the Federal Savings and Loan Insurance Corporation provides in part as follows:

"Each insured institution shall set up a Federal insurance reserve account for the sole purpose of absorbing losses and shall credit thereto during each fiscal year at least three-tenths of 1 percent of the aggre-

gate of its insured accounts standing on its books at the beginning of such fiscal year".

* * * * *

"Whenever the net credits to such Federal insurance reserve account amount to 5 percent of all insured accounts, the insured institutions may cease to make such credits to such account: Provided, however, that if at any time thereafter the net credits to such account fail to equal 5 percent of all insured accounts, such annual credits shall be resumed until the net credits again equal 5 percent of all insured accounts".

Section 11. (b) of the Rules and Regulations of the Federal Savings and Loan Insurance Corporation provides:

"With the written approval of the Board any reserve account, which has been irrevocably established by an insured institution for the sole purpose of absorbing losses, may be designated as such Federal insurance reserve account: Provided that such account shall be subject to the conditions of the preceding paragraph".

It will be noted that the reserve or contingent funds provided for by the statute and rules both have the same purpose- that is, the building up of a reserve for the protection of the shareholders of the Association. The fund in both cases is identical in its

Honorable J. W. McCammon

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July 21, 1937

purpose and make-up, and the designation of it as a Federal Insurance Reserve Account does not in any way vitiate or abrogate the requirement of the state law that a reserve for the protection of the shareholders must be set up. Since the Association in question is incorporated under the laws of Missouri it must therefore follow the statutes of Missouri in regard to how its reserve fund is to be built up, namely Section 5602, supra. However, we can see nothing harmful or illegal about designating such reserve fund as the Federal Insurance Account.

CONCLUSION.

It is therefore the conclusion of this Department that the contingent fund created under Section 5602, Laws of Missouri 1935, may be designated as the Federal Insurance Reserve Account, and that the same does not lose its identity or status as a contingent fund as provided for by Section 5602.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J.E. TAYLOR
(Acting) Attorney-General

AO'K/R

BUILDING & LOAN: Semi-annual report if not published by September 6, 1937, does not have to be published

August 27, 1937



Mr. J. W. McCammon, Supervisor
Bureau of Building & Loan Supervision
Jefferson City, Missouri

Dear Mr. McCammon:

This department is in receipt of your request for an opinion, which reads as follows:

"Section 5623, Laws of 1937, page 194, changes the date from September to July as to when the semi-annual reports of the building and loan associations are to be published. The law contained no emergency clause and so goes into effect September 6th. Would you render me an opinion as to whether the association must publish a report this September."

Section 5623, Laws of 1937, page 194, provides in part as follows:

"Every such corporation shall semi-annually, in the months of January and July, publish in one or more newspapers of general circulation in the county where the principal office of such corporation is located, a statement verified by the oath of its president and secretary, in such form as the supervisor may prescribe, and the said report shall be made upon blanks prepared by the supervisor and furnished by him to such associations."

August 27, 1937

As noted in your request, this act does not go into effect until September 6, 1937, because there was no emergency clause. The old law, Section 5623, Laws of 1931, page 160, which will be in effect until September 6th, provides in part as follows:

"Every such corporation shall semi-annually, in the months of March and September publish in one or more newspapers of general circulation in the county where the principal office of such corporation is located, a statement verified by the oath of its president and secretary, in such form as the supervisor may prescribe, and the said report shall be made upon blanks prepared by the supervisor and furnished by him to such association."

It will be noted that the report is to be published in the month of September.

The Century Dictionary, Volume 3, page 2034, defines "in" as: "of a course or period of time; within the limits or duration of; during"

In Savory v. Goe, 21 Fed. Cas. 549, one of the conditions of a bond was that "A" should deliver to "B" certain whiskey "in all the month of May". The court held that the seller was authorized to deliver up till the last hour of May 31st.

In Verdine v. Olney, 43 N. W. 975, 77 Michigan 310, a bond provided that it may be paid in five years and the clause was construed to mean within such time.

Therefore, the associations may publish their reports any time within the month of September and if they wait until after the 6th day of that month, then the law that requires them to do such act, is no longer in effect and the duty to do so is no longer mandatory.

CONCLUSION

It is, therefore, the opinion of this department that Section 5623, Laws of 1931, page 160, makes it the duty of a building and loan association to publish a report within

Mr. J. W. McCammon

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August 27, 1937

and during the month of September. However, Section 5623, Laws of 1937, page 194, which goes into effect September 6, 1937, amends this law and changes the date of the report to July. Therefore, if the building and loan associations do not publish such report before September 6, 1937, then the duty to do so, no longer exists.

Respectfully submitted,

OLLIVER NOLEN
Assistant Attorney General

APPROVED:

J. W. TAYLOR
(Acting) Attorney General

A O'K/MR

BUILDING AND : Administrators, Executors, Guardians, and
LOAN : Curators are not included in term "trustees
of trust funds" in Laws of 1937 page 508.

August 28, 1937.

Hon. J. W. McCammon,
Supervisor, Bureau of
Building & Loan Supervision
Jefferson City, Mo.



Dear Mr. McCammon:

This department is in receipt of your request
for an opinion which reads as follows:

"I am enclosing house bill No. 190,
on which I desire your opinion as
to whether or not said act permits
"administrators, guardians and execu-
tors" to invest in building and loan
shares which are insured by the
Federal Insurance Corporation.

You will note that the words "admin-
istrator, executor and guardian" are
not found in the bill, but the words
"invest their trust funds and other
funds or moneys in their custody or
possession" and the word "trustees"
are the only reference to persons
acting in a fiduciary capacity.

You will readily understand that this
bill is a great aid to savings and
loan associations that have their
shares insured and I am particularly
anxious that such building and loan
associations may have all possible
avenues of business open to them.
In this connection, I might add that
while this bill will not be in effect
until 90 days after the adjournment of
the legislature, plans are already on
foot to set the machinery in motion
so that executors, administrators and
guardians may invest.

There is a diversity of opinion, particu-
larly among probate judges, as to whether
such could order or approve an invest-
ment in insured shares by administrators,
executors, etc.

There was handed to me two memos which may be of value to you in reaching a decision and I am enclosing them herewith and request that same be returned when they have served your purpose.

If by executive interpretation this house bill can be held to be inclusive enough to permit administrators, executors and guardians to invest in federally insured shares, it will be in line with my thoughts on the matter. However, if house bill no. 190 will not permit of such interpretation, then before you promulgate your official opinion, I will appreciate it very much if you will notify me so that I may present other citations of authorities that I may have at my command.

It might be necessary to have house bill No. 190 amended, but in the meantime, if you could give a ruling similar to that given as to Home Owners Loan bonds, then building and loan associations will profit, as I believe the legislature intended that executors and guardians could so invest, and will, if necessary amend said bill at the next session in that particular."

House Bill No. 190 may be found in Laws of 1937, page 508, and provides as follows:

"It shall be lawful for banking institutions, trust companies, insurance companies, loan and investment companies, mortgage loan companies and trustees of trust funds, and they are authorized to invest their trust funds and their funds and moneys in their custody or possession, in the stock and/or savings accounts in any federal or state building and loan association a member of a Federal Home Loan Bank, and insured by the Federal Savings and Loan Insurance Corporation, and said institutions and trustees of trust funds are further authorized to become members of said associations according to the Charter and By-laws of said associations; Provided, that no such investment may be made in excess of the maximum amount for

which such a stock or savings account may be insured.

"The stock and/or certificates of savings accounts in said associations may be eligible as security for all public deposits in depositories or by public officials, deposits of state or any political sub-division thereof where bonds or deposits are required by law to be deposited."

The question presented is whether the phrase "trustees of trust funds" as used in the above statute is broad enough to include administrators, executors, guardians and curators. Section 104 R. S. Mo. 1929 provides as follows:

"Surplus money may be loaned, when--- If, on the return of the inventory, or at any other time, it shall appear to the satisfaction of the court that there is a surplus of money in the hands of the executor or administrator that will not shortly be required for the expenses of administration, or payment of debts, it shall have discretionary power to order him to lend out the money on such terms and for such time as may be deemed best."

Section 410 R. S. Mo. 1929 provides as follows:

"When it shall appear that it would be for the benefit of the ward that his real estate, or any part thereof, be sold or leased, or his personal property, or any part thereof, be sold, and that the proceeds be put on interest or invested in United States or state bonds, or in any other real estate, or in any other personal property, or in the preservation of the estate of the minor, the probate court may authorize and order such sale, leasing or investment."

Section 418 Laws of Missouri 1935, p. 186, provides in part as follows:

"Guardians and curators shall, unless the money be invested in improving the real estate of wards as hereinafter

provided, loan the money of their wards at the highest legal rate of interest that can be obtained, on prime real estate security, or invest it in bonds of the United States, or bonds guaranteed by the United States, or of the State of Missouri, or of the federal farm loan bank."

In *Stephens v. Stephens*, 232 S. W. 979, the Supreme Court held that under Section 418, supra, a guardian or curator without an order of the probate court may loan the money of their wards on prime real estate security or invest it in bonds of the United States or bonds guaranteed by the United States or of the State of Missouri. Therefore we are to ascertain whether House Bill No. 190 allows such funds to be invested in building and loan shares without an order of probate court or must Sections 104 and 410 be followed.

In the memorandum attached to your request, several reasons are advanced as to why administrators, executors, guardians and curators are "trustees of trust funds" so as to bring them within the purview of the statute allowing such fiduciaries to invest in building and loan shares. We will note in passing, several reasons why it may be inferred that the Legislature did not intend to include such persons in the term "trustees of trust funds":

1. An executorship or administratorship is not a trust nor is a guardianship a trust, *Restatement of the Law*, para. 6 and 7, pp. 22-27. In *McCune's Estate v. Daniel*, 76 S. W. (2d) 403, the Supreme Court of Missouri recognized the difference between a trustee and a guardian:

"This will does more than authorize the probate court to appoint Daniel, curator of the estates of the minors and in fact appoints and invests with the power and duties of a trustee with respect to the funds of the estate * * * Had the will in this case done nothing more than designate Daniel as curator of the minor children and the probate court had appointed him such, then the provisions of Section 412 R. S. 1929 would apply. But the present will not only nominate Daniel as curator, but expressly imposed on him the duty as well as power to invest the surplus funds of the estate in foreign lands. That the defendant was to act in the capacity of

trustee, rather than as a mere statutory curator is evidences by the provisions of the will."

2. The Legislature in similar statutes have included administrators, executors, guardians and curators as well as trustees. Section 2921 R. S. Mo. 1929, wherein the Legislature provided for investments in bonds registered by the State Auditor, reads, in part, as follows:

"They shall also be eligible for the investment of any funds in the possession of any administrator, executor, guardian, curator, trustee and all other persons sustaining fiduciary relations. Such investments may be made without an order of court first had and obtained, and without incurring liability for loss, except in case of inexcusable negligence."

We may, therefore, infer that the Legislature in enacting the instant statute did not intend to include administrator, executor, guardian and curator, since they could have used these words as they did in the statute quoted above, so there would be no ambiguity.

3. The statute provides that the "trustees of trust funds" are authorized to become members of said associations. It is a well considered principle of law that an investment must not be made in the name of the guardian, but in that of the ward, 28 C. J. p. 1145. It may, therefore, be inferred that since the act provides that the trustee shall become a member, that it was not intended that it should include a guardian or curator who must make the investment in the name of the ward.

However all the above is noted only to show that the intention of the Legislature might be construed as not to include administrators, executors, guardians and curators in the term "trustees of trust funds."

The rule of statutory construction that applies in this case is given in 59 C. J. para. 510.

"The repeal of statutes by implication is not favored. The courts will not enlarge the meaning of one act in order to hold that it repeals another by implication".

House Bill No. 190 does not expressly repeal sections 104 and 410 R. S. Mo. 1929. The repeal of a statute by implication is not favored in Missouri and the acts should be construed if possible so both will stand and be given effect. State ex. rel Karbe v. Bader, 78 S. W. (2d) 835, 336 Mo. 259.

Therefore in order to construe House Bill No. 190 as allowing executors, administrators, guardians and curators to invest in building and loan associations, we must first imply that the term "trustees of trust funds" includes the four classes above and then we must further imply that the legislature intended to repeal Sections 104 and 410, supra. This is repealing statutes by basing an implication upon an implication or as was aptly stated above, it is "enlarging the meaning of one act in order to hold that it repeals another by implication". We believe the rule is well stated in *Roxana Petroleum Company v. Cope*, 269 Pac. 1084, 132 Okla. 152:

"Let it be remembered in beginning the consideration of this question that the Compensation Law of this state makes no mention of minors, and it is only by implication that they can be included within any section of that law, and this seems to be admitted. And having by implication brought them within the Compensation Law, and given them thereunder the rights to adults, upon this implication, as a foundation, we are then asked to hold that the act has changed, abrogated, and superseded the common law and older statutory rights of the parents. And that by building one presumption or implication upon another we should destroy the rights of parents which have existed without question until we were here asked to apply this new and strange doctrine.

"No authority is necessary to sustain the proposition that repeals by implication are not to be favored, and that to strike down a value right given by a statute and also existing by common law, merely upon an inference to be drawn from a new statute, presents an unhappy manner of adjudicating those rights and holding that they no longer exist."

CONCLUSION.

It is, therefore, the opinion of this department that

Hon. J. W. McCammon,

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August 28, 1937.

"trustees of trust funds" as provided for in Laws of 1937, page 508, does not include administrators, executors, guardians or curators and that such persons must follow the preceedure as laid down in sections 104 and 410 R. S. Mo. 1929 when investing in shares of building and loan associations; and it is our further opinion that a probate court has power and authority, under such sections, to approve investments in building and loan shares, which are insured by the Federal Insurance Corporation.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

AO'K:LB

Sheriffs:

Deputies may not be paid a salary of \$50.00 per month out of county funds, by order of the county court, directly nor indirectly in Sullivan County.

September 10, 1937



Mr. Forrest R. McClaskey,
Sheriff of Sullivan County,
Milan, Missouri.

Dear Mr. McClaskey:

This department wishes to acknowledge your request for an opinion wherein you state as follows:

"I do not seem to be able to get satisfactory information locally, pertaining to the payment of my chief deputy and am taking the liberty to ask your advice.

"Since January 1st. I have paid my chief deputy a flat salary of \$50.00 per month. This item is placed in my statement of account to the County Court and has been allowed each month and warrant issued to me and I have given him my personal check for same.

"It has been suggested to me that this might be in conflict with the rulings of the State Auditor and that when the County is audited some time in the future, such items would not be considered to conform with the law and I would have to return the money to the County.

"I do not wish to do any act in my official capacity which would not stand inspection and owing to my financial condition, I would certainly not be in shape to repay an amount of money of considerable size which I had obtained through mistake and to avoid such a thing I am asking you for advice.

"The duties of the Sheriff in this County since I have taken the office have been somewhat strenuous and on account of wholesale cattle-rustling and other crimes of a serious nature, I have been compelled to use a deputy continuously.

"Many trips are made without arrests or papers served and investigations concerning major crimes require that the sheriff have his deputy with him. The deputy cannot be expected to make these trips day and night without compensation even though the Sheriff does and if anything is to be accomplished worthwhile, it is necessary the deputy accompany me.

"The County Court understands this and are pleased to allow my deputy the straight salary of \$50.00 per month, but I do not wish to let them do something which might reflect on them later or place myself in an embarrassing position.

"I will thank you to advise me if the Sheriff has the right to use his deputy continuously and be paid a salary by the County Court, and if so should he be paid by warrant direct by the County Court or be paid by the Sheriff who will put the item in his expense account to the Court.

"Sullivan County has no jail and it is quite a busy job handling the prisoners to and from Sullivan County to jails in other Counties and this along with the other duties of the Sheriff really makes it out of the question for one man to do.

"The amount of money from the source of fees due the Sheriff in this County is not of sufficient size to hardly permit me to earn a living and I cannot afford to pay the deputy out of my own pocket.

"I will thank you for an opinion."

Section 11513 of the R. S. Mo. 1929 relating to the appointment of Deputy Sheriffs is as follows:

"Any sheriff may appoint one or more deputies, with the approbation of the judge of the circuit court; and every such appointment, with the oath of office indorsed thereon, shall be filed in the

office of the clerk of the circuit court of the county."

Section 11516 of the R. S. Mo. 1929, relating to emergency appointment of Deputy Sheriffs is, in part, as follows:

"In any emergency the sheriff shall appoint sworn deputies, who shall be residents of the county, possessing all the qualifications of sheriff. Such deputies shall serve not exceeding thirty days, and shall possess all the powers and perform all the duties of deputy sheriffs, with like responsibilities, and for their services shall receive two dollars per day, to be paid out of the county treasury."

These are the only two sections of the statutes relating to the appointment of deputy sheriffs. Under appointment by virtue of said Section 11513, the deputy is paid by the sheriff out of the sheriff's fees.

In Section 11516, the deputy is appointed by the sheriff for a period not exceeding thirty days and is to be paid out of the county treasury.

We are unable to find any statute giving county court the right to pay a deputy sheriff a monthly wage for continuous work in such capacity.

In the case of State vs. Endicott, 38 S. W. (2) 69, the Court in commenting on the right of a public officer to fees lays down the following rule:

"Some of the earlier cases held that the right of a public officer to fees is derived solely from the statute, and he is

September 10, 1937

entitled to no fees for services, unless
the statutes give it."

The Court in the above case in commenting on the appointment of
a deputy sheriff said:

"There can be no doubt that a deputy
sheriff appointed by the sheriff, as pro-
vided by section 11513, R. S. Mo. 1929,
is a public officer. State ex rel. Walker
vs. Bus, 135 Mo. 325, 36 S. W. 636, 33 L.R.A.
616. That being true, he is subject to the
same general limitations as any other public
officer in the matter of salary and fees.
There is no provision in the law providing a
salary for deputy sheriffs in counties such
as Ozark county."

The county would be controlled by this decision.

CONCLUSION

Therefore, it is the opinion of this department that a deputy
may not be paid a salary of \$50.00 per month out of county funds,
by order of the county court, of Sullivan County, directly or in-
directly.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

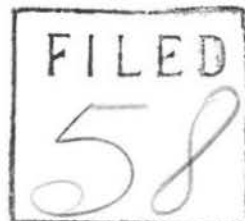
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SALARIES AND FEES: Where the County Clerk performs services that are not officially his duty, the County Court is authorized to pay him therefor if the services so performed are reasonably necessary county duties.

COUNTY COURTS:

September 23, 1937.

16-8



Hon. T. R. McCracken,
County Clerk,
Salem, Missouri.

Dear Sir:

This acknowledges receipt of your inquiry which is as follows:

"It has been a custom of the county court to pay the County Clerk a few dollars each month to take care of the telephone. This phone here in my office is the only phone in the court house, and therefore requires a great deal of time and energy running after people all over the court house and some times all over town to get the person that is wanted at the phone. For all of these services rendered I have been receiving only two dollars a month. The Auditors that are auditing my books inform me that I will have to refund all of this money that I have received for these services. The County court is saving at least \$100.00 per year, by having only this one phone in the court house. This has only been a sacrifice for me to attend to the phone so cheaply. Do I really have to refund this money to the county? Please advise me."

Replying thereto, we understand your state of facts to be this: That there is only one telephone in your court house, that being in your office. The county court is paying the telephone dues on that phone. It serves the

purposes of your office in performing your official duties and in addition to that you carry messages from your office to the various other offices when calls are officially made for the other county officers who do not have telephones, and those officials come to your telephone and transact their official business in that regard. For your services and as compensation to you for carrying these messages to the other officials, your county court has by an order of record authorized or directed you so to do and has by order of record ordered warrants drawn to compensate you for those services that you performed in answering the telephone for the other officials and in going to the offices of the other officials and calling them to your telephone, such warrants being a total of approximately \$25.00 a year.

Under the above state of facts, you desire to know whether the payment so made to you by the county court is lawful.

Replying thereto, if this payment of approximately \$25.00 is made to you as compensation for your official acts, it would be necessary that some statute authorize the payment of the same, as fees or salaries are authorized only where there is a statute under the operation of which they may be paid to county officials.

In the case of *State ex rel. Troll v. Brown*, 47 S. W. 504, 146 Mo. 401, the doctrine is announced by the Supreme Court of Missouri that no officer is entitled to fees of any kind unless provided for by statute. It is not a matter of contract. No recovery could be had on the basis of quantum meruit. The Court stated at page 406 (Mo.):

"It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory rights, statutes allowing the same must be strictly construed. *State ex rel. v. Wofford*, 116 Mo. 220; *Shed v. Railroad*, 67 Mo. 687; *Gammon v. Lafayette Co.*, 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform as such officer, unless the statute gives it. When the statute fails to provide a

fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

The same doctrine was later announced in the case of State ex rel. Evans v. Gordon, 149 S. W. 638, 245 Mo. 12, 27:

"Compensation to a public officer is a matter of statute, not of contract; and it does not depend upon the amount or value of services performed, but is incidental to the office.

"Throop on Public Officers (Sec. 443) says: 'It has been often held, that an officer's right to his compensation does not grow out of a contract between him and the State. The compensation belongs to the officer, as an incident of his office, and he is entitled to it, not by force of any contract, but because the law attaches it to the office.'

"Mechem on Public Offices and Officers says: 'Sec. 856. Unless, therefore, compensation is by law attached to the office, none can be recovered. A person who accepts an office to which no compensation is attached is presumed to undertake to serve gratuitously, and he cannot recover anything upon the ground of an implied contract to pay what the service is worth.' * * *

"In Bank v. Refrigerating Co., 236 Mo. 414, Brown, J., speaking for the court, says: 'When the law requires a specific service to be performed by a public officer, he must perform that service regardless of whether any provision has been made to pay him for same.'

"Not only is the right to compensation dependent upon statute, but the method or particular mode provided by statute must be accepted. On this point the Kansas City Court of Appeals says: 'It seems the general rule in this country, as announced by the decisions and textwriters, that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute. And further it seems well settled that if the statute provides compensation in a particular mode or manner, then the officer is confined to that manner, and is entitled to no other or further compensation, or to any different mode of securing the same. * * *'"

At page 29 (Mo.) the Court says:

"As the Legislature may fix such compensation to a public office as it sees fit, or none at all, we can see no constitutional objection to its attaching such conditions as it deems proper to the payment of the compensation, such conditions to be binding upon any one who thereafter enters upon such office and performs its duties. As stated above, the compensation has no relation to the amount or value of the service. There can be no application of the doctrine of quantum meruit. The officer takes the office cum onere. Having accepted it with the conditions imposed by the Legislature, upon whose will he must depend for any compensation at all, he cannot afterwards challenge the power of the Legislature to impose such conditions. * * *"

In the case of King v. Riverland Levee District, 218 Mo. App. 490, 279 S. W. 195, the St. Louis Court of Appeals stated, 1. c. 196 (S.W.):

"It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office.

* * * * Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in *State ex rel. Wedeking vs. McCracken*, 60 Mo. App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same."

It is your duty as county clerk to collect whatever fees the statute prescribes for the performance of duties by the county clerk, and all of such fees must be accounted for to the county. It is your duty as county clerk to perform all of the services enjoined upon you by the law regardless of whether the law authorizes compensation therefor.

In the case of *Callaway County v. Henderson*, 119 Mo. 32, the county clerk had received under an order of the county court \$400 for keeping regular accounts between the treasurer and the county, the statute there authorizing the county court to allow the clerk for his services under that article, "such compensation as may be just and reasonable." The county clerk there contended that he was entitled to retain this \$400 in addition to the \$1800 provided by the statute as his compensation as clerk. The court ruled against his contention, holding that his official emoluments were limited by another provision of the statutes which provided that the amount of fees a clerk might retain for one year should be not more than \$1500. The court there held that the county clerk, having collected more than the amount so allowed him for his salary and the amount allowed for deputy hire, must pay back to the county that part

of this \$400 which, added to the other collections made by him, made an excess over the amount he and his deputies were entitled to receive.

We know, however, of no statute or law which requires you as county clerk to act as messenger for the various other county officials in calling them to the phone. If this service that you render is not an official act, then it would seem to not come under the rule above announced that authority for the payment thereof to you shall be given by statute.

The question then arises, does the county court have the authority in law to enter into such an agreement by which part of the county revenue will be paid to you as compensation for services that you render in favor of the county where the performance of those services does not interfere with you properly carrying on the official work that you have before you as county clerk?

Section 36 of Article VI of the Missouri Constitution provides:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. * * *"

In the case of State ex rel. Brewer, County Collector v. Federal Lead Co., 265 Fed. 305, the above section of the Constitution is construed and the court says, l. c. 310:

"It is also obvious that the above constitutional provision, in conferring upon the county courts of the several counties power to transact 'all county business,' has the effect of making such county courts the general agents of the counties. If this view is correct, it is clear that the above statute and the constitutional provision above quoted

have a very important bearing upon the issues presented in this case. For; absent some statutory inhibition, and I know of none, and subject to some prohibitions of the Constitution of Missouri not here relevant, the county courts are authorized to deal with all county business just as any other general agent of an individual principal might do."

The county is under the legal duty to furnish the usual and appropriate office equipment to the various county officials. This is held in the case of *Ewing v. Vernon County*, 216 Mo. 681, where the recorder of the county sued the county for recovery of money paid by him for janitor service for the recorder's office, and recovered the same.

In the more recent case of *Buchanan v. County of Ralls*, 283 Mo. 10, the Supreme Court held that the county was under liability to pay back to the county treasurer the money theretofore expended by her in paying rent for the treasurer's office during her incumbency, saying, l. c. 15:

"It was the duty of the appellant to furnish respondent with suitable office space, heat, lights and janitor service."

If it was the duty of the county to furnish rent, light, heat and janitor service, it appears to us the county might be under the duty also of furnishing telephone service, as in the progress of time a telephone is regarded as an essential to a well equipped county office.

If the county business is being conducted in a proper and satisfactory way under the present arrangement, by which the county is at the expense of paying for one telephone and perhaps the price of one other telephone, being the amount they are paying to you in acting as messenger for the other officials, it would seem to be a reasonable arrangement in looking after the county affairs. Doubtless the other telephone expense that would be required, and for which the county would be obliged to pay, would amount to quite a good deal more than the amount they are paying to you, as stated in your letter, and under the authority of the *Brewer* case,

supra, it would seem that the county court is reasonably and properly attending to the duties of the county in carrying out the agreement with you as set forth in the question as stated by us hereabove.

CONCLUSION

It is our opinion that the county court has authority to enter into an agreement of record with the county clerk by which the county clerk performs for the county the services required in supplying, through his telephone, telephone service to the county officials in the courthouse, and to order warrants in favor of said county clerk for a reasonable compensation therefor, it appearing that the performance of those services by the county clerk does not interfere with the proper performance by the county clerk of his official duties, and this is true especially in view of the fact that by this arrangement with the county clerk the county saves the other additional expense it might be put to in having to pay the telephone bill for each of the other county officials in the courthouse.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

DW:HR

SOCIAL SECURITY:
UNEMPLOYMENT IN-
SURANCE:

(1) Moneys paid by employers under a State unemployment insurance law are not necessarily "state funds" within the meaning of Art. IV, Sec. 43, Const. of Mo.

(2) Such mandatory payment is not violative of the "due process" clause, and if a tax is for a public purpose.

January 7, 1937.

Senator Allen McReynolds,
Chairman, Social Security Committee,
Jefferson City, Missouri.



Dear Sir:

We have received your request of recent date for an opinion, which reads as follows:

"Is an amendment to the Missouri Constitution required to meet the requirement as set forth in Sec. 903, Paragraph 3, Title IX, of the Federal Social Security Act, that all money received in the State unemployment fund must immediately be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund?"

I.

As above stated, Sec. 903, Title IX, Federal Social Security Act, reads in part as follows:

"All money received in the unemployment fund shall immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904."

Sec. 43, Art. IV, Constitution of Missouri, reads in part as follows:

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law."

Sec. 15, Art. X, Constitution of Missouri, reads in part as follows:

"All moneys now, or at any time hereafter, in the State treasury, belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong, in such bank or banks as he may, from time to time, with the approval of the Governor and Attorney-General, select."

Sec. 19, Art. X, Constitution of Missouri, reads in part as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor."

It will be noted that there is an apparent conflict in the Federal Act and the Missouri Constitution in that the Federal Act provides that the money collected must be paid immediately into the Federal Trust Fund, while under the Constitution the Missouri provision states that "all revenue collected and moneys received by the State from any source whatsoever" must be paid into the treasury and be appropriated by law.

The question comes down to whether funds collected by the State from employers to be paid employees during a period of unemployment are state funds within the meaning of the constitutional provisions, so that said funds must go into the treasury and then be appropriated out by law.

Sec. 43, Art. IV, Constitution of Missouri, was interpreted in *State v. Board of Regents*, 264 S. W. 698, 1. c. 699, when the court en banc, speaking through Judge Walker, said:

" * * * By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources, as our numerous statutes attest, but, no matter from what source derived, if required to be paid into the treasury, it becomes revenue or state

money; its classification as such being dependent upon specific legislative enactment, or, as aptly put by the respondent, state money means money the state, in its sovereign capacity, is authorized to receive, the source of its authority being the Legislature. * * *

The above is a definition of "revenue", as was noted when the definition was quoted in *State v. Hackman*, 282 S. W. 1007, l. c. 1011. However, the definition and rules are equally applicable to the phrase "money received by the State from any source whatsoever". Revenue is said to mean "current income of the state from whatsoever source derived. * * * This current income may be derived from various sources." The difference then is that revenue is current income, that is, income received each year, while "moneys from any source whatsoever" applies to single or sporadic receipts. Both must be received by the State before they become state funds and the authority to receive these funds must be given the State by the Legislature.

The rule seems to be that state funds, i. e., revenue and money received by the State, must go into the treasury. It is the intention of the Legislature that must be looked to in determining whether any fund is a state fund. One of the surest indications, on the part of the Legislature, that a fund is to be a state fund, is that it is required to be paid into the treasury. Even then, if the fund is not subject to appropriation for public use, it is not state funds. The Legislature must give the State authority to receive such funds as state funds, and if the intention of the Legislature is that they are not to be state funds, and there are no other constitutional inhibitions, then the funds do not have to go into the treasury, nor be appropriated out by law.

This view has been followed in all the Missouri cases wherein the question has arisen whether certain funds should be paid into the treasury and whether funds already in the treasury must be appropriated before they could be used.

In *State ex rel. Stevenson v. Stephens*, 37 S. W. 506, money and securities were deposited with the State Treasurer by investment companies for the protection of investors. The question arose whether this money could be paid without a warrant and appropriation. The court, after citing Secs. 15 and 19 of Art. X of the Constitution, said:

"It is manifest that these provisions only apply to money 'belonging to the state.' The money in question, though it was deposited with the treasurer, was for the specific purpose of making good the security

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intended for the protection of those dealing with bond investment companies, and was not money belonging to the state, within the meaning of the constitution. The securities, whether in money, bonds, or notes, are held by the treasurer in trust, not for the use or benefit of the state, but for the protection of those who may hold the bonds, certificates, or debentures of bond investment companies which are unauthorized to sell such securities on the partial payment or installment plan. * * * It is clear that the legislature did not intend that the money or securities deposited should be paid out or returned under the regulation required in paying out the public money. * * *

Sec. 5037, R. S. 1899, provided that members of the board of examiners for barbers should each receive \$3 per day and necessary traveling expenses, which should be paid out of any money in the hands of the treasurer of the board. Whether this was in conflict with Art. IV, Sec. 43, was raised in *Ex parte Lucas*, 61 S.W. 218. The court held that the contention was not well founded because "Sec. 43, Art. 4, applies only to money provided for and received by the State. The money authorized to be collected under this act is not state revenue, but simply a provision to make the board of examiners self-supporting."

A similar situation arose in *State ex rel. Kerster v. Hackman*, 264 S. W. 366. However, in this case the statute in question provides that the fees collected should be paid into the state treasury and the examiners paid from that. The court held that the money must be appropriated because

"It is manifest that the intention of the Legislature in placing the funds in the hands of the state treasurer was, not only to provide official information as to its disbursement, but to keep the expenses of the department within the limits provided by the Legislature. The Legislature may be presumed to have had the constitutional restrictions in mind when they passed the act creating the fund."

The right of a collector of collateral inheritance tax to retain his fees from the money collected, and before sending it in to the State Treasurer, was questioned in *State ex rel. Curators v. Walker*, 144 S.W. 866. The court stated that the liberal construction of Sec. 43, Art. IV was not to apply, and it was the

intention of the Constitutional Convention that these fees were not state funds, because such practice had been the custom when the Constitution was adopted, and

"The convention which framed our Constitution was composed of men who knew what the law on this subject then was, and if they had understood that this section was liable to be construed as applying to the payment for services rendered in collecting the revenue, they would doubtless have made some provision to meet that condition, because payment for such services out of the funds before they were paid into the treasury had always been allowed by statute, and also because it would naturally impede or hinder the state in collecting its revenue unless such payments were so allowed."

In State ex rel. Clerk v. Gordon, 170 S.W. 892, it was held that there was an appropriation and Art. IV, Sec. 43, was not violated.

State ex rel. Thompson v. Board of Regents, 264 S.W. 698, has been referred to above and it involves the question whether insurance received due to the fire in a college building had to be paid into the State Treasury by the Board of Regents, or could be applied by the Board to rebuilding the structure. The court held:

"In the foregoing discussion of the constitutional provision invoked by relator, we have stated generally that no statute required the payment into the state treasury of the money here in controversy, and that a statutory enactment was a prerequisite to such payment and its receipt and deposit by the treasurer to entitle it, under the Constitution, to be classified as state money. A review of the statutes in relation to the State Teachers' Colleges is therefore not inappropriate as confirmatory of this conclusion. These statutes, so far as applicable to the matter here under review, are to be found in chapter 102, art. 17, R. S. 1919, as follows:"

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Then are listed the statutes, and the court concludes with

"Much space is devoted in the lucid brief filed by the respondent to the nonapplications to the matter at issue of numerous other sections of the statutes relating to the management of public institutions and the receipt and disbursement of their funds from whatever source derived. Without burdening this opinion with their review, it seems sufficient to say that in none of these statutes, either by express enactment or reasonable implication, does it appear that it was within the contemplation or intention of the Legislature that moneys received by the managing boards of educational institutions in the nature of incidental fees should, as a condition precedent to their use by the respective boards, be required to be first paid into the state treasury and appropriated therefrom by the Legislature. * * *"

Finally, in State ex rel. McKinley Publishing Co. vs. Hackman, 282 S.W. 1007, the status of the proceeds from license fees which were paid into the treasury were questioned. The court quoted the definition above from State ex rel. Thompson v. Board of Regents and continued:

"It is not only levied by the state but is collected by it and paid directly from the motor vehicle owners into the state treasury. * * * It thus appears that not only is the fund public revenue or state money, but is public revenue of a very extraordinary kind, levied, collected, and held by the state for two specific public uses, the major use of which is the payment and retirement of state bonds."

There are many statutes in Missouri, the constitutionality of which has never been questioned, relating to funds in the possession of the State which are not in the treasury, or, if they are, do not have to be appropriated out to be paid, the intention of the Legislature being that they are not state funds.

Sec. 620, R. S. Mo. 1929, relates to the Escheat law and provides that the State Treasurer shall hold certain moneys in escheat, which will be paid out upon request of those who are entitled to the moneys.

Sec. 5303, R. S. Mo. 1929, provides that the Commissioner of Finance shall hold all unclaimed deposits, dividends and interest of corporations or private banks. Under this section, the Commissioner holds the money himself, and pays same out without appropriation.]

Sec. 5222, R. S. Mo. 1929, relates to deposits unclaimed in insolvent or closed savings banks. These deposits are to be held by the State Treasurer for the use and benefit of the depositors and paid out on the claim of these depositors.

Secs. 5704, 5706, 5711, 5761, 5765, 5746, 5749, 5750, 6084, 5935, 5802, 5808, R. S. Mo. 1929, provide for the deposit of all securities by insurance companies with the Department of Insurance of the State of Missouri, which deposits are held by the department and returned without ever having been paid into the State Treasury or appropriated out by law.]

II.

The question then presents itself whether a state unemployment compensation law would be in conflict with any other provision of the Constitution of Missouri.

Sec. 30, Art. II, Constitution of Missouri, provides:

"That no person shall be deprived of life, liberty or property without due process of law."

Chamberlin, Inc. v. Andrews, 271 N. Y. 1, 2 N. E. (2d) 22, which was affirmed by a divided court of the Supreme Court of the United States, 81 L. Ed. 69, dealt with the New York unemployment insurance law, and in regard to the due process provision it said:

"Whether or not the Legislature should pass such a law, or whether it will afford the remedy or the relief predicted for it, is a matter for fair argument but not for argument in a court of law. Here we are dealing simply with the power of the Legislature to meet a growing danger and peril to a large number of our fellow citizens, and we can find nothing in the act itself which is so arbitrary or unreasonable as to show

that it deprives any employer of his property without due process of law or denies to him the equal protection of the laws."

While we do not pass upon the question of whether this legislation is a tax measure or an exercise of the police power, however, if it is a tax, it does not violate Section 3, Article X, of the Constitution of Missouri, which reads:

"Taxes may be levied and collected for public purposes only."

Again we quote from Chamberlin, Inc. v. Andrews, supra, and the court held:

"It is said that this is taxation for the benefit of a special class, not the public at large, and thus the purpose is essentially private. The Legislature, after investigation, has found the facts to be that those who are to receive benefits under the act are the ones most likely to be out of employment in times of depression. The courts cannot investigate these facts and should not attempt to do so. The briefs submitted show that the classification or selection made by the Legislature has followed investigation and has sought to reach the weakest spot. Experience may show this to be a mistake. No law can act with certainty; it measures reasonable probabilities. 'Judicial inquiry does not concern itself with the accuracy of the legislative finding, but only with the question whether it so lacks any reasonable basis as to be arbitrary. Standard Oil Company v. Marysville, 279 U. S. 582, 586, 587, 49 S. Ct. 430, 73 L. Ed. 856.' Mr. Justice Roberts in Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251, 56 S. Ct. 453, 456, 80 L. Ed. ____."

1/7/37

CONCLUSION

A positive and unqualified opinion can not be given by this department on any legislation yet to be enacted, the statutes in their final form being the only basis from which such a conclusion may be drawn. However, it is the opinion of this department, since under similar circumstances the Supreme Court of Missouri has held that certain moneys were not state funds because they were not intended by the Legislature to be such, that moneys paid by employers in the State to be used for the benefit of employees during times of unemployment may not necessarily be "state funds" within the meaning of Section 43, Article IV, of the Constitution, especially so if it is manifestly the intention of the Legislature that such moneys are not to be "state funds".

Such mandatory payment on the part of the employers is not violative of the "due process" clause of the Missouri Constitution (Sec. 30, Art. II), and such a tax, if it is a tax, is for a public purpose as required by Section 3, Article X, of the Constitution of Missouri.

Yours very truly,

COVELL R. HEWITT,
Assistant Attorney General.

APPROVED:

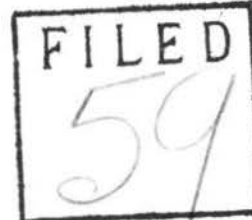
ROY McKITTRICK,
Attorney General.

AO:HR

COUNTY BUDGET ACT: The money contracted by the county for lease on road machinery during the year 1936 must be paid out of the revenue of the year 1936.

January 26, 1937

1.29



Mr. C. W. McKim,
County Clerk Worth County
Grant City, Missouri

Dear Sir:

This department is in receipt of your letter of January 21, wherein you make the following request relative to the County Budget Act:

"If the County Court leases machinery at the beginning of one year making the lease come due in February of the following year which years revenue should the warrant be issued upon. Or at the beginning of 1936 Worth County leased some machinery, the lease coming due in February of 1937. Now then is it permissible to issue a warrant upon 1937 revenue or should it be issued upon 1936 revenue? Is a lease the same as any other bill and should be paid for out of the revenue of the year upon which most of the lease run or should it be taken from the revenue of the year in which the warrant is written, or upon the year the lease fell due?"

The County Budget Act, Sec. 1, p. 341, Laws of Missouri 1933 among the other duties of the County Court makes it mandatory for said court to prepare the budget from January 1 to December 31 in each year, in the following language:

"The county courts of the several counties of this state are hereby authorized, empowered and directed and it shall be their duty, at the regular February term of said court in every year, to prepare and enter of record and to file with the county treasurer and the state auditor a budget of estimated receipts and expenditures for the year beginning January 1, and ending December 31."

Therefore, the leasing of the machinery mentioned in your letter was within the period covered by the 1936 budget. We construe the leasing of the machinery to be a contract which must be taken into consideration in estimating the current or anticipated revenue for the year in which the contract was entered into.

Sec. 12 of article 10 of the Constitution of Missouri is as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose."

In the case of Trask vs. Livingston County, 210 Mo. 582 the court in discussing a contract, relative to a bridge to be constructed the following year, said:

January 26, 1937

"The Constitution permits the county court to anticipate the current revenues to the extent of the county's income for the year in which a debt is contracted or created, but prohibits the anticipation of the revenues for any future year. A bridge contracted for in September is to be paid for out of the revenue of the year in which the contract is made, if the appropriation therefore is not in excess of such revenues, and cannot be paid for out of the revenues for the next year, even though completed and accepted the next year."

CONCLUSION

We are of the opinion in view of the terms of the Budget Act and the decision quoted supra, the amount contracted for the lease of machinery must be paid out of the 1936 revenue. A lease only differs from an ordinary current obligation of the county to the extent that it must be paid out of the revenue of the year during which the contract was made, and not in the year in which the lease might terminate or fall due.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

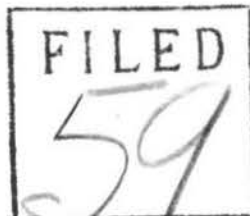
J. E. TAYLOR
(Acting) Attorney General

OWN:JM"

JUSTICE COURTS - Constable or justice as custodian of monies paid in connection with litigation.

February 4, 1937.

Hon. John H. McNatt,
Associate Prosecuting Attorney of
St. Louis County,
Clayton, Mo.



Dear Sir:

A request for an opinion has been received from you under date of December 26, 1936, which request is in the following terms:

"This is to ask your opinion on the question of whether the Justice of the Peace or the Constable should be the custodian of the fees that are received by virtue of criminal or civil process."

We are advised that under the recent readjustment of townships in St. Louis County that the population of the smallest township therein at the present time is approximately 4,500 persons, and that the population of the largest is approximately 61,000 persons, so that none of the articles or sections applying to justices of the peace or constables in townships having larger populations than that of the largest in St. Louis County would now be applicable, and therefore the governing statutes will be the general statutes on this subject. In order to make the scope of this opinion more clear, it may be remarked that we have been unable to find any statutes providing for the payment of money directly to justices of the peace, and that we have found numerous statutes requiring payments to be made to constables, and that there will be set out below these sections, the same to be followed by certain inferences and general propositions deducible from the statutory scheme.

R. S. Mo. 1929, sec. 11776, governing fees of officers, jurors and witnesses, provides for the certification and delivery of fee bills "to the sheriff or other officer of the proper county charged by law with the service of executions, who shall proceed forthwith to collect the same; * * * and if any such officer shall neglect or refuse to levy and collect such fees, or to pay over the money collected thereon to the person entitled thereto, within three months after such fee

Hon. John H. McNatt

February 4, 1937.

bill shall have been delivered to him, the court wherein such fees accrued shall, upon ten days previous notice given to such officer, on motion, enter up judgment against him and his sureties for the amount of the fee bill, interest and costs thereon. All provisions of this section concerning the collection of fee bills shall also apply to fee bills issued by justices of the peace".

Section 11809 provides as follows:

"Justices of the peace may issue fee bills for all services rendered in their courts, and if the person chargeable shall neglect or refuse to pay the amount thereof to the constable or proper officer, within twenty days after the same shall have been demanded by such officer, he may and shall levy such fee bills on the goods and chattels of such person, in the same manner and with like effect as on a fieri facias."

As to fines in criminal proceedings before justices of the peace, section 3486 provides for the delivery by the justice before whom any conviction may be had to the county treasurer and clerk of the county court a statement of the amount of the fines and return day of the execution, "and the name of the constable charged with the collection thereof; and the county treasurer shall charge the constable with the amount of such fine, and unless the same be paid into the county treasury on or before the return day of the execution, the county court shall, at their next term, ten days notice being given to the constable in default and his sureties, render judgment against them for the amount due * * *".

Section 2194 provides that "on each summons the justice shall indorse the amount of the plaintiff's demand, with the costs that have accrued; and if the defendant shall pay to the officer serving the summons the amount claimed and costs, the summons shall be returned as satisfied * * *".

Section 2201, providing that any person having a bond, note or account on which he wishes a suit brought may place the same in the hands of the constable of the proper township for suit, provides further that "if the constable receive the money on such bond, note or account before suit is brought, and fail to pay it over on demand, or fail to bring suit, whereby any loss is sustained, he and his sureties shall be liable therefor on his official bond".

Hon. John H. McNatt

February 4, 1937.

Section 2202 provides that if "the defendant pay to the constable the full amount of the claim, with the fees for collection and the costs which have then accrued, the constable shall certify the same to the justice, and the suit shall be discontinued".

Section 2226 provides that if the defendant makes payment under Section 2202 to the constable, and plaintiff continues to prosecute and fails to recover judgment for a larger amount, plaintiff shall pay costs accruing after such payment to the constable.

Section 2316 provides that executions in justice courts shall be directed to the constable and "that it shall be the duty of the constable, in case the amount of said judgment, or any part thereof, shall be collected before the return day of such execution, to pay the same over to the party entitled thereto".

Section 2322 provides that the constable, after sale under a justice court execution, "shall, after deducting costs, pay the money over to the party entitled thereto, and make return of such execution as hereinbefore provided".

Section 2328 provides as follows:

"The constable of the township shall receive all money that may be tendered to him in payment of any judgment, obtained before a justice of the peace of such township, and shall give the person paying the same a receipt therefor, in which shall be specified on what account the same was paid; and the payment shall be valid against the judgment, and, upon the production to the justice of the receipt therefor, shall be credited therewith. The person entitled to the money paid shall have the like remedies against the constable and his sureties for the recovery thereof, as if such money had been collected by the constable on execution."

Section 2329 provides as follows:

"Payment to justice not valid against judgment.- No payment of money upon a judgment, made to the justice either before or after execution thereon, shall be valid against such judgment, nor credited thereto, unless paid

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February 4, 1937.

with the consent of the person to whom the same is due."

Section 2330, governing proceedings against a constable and his sureties, provides for their liability where the constable "has failed to have money by him collected on execution or fee bill before the justice on the return day thereof, ready to be paid to the persons entitled thereto" and where the constable "has failed to pay or deliver, upon demand of the party entitled thereto, money received by him on judgment or on demand placed in his hands for collection, and for which he has given his receipt, or money or property received in pursuance of any of the provisions of this article * * *".

Section 11749 requires every constable to give bond that he will "pay all money received by him by virtue of his office" and section 2338 provides the method by which a party aggrieved may proceed against a constable and the sureties on his bond.

Section 11750 requires every constable to receive and receipt for any claim tendered him for collection within his jurisdiction, and provides that "such constable and his sureties on his official bond shall be liable for the amount which may be collected by said constable on such claim, whether the same be collected by process or otherwise".

As stated above, we have found no constitutional or statutory provision requiring a justice of the peace to give a bond or authorizing a justice of the peace to collect any money (except his own compensation as allowed by law), or providing for the payment by any person to the justice of the peace directly of any money. In view of the fact that constables are under bond and that there are numerous statutes providing for the collection by them or payment to them of money for various costs, judgments and fines, it would seem that our statutory scheme contemplates constables and not justices of the peace as being the custodians of all monies coming through their courts. Under general principles of statutory construction, it would seem that this construction is not only intended by the statutes themselves, but is impelled by the fact that such a construction would furnish protection for the proper accounting of these monies by an official who is under a bond, whereas the other construction would not furnish any such protection. In the case of *State ex rel Lentine v. State Board of Health*, 334 Mo. 220, 65 S.W. (2d) 943 (1933) the court said:

Hon. John H. McNatt

February 4, 1937.

"It may be considered trite to again observe that the primary and fundamental purpose in statutory construction is to ascertain and give effect to the legislative intent nevertheless such is always the end sought and the numerous rules for the interpretation or construction of statutes are merely aids in the quest. But such rules should not be so applied as to restrict or confine the operation of a statute within narrower limits or bounds than manifestly intended by the Legislature and whether the proper construction of a statute should be strict or liberal it certainly should be such as to effectuate the obvious purpose of its enactment and the evident legislative intent. Reference should be had to the policy adopted by the Legislature in reference to the subject-matter, the object of the statute, and the mischief it strikes at or seeks to prevent, as well as the remedy provided." 55 S.W.(2d) 950 (1933)

We have made no attempt in this opinion to go into the method of accounting imposed by law on constables for the payment of monies received by them to the persons entitled thereto, this opinion being confined to the question of the person to whom fees or money should be paid directly in the first instance, aside from any question of their subsequent or ultimate disposition.

In conclusion, it is our opinion that a constable, and not a justice of the peace, is the custodian of the fees received in their court by virtue of civil and criminal process, and that it is the constable who must account for such fees to the person or persons entitled thereto.

Very truly yours,

EDWARD H. MILLER,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TAXATION AND REVENUE: Under Section 9787 R. S. Mo. 1929, the county court can compel the assessor to carry out the provisions of said section and may use its own discretion concerning compensation

August 24, 1937

Supplementary opinion # 66 dated 5-2-4-38

Mr. John H. McNatt
Prosecuting Attorney
St. Louis County
Clayton, Missouri



Dear Sir:

This Department is in receipt of your letter of July 12, wherein you request an opinion regarding Section 9787, Revised Statutes Missouri 1929. Your letter is as follows:

"We should like to know whether under R. S. Mo. 1929, sec. 9787, our County Assessor can be required to compile and keep a land list for a full and accurate assessment of all property in this county without being paid therefor out of the County treasury. The County Court has ordered Assessor Neaf to do this work, expecting him to pay for it out of his fees rather than, as the statute requires, out of the County treasury. We should also like to know whether the County Court's order requiring Assessor Neaf to do this work is mandatory.

"Thanking you very much for your courtesy in this matter, I remain."

Chapter 59, Article II, relates to Assessors and assessments of property. Section 9782 refers to the

real estate book and personal assessment book and what the same shall contain. Section 9784 deals with the land list. Sections 9785 and 9786 relate to keeping the mortgage lists and the abstract of lands which are delinquent.

Section 9787, being the one in controversy, reads as follows:

"Nothing in the preceding five sections shall be construed to apply to counties which have already adopted a method of plats and abstracts to facilitate the assessment and collection of the revenue; nor shall the provisions of the preceding five sections apply to counties having a less population than forty thousand, unless a majority of the voters in any such county shall elect to adopt its provisions at a general election, upon the question being ordered to be submitted by the county court; Provided, that in counties having a population of over forty thousand the county court may, in addition to the foregoing provisions for securing a full and accurate assessment of all property therein liable to taxation, or in lieu thereof, by order entered of record, adopt for the whole or any designated part of such county any other suitable and efficient means or method to the same end, whether by procuring maps, plats or abstracts of titles of the lands in such county or designated part thereof or otherwise, and may require the

assessor, or any other officer, agent or employe of the county to carry out the same, and may provide the means for paying therefor out of the county treasury."

It would appear by the terms of Section 9787 that the five preceding sections mentioned shall not affect counties of less than 40,000 population. Your county being of much greater population than 40,000 the attached order of the county court attempts to comply with the last conditions of the section. We note also the copy of the order of the county court covering the year 1934. The last paragraph of the order awards compensation to the assessor for additional clerks and draughtsmen for such length of time as may be necessary for completing and carrying out the method and system adopted by the court. The present order directs the county assessor to carry out the method as provided, but as to the compensation

"finds that the fees of the office of the Assessor of St. Louis County are adequate to pay salaries of sufficient personnel to carry out said method and system without the necessity of payment of salaries of additional personnel out of the County Treasury."

Two questions arise: Is it mandatory on the county assessor to carry out the duties as contained in Section 9787 and the order of the court; and, can he be compelled to do so without additional compensation.

The statute contains the expression, "and may require the assessor or any other officer, agent or employee of the county to carry out the same." By

the terms of the statute it would not appear that it is a duty which would necessarily fall upon the assessor any more so than any other officer, agent or employee of the county. In other words, it does not appear to be a duty common only to the assessor and which he alone, by virtue of his office, could perform. However, it would appear that he is the most logical one to perform the duties.

In the decision of State ex rel. Zoological Board v. St. Louis, 318 Mo. l. c. 922, the court, dealing with Sections 9009 and 9016 of the Revised Statutes of 1919, held to the effect, with reference to compelling officers to perform ministerial acts, as follows:

"Where a specific ministerial duty, which from its terms is mandatory in its nature, is imposed upon an officer, a board or tribunal with respect to the levy, assessment and appropriation of taxes or the expenditure of the same, mandamus will lie to compel its performance."

The Legislature has delegated the county court authority to select one of the officers mentioned in the section to perform the duties as hereinbefore outlined. It is a discretionary act on the part of the county court but once the county court has exercised its discretion, we think that the statute is plain in its terms that it is mandatory on the officers so selected to perform the duties. In other words, if the Assessor has been selected mandamus would lie to compel him to perform the duties.

We next discuss the question of the compensation; likewise, it appears to be a discretionary matter with the county court as in neither instance has the Legislature seen fit to use the mandatory verb "shall," but instead uses the directory or discretionary word "may."

The duties imposed on the Assessor in the instant case, as stated above, fall most logically on that office. In fact, we think that when the county court selects the Assessor as the person to perform the duties it becomes a part of his office. The general rule with respect to the duties of an officer imposed by statute and those not a part of his duties by virtue of his office is tersely stated in 46 Corpus Juris, page 1017, paragraph 242:

"Where the duties of an officer are increased by the addition of other duties germane to the office without provision for compensation, the officer must perform such duties without extra compensation. So, an officer is not entitled to extra compensation because additional duties pertaining to the office have been assumed by him or imposed upon him by the exigencies of the office. But for services performed by request, not part of the duties of his office, which could have been as appropriately performed by any other person, he may recover a proper remuneration. Public policy, however, requires that courts should not favor nice distinctions in order to declare certain acts of public officers extra-official."

We think the last sentence as contained in the quotation from Corpus Juris is to the effect that courts should not favor nice distinctions in order to declare certain acts of public officers extraofficial, and is not applicable to the point under discussion, for the reasons hereinbefore mentioned.

Again, referring to the fact that the statute, by using the word "may," in the last sentence, shows conclusively that it is a discretionary matter as to compensation in reference to paying the Assessor. Therefore, we think that the principles as laid down by the court in the case of Sanderson v. Pike County, 195 Mo. 604, are applicable:

"It will thus be seen that the Legislature has vested in the county court the power to fix the compensation of the treasurer for his general services and for his services in disbursing the school moneys of the county. With this discretion neither this court nor the circuit court has any right to interfere. The county court is a court of record, and its acts and proceedings can only be known by its record. A contract with such court cannot be established by parol evidence. (Maupin v. Franklin Co., 67 Mo. 327; Dennison v. County of St. Louis, 33 Mo. 168.) No record of the county court was produced on the trial of this cause fixing the treasurer's compensation under either of the foregoing sections of the statute. It is well-settled law in this State that the right to compensation for the discharge of official duties is purely a creature of the statute, and that the statute which is claimed to confer that right must be strictly construed. The right of a public officer to compensation is derived from the statute, and he is entitled to none for services he may perform as such officer, unless the statute gives it. (State ex rel. v. Adams, 172 Mo. 1-7; Jackson

County v. Stone, 168 Mo. 577; State ex rel. v. Walbridge, 153 Mo. 194; State ex rel. v. Brown, 146 Mo. 401; State ex rel. v. Wofford, 116 Mo. 220; Givens v. Daviess Co., 107 Mo. 603; Williams v. Chariton Co., 85 Mo. 645; Gammon v. Lafayette Co., 76 Mo. 675.)

"Such compensation is not the creature of contract nor dependent upon the fact, or value of services actually rendered (State ex rel. v. Walbridge, supra, and authorities cited on pp. 203 and 204), and cannot be recovered upon quantum meruit. (Wolcott v. Lawrence Co., 26 Mo. 272, and cases supra.)

"This suit was brought upon the theory that under the provisions of section 9849, supra, the plaintiff was entitled to 'one-half of one per cent of all school moneys disbursed by him,' when, in fact, he was only entitled 'to such compensation for his services as the county court may deem advisable,' not exceeding that amount.

"There was no legal evidence tending to prove that the county court deemed it advisable to pay him for such services any more than they did in fact pay him.

"The circuit court by its finding and judgment charged the county for the value of his services upon an implied contract and upon the exceedingly doubtful weight of the parol evidence, when such a contract, either express or implied, could not be established by such evidence, as abundantly appears by the cases cited."

CONCLUSION

Having come to the conclusion that the word "may", as used in both statutes, indicates that the acts of the county court, if it complies with the statute with reference to the duties to be performed, are purely discretionary acts, it would naturally follow that the county court by its discretion in the first instance could compel the Assessor to carry out the duties in said section and, by its discretion with reference to compensation, could allow or could refuse to allow the Assessor compensation. It appears that the county court has exercised its discretion by order to the effect and for reasons best known to it that the Assessor shall not be allowed any compensation.

We are, therefore, of the opinion that such an order is a valid binding order.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN LC

COUNTY BUDGET ACT: County Clerk incurs no liability by issuing warrants out of the 1937 revenue for 1936 expenditures, provided such warrants do not violate the priorities of the classes in section 2 of the County Budget Act. Warrants are invalid which are issued from the 1937 revenue for 1936 expenditures.

January 11, 1937

Mr. Emory C. Medlin
Prosecuting Attorney
Barry County
Cassville, Missouri



Dear Sir:

This Department is in receipt of your letter of January 5, wherein you make the following inquiry relative to the County Budget Act. Your specific question is as follows:

"I am writing you for our County Clerk who wants to know if under the County budget law, if he would be liable if he issued warrant out of the 1937 budget to pay 1936 debts. It seems that the County Court has failed in 1936 to make their budget large enough, and are now in debt.

"As Prosecuting Attorney of Barry County, I would appreciate your opinion as the statute is not very clear in this matter."

The purpose of the County Budget Act was to promote efficiency and economy in county government. The first eight sections, page 340, Laws of Missouri, 1933, control the finances of counties less than 50,000 population, which would, therefore, include Barry County.

Section 2 relates to the classification of proposed expenditures into six classes, and by Section 1 such classifications and priorities are to be sacredly preserved.

The other sections have reference to the duties of officers in compiling and preparing the budget. Section 8, page 346, is the penal section and is, in part, as follows:

"Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

By analyzing the above quoted section it would appear that the liability imposed on your county clerk would be "as a result of violating or issuing a warrant contrary to the provisions of the act." In all probability the issuance of a warrant by your county clerk, out of 1937 revenue for 1936 expenditures, would not violate the terms of the Act but would effect the validity of the warrant. In enacting the Budget Act the Legislature did not change the complete financial structure of the county, in fact only certain statutes were repealed specifically, therefore, the decisions of the Supreme Court and other statutes which are not in conflict still remain in full force and effect. The county court cannot issue warrants in excess of the anticipated revenue. As was said in the case of *State ex rel. v. Johnson* 162 Mo. 1. c. 629:

"It was then anticipated that, though the county court might not issue warrants in excess of the levy for a year's current expenses, and that a creditor might rely upon the fact his contract was within the amount of revenue levied and provided, and trust to the power of the State to enforce its taxes, still it might happen from some unforeseen cause enough of the estimated amount of revenue might not be collected to

pay all the warrants drawn against it in anticipation. Under such circumstances it has never been ruled that such a creditor's warrant was absolutely void and extinguished by the non-payment in the year in which it was drawn. On the contrary, this court has often said in no uncertain terms that it was valid and payable out of any surplus revenue in the hands of the county treasurer that might arise in subsequent years. (Randolph v. Knox County, 114 Mo. 142; Andrew County v. Schell, 135 Mo. loc. cit. 39; State ex rel. v. Payne, 151 Mo. loc. cit. 673; Railroad Co. v. Thornton, 152 Mo. 570; State ex rel. v. Allison, 155 Mo. loc. cit. 344; and on this point, Reynolds v. Norman, 114 Mo. 509.)"

When warrants are issued and there are funds retiring the same, or the total amount of the anticipated revenue is not collected, as was said in the Johnson decision, such warrants may be paid out of surplus funds which might arise in subsequent years. Referring to the question of issuing warrants on the 1937 revenue we think that the decision in Trask v. Livingston County 210 Mo. 582, is decisive of the matter:

"The Constitution permits the county court to anticipate the current revenues to the extent of the county's income for the year in which a debt is contracted or created, but prohibits the anticipation of the revenues for any future year. A bridge contracted for in September is to be paid for out of the revenue of the year in which the contract is made, if the appropriation therefor is not in excess of such revenues, and cannot be paid for out of the revenues for the next

Mr. Emory C. Medlin

-4-

January 11, 1937

year, even though completed and
accepted the next year."

We are inclosing copies of an opinion rendered December 31, 1936, to Honorable William E. Stewart, Prosecuting Attorney, Edina, Missouri, and one rendered to Honorable Paul N. Chitwood, Prosecuting Attorney Ellington, Missouri, dated November 16, 1936, which bear on this question.

CONCLUSION

We are of the opinion that your county clerk should not issue warrants out of the 1937 revenue in payment of expenditures of 1936.

You refer in your letter to warrants issued out of the 1937 budget to pay 1936 debts. If the funds out of which you propose to pay the warrants are, in reality, 1936 revenue, then it is our opinion that the same can be paid, but you state in the next sentence that the county court failed, in 1936, to make the budget large enough; therefore, we conclude that you contemplate paying expenditures of 1936 out of the revenue of 1937, which we hold to be illegal. Another feature to be considered if such warrants were issued is to the effect that the priorities mentioned in Section 2 might be jeopardized.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

Inclosure

SOLDIERS' BONUSES: Applications filed before December 31, 1936, payable immediately.

June 5, 1937.



Honorable Lewis M. Means
The Adjutant General
Jefferson City, Missouri

Dear General Means:

We acknowledge your letter of May 29, 1937, requesting an opinion, which reads as follows:

"The 59th General Assembly has passed House Bill No. 45 which repeals section 9 of an act of the 58th General Assembly, 1935, approved April 1, 1935, and found at pages 362 and 363, both inclusive, of the Laws of Missouri, 1935, and has enacted in lieu thereof a new section to be known as section 9 which provides that the time be extended for two years for the payment of Bonuses to the Soldiers' and Sailors' of the World War.

"This Act does not carry an emergency clause, and an opinion is requested as to whether or not funds can be expended for the payment of Bonuses immediately or whether it will be necessary to wait the usual three months after the passage of the Bill."

Article IV, Section 36 of the Missouri Constitution provides:

"No law passed by the General Assembly, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency (which emergency must be expressed in the preamble or in the body of the act), the General Assembly shall, by a vote of two-thirds of all the members elected to each house, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journal."

June 5, 1937.

Section 9, Laws of 1935, page 362, provides in part:

"It shall be the duty of the adjutant-general to determine as expeditiously as possible the persons who are entitled to the payments under this act and to make such payments in the manner herein prescribed. Applications for such payments shall be filed with the adjutant-general on or before December 31, 1936, and at such place or places as the adjutant-general may designate and upon blanks furnished by the adjutant-general:
* * * *."

CONCLUSION.

Under House Bill 45, referred to in your letter, the payment of Soldiers' bonuses in Missouri, whose applications were not filed by the Adjutant General before December 31, 1936, must be delayed until said House Bill becomes the law, that is, payments must be deferred until ninety days after adjournment of the 59th General Assembly. Those claims filed before December 31, 1936, can be paid immediately out of funds available for that purpose.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

MOTOR VEHICLES: Sale of defaced or altered serial
number on automobile tires

October 19, 1937

10-23

Mr. Emory C. Medlin
Prosecuting Attorney
Barry County
Cassville, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of October 18, 1937, in which you request an opinion as to Section 7781 of the Motor Vehicle Laws, and also ask whether or not a dealer can sell tires which have not been marked C. M. V. Your letter is as follows:

"I'm calling your attention to Section 7781 Motor Vehicle Laws, removing, altering, or defacing manufactured numbers. It seems that there are a number of places in Springfield who handle used tires, and practically all of the serial numbers have been removed from them. A great many of the tires are manufactured in Illinois.

"As I read that section it is a violation of the law and I don't see any way around it. I just wonder if your attention has been called to it, or if you know of any way where they could sell tires which hasn't been marked by C. M. V. and followed up by the letters Mo.

"I would appreciate your opinion in regard to this matter as the

October 19, 1937

officers are handicapped in running down stolen cars, where the country is flooded with tires with serial numbers removed."

I am referring you to paragraph (b) of Section 7781, which has not been repealed but which has been affected by additional Section 7781-a, in the Session Laws of 1935. In this section the Legislature provided for the registration of tires on which the serial number had been destroyed, removed, covered, altered or defaced.

Section 7781, Revised Statutes Missouri 1929, provided that tires, as set out, should be registered within thirty (30) days from the taking effect of the article, which time has elapsed.

Section 7781-a was an additional section to provide for the registration where tires had been defaced since the act of section 7781. The penalty under Section 7781, Revised Statutes Missouri 1929, is covered by Section 7786, paragraph (d).

The statute, 7781, is not ambiguous in any respect and prescribes a penalty, so it is not necessary to interpret the construction of same. Betz v. Kansas City Southern Railway Company, 284 S. W. 1. c. 462.

This section, along with other sections, has been passed on by the Supreme Court as to the legal effect and constitutionality in the case of Star Square Auto Supply Co., et al. v. Gerk, et al. 30 S. W. (2d) 447.

CONCLUSION

Taking into consideration Section 7781-a of the Session Laws of 1935 there is only one method

Mr. Emory C. Medlin

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by which tires can be sold that have been defaced,
and that is by the owner of the tires complying
with Section 7781-a, page 299, Laws of Missouri 1935,
and the tires must be marked with the number given
by the Commissioner of Motor Vehicles before they
can be sold.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

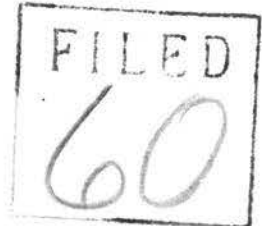
J. E. TAYLOR
(Acting) Attorney General

WJB LC

BONUS MONEY: Mother of soldier is entitled to soldiers' bonus, when.

October 26, 1937.

10-28



Honorable Lewis M. Means
The Adjutant General
Jefferson City, Missouri

Dear Sir:

We acknowledge your request for an opinion dated October 22, 1937, which reads as follows:

"The mother of the above deceased veteran has filed a claim for Missouri Soldiers' Bonus. This veteran was married but separated from his wife. When he executed an allotment blank on May 6, 1918, he named his wife but requested exemption from the compulsory allotment to her on the ground of separation. After an investigation exemption was granted as to the wife and no payments of allotment or Government family allowance were made for her benefit.

"There is no record of his wife's death, neither can the veteran's mother show that there was a divorce.

"An opinion is requested as to whether we could pay the mother on the grounds that the Government recognized this separation in 1918, or whether the widow, if living, could come in and claim this Bonus and have a chance of collecting it.

"We would appreciate an early opinion in this matter."

Article IV, Section 44b, of the Missouri Constitution provides for the distribution of soldiers' bonus money, and reads in part:

" * * * * The legislature shall enact such laws as may be necessary to carry into effect this amendment. The wife or husband, child, mother or father, in the order named and none other, of any deceased resident who served honorably in the military or naval forces, as provided in this section, shall be paid the sum or allowance that such deceased resident would be entitled to receive hereunder if such deceased resident had lived: * * *."

Pursuant to this constitutional amendment the Legislature has provided in the Laws of Missouri, 1937, p. 479, Section 9, as follows:

"It shall be the duty of the adjutant-general to determine as expeditiously as possible the persons who are entitled to the payments under this act and to make such payments in the manner herein prescribed. Applications for such payments shall be filed with the adjutant-general on or before December 31, 1938, and at such place or places as the adjutant-general may designate and upon blanks furnished by the adjutant-general: Provided further, the adjutant-general shall have the power to adopt all proper rules and regulations not inconsistent herewith to carry into effect the provisions of this act; and provided further, that all officers of the state or any county and any city or town therein are hereby directed to furnish free of charge, in writing, any information that the records in his office may disclose relative to the identity, place and period of residence and the war service of any soldier claiming a payment under this act, whenever such information is required by the adjutant-general of any person making an application for such bonus or any part thereof; and any application for bonus heretofore filed and rejected may be filed before the

adjutant-general and by him again heard; and if it appears that the rejection of the claim was erroneous, the rejection may be set aside, and the claim allowed and paid; and provided further that no department of the state government shall employ any clerks for the purpose of carrying out the provisions of this act, except the adjutant-general shall employ an examiner of soldier bonus claims and one stenographer for the handling of claims."

Section 1709 R. S. Mo. 1929:

"If any person who shall have resided in this state go from and do not return to this state for seven successive years, he shall be presumed to be dead in any case wherein his death shall come in question, unless proof be made that he was alive within that time."

In the case of Carter v. Life Insurance Company, 158 Mo. App. 368, 373, 138 S. W. 49, the Court construed the above Statutes and said:

"But the presumption of death, which is the one on which the statute operates, only arises when these facts are present: first, residence of the person in this state; second, departure of that person from this state; third, the continued absence of that person from this state for seven successive years, no proof being made that he was alive within that time."

CONCLUSION.

This department is of the opinion that the soldiers' bonus money of Missouri which is available to the wife or husband, child, mother or father of any deceased

resident soldier who served honorably in the military or naval forces, must be paid, but paid only to the persons above specified, and then only in the sequence as above set out, and the payment to a specified person in any other sequence than the order provided in the Constitution is positively prohibited, any act of the Legislature or of an administrative officer to the contrary notwithstanding. The Constitution, supra, provides exclusively for the succession of payees of bonus money.

The Legislature in Section 9, supra, provided that the Adjutant General determine the persons entitled to payment and reject those claims which he believe unconstitutional, and provided further for an appeal on rejected claims. Where the constitutionally qualified soldier be dead, and the soldier died leaving a wife surviving, then the surviving wife, and she only, and during her life time, may make application for the bonus money and receive payment.

When the constitutionally qualified soldier be dead, and his wife, if any, be dead, and the constitutionally qualified soldier left surviving children, then they, and only they, during their life time may make application for the bonus money and receive payment.

When the constitutionally qualified soldier be dead, and his wife and children, if any, be dead, and the constitutionally qualified soldier left surviving a mother, then and only then, during her life time, can she make application for the bonus money of her son and receive payment.

Since the facts submitted show that the deceased soldier had a wife, it is necessary that the soldier's mother prove that the wife and any other known prior eligible claimant be dead before she, as mother, be entitled to claim and receive the bonus money. We are further of the opinion that should the mother claim the death of eligible persons with prior rights under the Constitution, the presumption of death will legally begin from the time that substantial affidavits show them to have been last known to be alive, and after

Hon. L. W. Means

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October 26, 1937.

seven years has elapsed from that date, then the mother can legally assert in her favor the statutory presumption of death in support of her claim of death entitling her to the Missouri bonus. Until actual death, or statutory presumptive death be shown in the files of the Adjutant General, the mother is not entitled to the bonus money.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

WOS:H

COUNTY BUDGET ACT: Funds for purchasing road machinery
cannot be taken from Class 3 under
Budget Act

January 18, 1937

Honorable George H. Miller
Prosecuting Attorney
Hickory County
Hermitage, Missouri



Dear Sir:

This department is in receipt of your letter of
January 9, wherein you make the following inquiry:

"Will you please advise me as
to whether or not money in the
class 'three' general revenue
funds may be used by County
Court to purchase road machinery."

Class 3 of the County Budget Act, Laws of 1933,
page 341, is as follows:

"The county court, shall next set
aside and apportion the amount
required, if any, for the up-
keep, repair or replacement of
bridges on other than state
highways (and not in any special
road district) which shall consti-
tute the third obligation of the
county."

By analyzing Class 3 we think it was the intention
of the Legislature to confine the funds for this class
to the definite purpose of upkeep, repair or replacement
of bridges. In other words, to repair a bridge already
in existence or to replace a bridge which has been in
existence. We are of the opinion that you cannot construe
Class 3, even by implication, to include road machinery.

Honorable George H. Miller

-2-

January 18, 1937

Therefore, it is the opinion of this department that you cannot use the fund allotted to this class for the purchase of road machinery.

By way of suggestion, although your letter does not indicate the condition of your county with reference to the Budget Act, if there are any excess funds in Class 3, this being the close of the fiscal year, and all of the other classes have received their allotted priorities, then such funds may be used for the purchase of road machinery. The authority for the above statement being Section 12167, Revised Statutes Missouri 1929, which is as follows:

"Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

As stated above, we merely make the suggestion without being in possession of the facts relating to the financial condition of your county. If the suggestion is followed, of course, the burden is on the county officials to determine the facts.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

CIRCUIT CLERKS AND RECORDERS: Quarterly report to be
filed with County Clerk.

January 20, 1937.



Honorable Willis H. Mitchell
Prosecuting Attorney
Douglas County
Ava, Missouri

Dear Sir:

We acknowledge your letter of January 4, 1937,
requesting an opinion which reads as follows:

"We would like to have your construction of Section 11814 of 1933 Session Acts.

"The point at issue is, whether or not the Circuit clerk (also Recorder) or as recorder, is compelled to make an itemized list of all fees collected in Recorder's office showing who paid each item the date etc. in his report to County Court.

"Or whether or not it is just the fees charged and not paid. Or whether or not it is so many marriage licenses at so much, etc.)

The pertinent part of Section 11814, Laws of 1933, p. 372, provides:

"* * * Such clerk shall, at the end of each quarter, file with the county clerk a report of all fees paid and accruing to his office during such quarter, stating the title of the case or on what account such fees were charged, together with the names of the persons paying or who are liable for same, with the names of all sureties, where security for costs has been required, and which report shall also show which of such fees have been paid and the total amount thereof, and what fee bills, if any, have been issued and for what fees and when placed in the hands of the sheriff for collection,

January 20, 1937.

and further stating that, after due diligence, he has been unable to collect the fees reported unpaid, and which said report shall be verified by the affidavit of such clerk.
* * * *

Your question is a matter of statutory construction, and in such cases section 655 R. S. Mo. 1929, provides in part:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import, * * * *."

CONCLUSION.

The language of section 11814, supra, is simple English and there are no technical words or phrases for construction. It is the circuit clerk's duty to follow the Statute in making his quarterly report to the county court.

The Legislature has provided that the circuit clerk (Recorder) list: (1) all fees paid to his office during the quarter; (2) all fees not paid but accruing to his office during the quarter; (3) the title to the case, or on what account such fees are charged; (4) the name of persons paying or liable payment of fees; (5) the names of sureties, where sureties have been required; (6) all fees paid to his office during the quarter, and the total of same; (7) the identity of fee bills issued

Hon. W. H. Mitchell

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January 20, 1937.

by him and the date he gave same to the sheriff for collection; (8) he is to state that after due diligence he has been unable to collect same and the report is to be verified under oath that the facts therein contained are true to his best knowledge and belief.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

WOS:H

COUNTY CLERK--Not required or authorized to extend city or town taxes in tax books for state and county purposes.

March 9, 1937

3-9



Hon. Walter E. Miller
Clerk of the County Court
St. Louis County
Clayton, Missouri

Dear Mr. Miller:

We are in receipt of your communication requesting an opinion of this office on the following matter:

"Representatives of villages and cities of the fourth class in St. Louis County have requested me to extend their city tax rates upon the general tax books for state and county purposes.

It is my opinion that the statutes strictly provide in what manner this levy should be made, i. e. the County Clerk shall prepare an abstract for the villages and cities of the fourth class and that said cities shall levy and collect their own taxes.

There seems to be a question in this matter, and therefore, I would like to have you give me your legal opinion as to the proper procedure."

I.

County Clerk without authority to extend taxes due cities of the fourth class in state and county tax books.

You are entirely correct in your statement that the statutes provide the specific manner in which the tax books are to be made out for the collection of taxes due cities of the fourth class. First in connection with the assessment

3/9/37

of the property, in the event a city assessor has been elected, that city assessor is required by law to sit with the county assessor and assess all property both real and personal in cities of the fourth class. Such assessment is later passed upon by the Board of Equalization and any changes or corrections thereof are to be made in the city assessor's book by a correction in red ink. It is only in the event that no city assessor has been elected that you are authorized to prepare an abstract and deliver the same to the mayor on or before the first day of July of each year of all the taxable property in the city. In the event there is a city assessor you are not authorized or required to supply the abstract. Section 6994 R. S. Missouri 1929.

After the making of the assessment by the city assessor or after the mayor has obtained the abstract from your office, as the case may be, it then becomes the duty of the city clerk to proceed to make up the city tax book. Section 6999 R. S. Missouri 1929, provides as follows:

"When the board of aldermen shall have fixed the rate of taxation for any given year, the city clerk shall make out appropriate and accurate tax books, and shall therein set out in suitable columns, opposite the name of each person and the item of taxable property as returned by the assessor and board of equalization, the amount of taxes, whether general or special, due thereon, and shall charge the collector with the full amount of taxes levied and to be collected; the clerk shall also charge the city collector with all licenses and other duties of all kinds to be collected."

The tax book thus prepared and in the hands of the city collector then becomes his warrant for the collection of the taxes and is of course the best evidence of the taxpayers' obligation to pay the taxes. The provisions of Section 7000 of course should not be overlooked. This section requires the City Collector to report monthly his collection of taxes and all other sums received.

CONCLUSION

These specific statutory provisions leave no doubt as to the method which is to be pursued in preparing the tax book for the collection of delinquent taxes due cities of the fourth class. The duty of the preparation of the tax book rests upon the city clerk who, after extending the amount of taxes in the book, delivers the same to the city collector who is charged therewith, and proceeds with the collection of such taxes. It is the opinion of this office that you are not required and are without authority to extend city taxes due cities of the fourth class upon the general tax book which you prepare for taxes due for state and county purposes.

II.

Current taxes due towns and villages may not be extended
in state and county tax book.

We direct attention to Article IX, Chapter 38, R. S. Missouri 1929, which deals particularly with towns and villages. Under the provisions of this article and particularly Section 7108 the chairman of the Board of Trustees is authorized to procure and the county clerk is directed to deliver to him a certified abstract of the assessment book corrected by the Board of Equalization of all property in the town which has been assessed for taxes for state and county purposes, together with the assessed value thereof. Thereupon the Board of Trustees is required to levy the taxes for the town based upon the assessment therein contained. Thus far the procedure is essentially similar under the statute to cities of the fourth class. However, in this article we fail to find any specific section directing any officer of the town to prepare the tax book. However, Section 7109 provides in part as follows:

"All assessments on real and personal property within the limits of such town, which may be certified and transmitted to the board of trustees from time to time, as provided in the preceding section, shall be taken and

considered as the lawful and proper assessment on which to levy and collect the municipal taxes of the town, and the payment of all taxes authorized by this article shall be enforced by the collector in the same manner and under the same rules and regulations as may be provided by law, etc.

Thus it plainly appears that the abstract which has been certified becomes and is the assessment for town taxes. A following section, 7111, specifically authorizes the Board to compensate the county clerk for certifying and transmitting "an abstract of the property within such town made taxable by law for state purposes". No further or other provision for compensation to the county clerk is provided. No compensation is provided to the Clerk for the extension of any taxes, etc. While this provision of the law is somewhat indefinite, to-wit, as to who makes up the tax book, we believe that under the general scheme as evidenced from the other laws enacted, that it is not contemplated that the town taxes be extended on the book for state and county purposes and collected by the county collector, as such provision would make unnecessary the appointment of a city collector and would eliminate from that office a great part of the duties which it naturally encompasses. We call attention to Section 7100 which authorizes the Board of Trustees to appoint "an assessor, collector****and such other officers, servants and agents as may be necessary." Thus, the Board of Trustees have ample authority to appoint a city collector whose primary duty would be the collection of current city taxes on real estate and personal property. Also, under this Section the Board of Trustees have the power to appoint such other officers and employees as may be necessary. It is quite certain that under this provision they would have authority to appoint either officers or employees to prepare the tax book, extending the taxes on the certified copy of the abstract received from the county clerk or preparing a new and separate tax book showing the

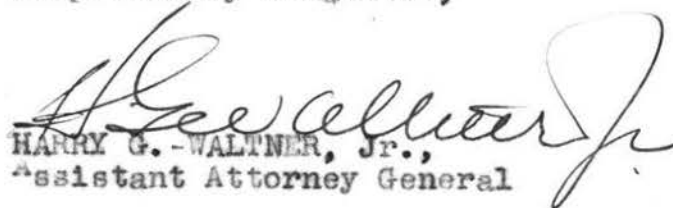
3/9/37

amount of taxes levied. An examination of this Article shows that there is no provision for the certification of the levy of taxes to the county clerk or to the county collector. Without such certification those parties would be unable to extend upon the county tax books the taxes levied and assessed against the property for town purposes. It should also be noted that in making provision for the fees and compensation of the county clerk, no portion of the expense of preparing the tax book for state and county purposes is charged to any town or village or municipality, but that expense is payable out of the state and county treasuries. Section 10007.

CONCLUSION

It is therefore the opinion of this office that you as county clerk of the county of St. Louis are without authority to extend taxes due towns and villages upon the current tax book containing taxes due for state and county purposes, but that taxes due such towns and villages should be incorporated into a tax book prepared by the town or village officials or employees from the certified copy of the abstract of the assessment. The policy of the law, as exemplified by the statutory enactments of the legislature relative to cities of the fourth class show this to be the recognized and established manner of providing for the collection of such taxes.

Respectfully submitted,


HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JET:MM

4
INSANITY INQUESTITION:

Cost of same may be paid by county court if a person is declared insane and his estate is insufficient to pay cost.

PAUPER OATH:

It is within discretion of court to allow a person to twice file and prosecute same suit as a poor person when first suit was dismissed.

June 14, 1937.

6-15

Honorable George H. Miller
Prosecuting Attorney
Hickory County
Hermitage, Missouri.



Dear Sir:

This Department is in receipt of your letter of May 3, 1937, in which you request an opinion as follows:

"We have a Spanish American War Veteran in our county who draws \$60.00 a month veteran's compensation. He is an habitual drunkard and refuses to provide for his family, spending practically all his money for liquor and beer. His check is turned over each month to a beer parlor operator. He doesn't live with his family, refuses to provide for them.

"Suit was instituted by the lady in Probate Court to have her husband declared an habitual drunkard. The lady is insolvent and has no folk who would go her bond for costs in case of suit. She was permitted to sue as a poor person, but the suit was dismissed because the Veterans' Bureau had not been notified with the required ten days' notice. She has one son who is in the CCC. When this boy comes home, the family of four will be practically dependent upon the county.

"Would it be proper for the Probate Judge to allow her to sue again as

June 14, 1937.

a poor person, or is there any way by which the county could pay the costs of the suit?"

Your request contains two questions, as we understand it:

First: May the Probate Court after having permitted a person to file an action as a poor person, again permit that person to file and prosecute said action as a poor person, where the first action was dismissed for failure to notify a necessary party thereto.

Second: May the County Court pay the costs of such a proceeding as is contemplated in the instant case.

We shall take up these questions in the order set forth.

Section 1240 R. S. Missouri, 1929, in part as follows:

"If any court shall, before or after the commencement of any suit pending before it, be satisfied that the plaintiff is a poor person, and unable to prosecute his or her suit, and pay the costs and expenses thereof such court may, in its discretion, permit him or her to commence and prosecute his or her action as a poor person, and thereupon such poor person shall have all necessary process and proceedings as in other cases, without fees, tax or

June 14, 1937.

charge; * * * , but if judgment is entered for the plaintiff, costs shall be recovered, which shall be collected for the use of the officers of the court."

In Fox v. Dold Packing Company, 70 S. W. 164, 96 Mo. App. 180, the court had before it the question of whether the trial court abused its discretion in not sustaining a motion to stay the proceedings until plaintiff had paid the costs of a former suit upon the same cause of action, where the former action had been dismissed. The court said: (S.W. 166).

"It is contended that the court in overruling defendant's motion to stay plaintiff's case until he had paid the costs of the former suit upon the same cause of action, did not exercise a sound discretion. We think it did. It was shown that on account of his poverty he was allowed to sue as a poor person in the Federal Court. Our statute provides that he may also sue in the State courts on account of his poverty and it would be a contradiction to deny his right to proceed with his case because he had failed to pay the costs in a case wherein he was allowed to sue as a poor person, and when it was reasonable to suppose, nothing to the contrary appearing, that his financial condition was unchanged."

In Carrier v. Missouri Pacific Ry. Co., 74 S.W. 1002, 1004, the Court, with a similar question before it, said:

"The action of the trial court in overruling defendant's motion to restrain plaintiff from prosecuting this action until the costs

June 14, 1937.

in the former suit upon the same cause of action were paid, and in making an order requiring plaintiff to give security for costs in the case at bar, and then permitting her to prosecute it as a poor person, is assigned for error. With respect to the first proposition, it seems to be a matter resting in the sound discretion of the court and not appealable."

These citations necessarily lead us to the conclusion, that the action of any court, in permitting a person to file and prosecute an action as a poor person, where that same action has formerly been instituted and prosecuted as a poor person, but dismissed, is wholly within the sound discretion of said court.

The second question which we have set out above is whether the county may pay the costs of such proceedings?

The action heretofore brought by the informant in the instant case and dismissed for failure to notify a necessary party thereto, evidently was brought under Chapter 1, Article 19, R. S. Missouri, 1929, relating to guardians of drunkards and confinement of drug addicts. Section 508 of this Chapter provides, among other things, that if an action is brought under this Chapter that the Court shall proceed therein in all respects as herein provided in respect to an idiot, lunatic or person of unsound mind. Chapter 1, Article 18, R. S. Missouri, 1929, relates to the appointment of guardians and curators of insane persons, and would govern the proceedings of an action brought under Chapter 1, Article 19, R. S. Missouri, 1929.

Section 513 of Chapter 1, Article 19, R. S. Missouri, 1929, is in part as follows:

"All fees of the Probate Court and fees and mileage of the sheriff shall be the same as in like proceedings in the inquisition and care of insane patients, and shall

also be paid out of the county treasury by order of the county court; but all such expenses, fees and mileage shall be a charge upon any estate of the patient subject to appropriation as hereinabove provided, and for the payment of which by the curator into the county treasury, said probate may and shall, from time to time upon application of the county court, make order for the sale and transfer of title of such estate as in the case of estates of insane persons under guardianship, and for payment into such county treasury."

Section 454, Chapter 1, Article 18, R. S. Missouri, 1929, is as follows:

"When any person shall be found to be insane according to the preceding provisions, the costs of the proceedings shall be paid out of his estate, or, if that be insufficient, by the county."

The two sections quoted supra are clear and have but one meaning and as such are not open for construction. *Cummings v. Kansas City Public Service Company*, 66 S. W. (2d) 920. Under the provisions of Sections 513 and 514, R. S. Missouri, 1929, the county may pay the costs of an insanity proceeding if said person alleged to be insane is so declared to be, and then only if the estate of said insane person is insufficient to pay that cost.

Therefore, it is the opinion of this Department that it is within the sound discretion of the Probate Court to permit a person if all the facts and circumstances justify doing so, to recommence and prosecute an action as a poor person, where the first suit so authorized and instituted was dismissed for failure to serve notice upon a necessary party thereto.

June 14, 1937.

It is further our opinion that the county may pay the costs of an insanity inquisition, if the person alleged to be insane is so declared to be, and then only if the estate of the insane person is insufficient to pay the costs of said inquisition. If the person so alleged to be incapacitated is discharged, then the costs will fall upon the informant unless said informant is an officer acting officially, then in such case the county may pay the costs as provided in Sections 454 and 513, R. S. Missouri, 1929.

In the instant case it appears from the facts before us, that the person alleged to be incapacitated, if declared to be so, will have an estate which will probably be sufficient to cover the necessary costs of this inquisition, and further that if the court in the exercise of its sound discretion permits the informant, who is not an officer acting officially, to recommence and prosecute this action and the person alleged to be incapacitated is discharged upon a hearing, then the costs of the inquisition will not be paid by anyone.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB SW

SCHOOLS: Property of railroads and similar utilities:

Method of ascertaining the assessment next before the last assessment and the valuation of distributable property of utilities in a school district as being a basis for a school bond issue.

August 6, 1937

Mr. George H. Miller
Prosecuting Attorney
Hickory County
Hermitage, Missouri



Dear Mr. Miller:

This will acknowledge your request of July 19, wherein you requested an opinion of this department, your letter being as follows:

"Section 9199 of the 1929 Statutes provides that a school loan shall not exceed five per cent of the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and County purposes previous to the incurring of said indebtedness.

"Would it be possible in voting bonds this year to base the five per cent on the 1934 assessment instead of 1935?

"Our railroad and utility tax comes in one lump sum and then is apportioned to the schools, being based on enumeration but no valuation is set off to any certain district. In valuing these utilities, how could one district arrive at a valuation to be added to the rest of its taxable property for the purpose of voting bonds?

"Thanking you very much, I am."

Mr. George H. Miller

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I

Your first question is based upon Section 9199, Revised Statutes Missouri 1929, which is, in part, as follows:

"The loan authorized by the preceding section shall not be contracted for a longer period than twenty years, and the entire amount of said loan shall at no time exceed, including the present indebtedness of said district, in the aggregate five per cent. of the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes previous to the incurring of said indebtedness, the rate of interest to be agreed upon by the parties, but in no case to exceed the highest legal rate allowed by contract; * * "

The clause included in said section "to be ascertained by the assessment next before the last assessment for state and county purposes previous to the incurring of said indebtedness," is construed in the case of *Steinbrenner v. St. Joseph*, 285 Mo. l. c. 329 (first paragraph), wherein the court uses the following language:

"We have above noted that the word 'assessment' as used in the Constitution means a completed assessment. The assessment which began in June, 1918, was not completed by the State Board of Equalization until September, 1919, so that at the time the city was acting in this bond matter, this was no assessment at all, or to be used for any purpose in this case.

In May, 1919, the first preceding completed assessment was that of 1917, or the one begun in June, 1917. 'The assessment next before the last assessment,' using the language of the Constitution, could be none other than the assessment begun in June, 1916, and completed sometime in 1917."

Under Section 9779 R. S. Mo. 1929, "Real Estate shall be assessed at the assessment which shall commence on the first day of June, 1893 and shall be required to be assessed every year thereafter."

Under Section 9800 R. S. Mo. 1929, "The Assessor shall make out and return to the County Court on or before the 20th day of January of every year, a fair copy to the Assessor's book, and the Clerk of the County Court shall immediately make out an abstract of the assessment book and forward the same to the State Auditor, to be laid before the State Board of Equalization."

Under Section 9862 R. S. Mo. 1929, "The State Board of Equalization shall meet at the Capitol in Jefferson City on the last Wednesday in February, 1894 and every year thereafter to equalize the valuation of the real property."

The State Equalization Board has not yet completed the assessment for the year of 1936. In speaking on this question, the Supreme Court in the case State ex. rel vs Gordon, 251 Mo. l. c. 309, said, "The assessments designated in the constitution as necessary to be considered in determining the per centum of indebtedness, mean the two successive, antecedent, completed assessments made by the State Board of Equalization previous to the incurring of indebtedness. This must be true for until the State Board of Equali-

Mr. George H. Miller

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zation has completed its labor, the total amount of taxable property in a subdivision cannot be determined."

Therefore, it is the opinion of this department, under the rule of law above stated, that the assessed valuation for the year 1934 will be the basis to be used in determining the amount of indebtedness which could be incurred by the school district.

II.

In your second question you ask "In valuing these utilities, how could one district arrive at a valuation to be added to the rest of its taxable property for the purpose of voting bonds?"

In voting utilities we must recognize two classes: first, distributable; second, local. For instance, the first, applied to railroads, consists of the roadbed, rolling stock and other movable property. This class is returned by the corporation to the Auditor, assessed as an entirety, en masse, by the State Board of Equalization, and the value thereof apportioned to the several counties, cities, towns, villages and municipal townships in which such railroad is located, and the assessment certified to the county court.

The other class, which may be designated as local property, embracing all other property of such railroads and which is not returned to the Auditor, is assessed by the local authorities as other local property is assessed. See Sections 10012-17-22-24-25-28 and 29 of the 1929 statutes.

Mr. George H. Miller

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August 6, 1937

Upon these assessments the county court levies the taxes authorized by law.

Your questions relate to the first class, which is designated by court decisions as being distributable or tangible property.

Taxes for school purposes are directed to be levied at an average rate on distributable property. Section 10029, 1929 statutes, provides:

"Such average rate for school purposes shall be ascertained by adding together the local rates of the several school districts in the county, and by dividing the sum thus obtained by the whole number of districts levying a tax for school purposes, and shall cause to be charged to said railroad companies taxes for school purposes at said average rate on the proportionate value of said railroad property so certified to the county court by the state auditor, under the provisions of this article, and the said clerk shall apportion the said taxes for school purposes, so levied and collected, among all the school districts in his county, in proportion to the enumeration returns of said district."

In construing said statute the Supreme Court, in the case of State v. Waddill, 52 S. W. (2d) 1. c. 479, said:

"Stated more concisely, the method prescribed by statute for the assessment and taxation of the distributable property of a railroad company is this: The state tax commission shall assess

Mr. George H. Miller

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August 6, 1937

the aggregate valuation of such property, regardless of its location in this state. The state board of equalization shall then equalize such aggregate valuation and apportion it, on a mileage basis, to the counties, municipal townships, cities, and towns in which the property or some part of it is located, and certify the result of its action to the county courts of the proper counties. On the aggregate value apportioned to a county, the county court of such county shall levy taxes for county purposes at the same rate levied on other property in the county for such purposes; on the apportionments made to municipal townships, cities, and towns, respectively, it shall levy taxes at the same rates levied on other property within the territorial boundaries of those subdivisions and agencies for their respective purposes; and on the apportionment made to the county it shall make a further levy of taxes for school purposes - at the average rate as heretofore defined. The school taxes so levied shall be distributed when collected, not on a mileage basis to the school districts in which some part of the railroad is located, but to all the districts in the county, the fund to be apportioned among them according to their enumeration returns.

"A reading of the three sections relating to the assessment and taxation of the property of street railroad companies in connection with those prescribing the method for the assessment and taxation of the property of other railroad companies leaves no doubt but that the property of the former, as described in said section 10019, is required to be 'assessed,

Mr. George H. Miller

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August 6, 1937

apportioned, certified and the taxes thereon levied' in the manner prescribed for the assessment and taxation of the distributable property of the latter. With respect to the manner so prescribed, there is no provision for the state tax commission to separately assess for each school district into which a street railroad extends the part of the property of the company owning the road which is located in such district. Nor is there any for the state board of equalization to make apportionments of the aggregate value to school districts. On the contrary, the affirmative provisions of the statutes negative the doing of either of these things. It follows that the questions touching the duties of the tax commission and the state board of equalization respectively, as heretofore stated, must be answered in the negative."

Under Section 9854 (6), Article 4, Chapter 59, in 1929 statutes, other utilities would be assessed in the same manner as said railroad property.

Under the Constitution (Section 12, Article X), a school district can issue bonds not exceeding "five per cent of the value of the taxable property therein," and where such distributable property of the railroad or utility does not touch a particular school district we do not see how any part of the valuation of said property can be said to be within the particular school district.

The court, in State v. Waddill, supra, held:

"there is no provision for the state tax commission to separately assess for each school district into which a street railroad extends the part of the property of the company owning the road which is located in

Mr. George H. Miller

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August 6, 1937

such district. Nor is there any for the state board of equalization to make apportionments of the aggregate value to school districts."

CONCLUSION

Therefore, it is the opinion of this department that the distributable public utility property that is not within the school district can not be considered as a part of its taxable property for the purpose of serving as a basis of a bond issue.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

SVM:LC

SHERIFF'S FEES:) County where proceedings originally instituted
) liable for costs for transportation of prisoner on
CRIMINAL COSTS:) account of insufficiency of county jail.

August 9, 1937.

8-11



Honorable Willis H. Mitchell
Prosecuting Attorney
Douglas County
Ava, Missouri

Dear Mr. Mitchell:

This is to acknowledge your letter of recent date relative to the liability for the payment of the sheriff's fees for transportation of a prisoner in a certain criminal case. The facts necessary for the determination of the question, as gathered from your letter, are as follows:

One Johnny Huff was charged with murder in the first degree by an information filed in Douglas County. On application for a change of venue defendant's case was sent to Ozark County, where defendant was lodged in jail following the transfer of the case, not being admitted to bail. The case was continued from time to time and on account of the insufficiency of the jail in Ozark County, by order of court he was removed and confined in the County Jail of Greene County and Jackson County during the pendency of the case. The bill of the Sheriff of Ozark County, for transporting Huff to these jails for safekeeping, is \$280.00. The State Auditor has refused to audit and pay same.

Your question is, whether or not the State is liable for the cost of transporting, and if the State is not liable which of the two counties, Ozark or Douglas, is liable for same?

The question calls for an examination of the statutes pertaining to the payment of costs in criminal cases.

Section 3846, R. S. Mo. 1929, provides in part as follows:

"In any criminal cause in which a change of venue is taken from one

county to any other county, for any of the causes mentioned in existing laws, and whenever a prisoner shall, for any cause, be confined in the jail of one county for an offense committed in another county, and in which costs are liable to be paid out of a county treasury, such costs shall be paid by the county in which the indictment was originally found or the proceedings were originally instituted;
* * * * *

Section 11791, R. S. Mo. 1929, regulating the fees of sheriffs, county marshals and other officers in criminal cases, provides in part as follows:

"* * * and the expenses incurred in transporting prisoners from one county to another, occasioned by the insufficiency of the county jail or threatened mob violence, shall be paid by the county in which such case may have originated. * * *"

We think these sections of the statute provide the answer to your question as to which county is liable for the fees due the Sheriff of Ozark County. By these two sections it will be observed that the liability for this particular cost is not placed on the State of Missouri, but is a liability of the counties and the sole question to be determined is which of the two counties, Douglas or Ozark, is liable?

It is apparent that it was the intention of the Legislature to place the cost of transporting a prisoner, under the circumstances as outlined in your letter, on the county in which the case may have originated. In other words, the liability is placed where the actual crime was committed. We assume that the order of the court made in this case is sufficient and was occasioned by the insufficiency of the County Jail of Ozark County.

Aug. 9, 1937

It is, therefore, the opinion of this Department that the fees due the Sheriff of Ozark County for transporting the prisoner for safekeeping, under the orders of the Circuit Court, should be and are due and payable by Douglas County, as the case originated in that County.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

APPROPRIATION: Approval by the Governor of appropriation bill makes funds immediately available.

August 27, 1937

Dr. J. C. Miller
Acting President
State Teachers College
Maryville, Missouri



Dear Dr. Miller:

We wish to acknowledge your letter and inclosures of August 26, 1937, wherein you request our opinion as to the date the funds appropriated by the Fifty-ninth General Assembly to the various state teachers colleges, as set forth in House Bill No. 503, became available to them. You state that the funds must have been available before June 29, 1937, in order for them to qualify for a Federal grant for which applications have been made.

Certified copies of three affidavits addressed to Mr. Edgar C. Burkhardt, Acting State Director PWA, under date of August 26, 1937, have been furnished to this department to which the name of Honorable Lloyd C. Stark, Governor of Missouri is affixed, and which read as follows:

" August 26, 1937

"Mr. Edgar C. Burkhardt
Acting Director
Public Works Administration
Federal Building
St. Louis, Missouri

Dear Mr. Burkhardt:

"On June 24, 1937, I had a conference with the Presidents of the five State Teachers Colleges in Missouri. The purpose of this conference which had been called by me

August 27, 1937

was to release the funds to the Teachers Colleges which had been appropriated by the Fifty-Ninth General Assembly as set forth in House Bill Number 503. This bill which had been subsequently approved by both the Appropriations Committees of the Senate and House of Representatives was passed and became an Act on June 6, 1937.

"At the conclusion of the conference, I released to the Northeast Missouri State Teachers College, located at Kirksville, Missouri, under the item 'Additions' \$300,464 from the general revenue of the state. In so doing, I contemplated the construction of an education building with repairs to the present junior high school building and an administration-arts building on the campus at Kirksville.

"Northeast Missouri State Teachers College had filed an application for a grant from the Public Works Administration which had been approved. The amount of funds released under 'Additions' included the applicant's part, \$300,000, on project docket No. No. 1309.

Yours very truly,
(signed) Lloyd C. Stark
Governor.

"STATE OF MISSOURI)
County of Cole)

"I, Lloyd C. Stark, Governor of the State of Missouri, affirm that the matters and facts as set forth in the foregoing letter are true.

(signed) Lloyd C. Stark

Dr. J. C. Miller

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August 27, 1937

Governor
(signed)
J. L. Ritzenthaler
Notary Public
(SEAL)
Commission expires Jan. 21, 1941. "

" August 26, 1937

"Mr. Edgar C. Burkhardt
Acting Director
Public Works Administration
Federal Building
St. Louis, Missouri

Dear Mr. Burkhardt:

"On June 24, 1937, I had a conference with the Presidents of the five State Teachers Colleges in Missouri. The purpose of this conference which had been called by me was to release the funds to the Teachers Colleges which had been appropriated by the Fifty-Ninth General Assembly as set forth in House Bill Number 503. This bill which had been subsequently approved by both the Appropriations Committees of the Senate and House of Representatives was passed and became an Act on June 6, 1937.

"At the conclusion of the conference I released to the Northwest Missouri State Teachers College, located at Maryville, Missouri, under the item of 'Additions,' \$240,000 appropriated from the state revenue and \$35,000 from the State Teachers College fund. In so doing, I contemplated the erection of a training school building

August 27, 1937

and library building on the college campus at Maryville.

"Northwest Missouri State Teachers College had filed applications with the Public Works Administration for grants which had been approved. One application was for a grant of \$135,000 to be applied on a training school building to be constructed at a cost of \$300,860, and the other application was for a grant of \$62,000 to be applied on a library building to be constructed at a cost of \$138,994.

"The amount of funds released under 'Additions' included the applicant's part of \$242,854 on Projects Dockets No. Mo. 1307 and 1328.

Yours very truly,
(signed) Lloyd C. Stark
Governor.

"STATE OF MISSOURI)
County of Cole)

"I, Lloyd C. Stark, Governor of the State of Missouri, affirm that the matters and facts as set forth in the foregoing letter are true.

(signed) Lloyd C. Stark
Governor

(signed)
J.L. Ritzenthaler
Notary Public
(SEAL)

Commission expires Jan. 21, 1941. "

" August 26, 1937

"Mr. Edgar C. Burkhardt
Acting Director
Public Works Administration
Federal Building

August 27, 1937

St. Louis, Missouri

"Dear Mr. Burkhardt:

"On June 24, 1937, I had a conference with the Presidents of the five State Teachers Colleges in Missouri. The purpose of this conference which had been called by me was to release the funds to the Teachers Colleges which had been appropriated by the Fifty-Ninth General Assembly as set forth in House Bill Number 503. This bill, which had been subsequently approved by both the Appropriations Committees of the Senate and House of Representatives, was passed and became an Act on June 6, 1937.

"On June 22, 1937, I had a conference with Dr. J. D. Elliff, President, Board of Curators of Lincoln University, and I released to Lincoln University, located at Jefferson City, Missouri, under item 'Additions' \$200,000 appropriated from the general revenue fund. In so doing, I contemplated the construction of a women's dormitory and a library building on the campus of Lincoln University at Jefferson City, Missouri.

"Lincoln University had filed application for a grant from the Public Works Administration on this project which had been approved. Your application was for a grant of \$117,000 to be applied on the above project. The amount of funds released under 'Additions' included the applicant's part of \$143,000

Dr. J. C. Miller

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August 27, 1937

on project docket No. 1329.

Yours very truly,
(signed) Lloyd C. Stark
Governor.

"STATE OF MISSOURI)
County of Cole)

"I, Lloyd C. Stark, Governor of the
State of Missouri, affirm that the
matters and facts as set forth in
the foregoing letter are true.

(signed) Lloyd C. Stark
Governor

(signed)
J. L. Ritzenthaler
Notary Public
(SEAL)
Commission expires Jan. 21, 1941."

The above affidavits state that House Bill No.
503 was finally passed by both Houses of the Legisla-
ture on June 6, 1937.

Article IV, Section 36, of the Constitution of
Missouri, provides when appropriation bills go into
effect, as follows:

"No law passed by the General
Assembly, except the general
appropriation act, shall take
effect or go into force until
ninety days after the adjourn-
ment of the session at which
it was enacted, unless in case
of an emergency (which emergency
must be expressed in the preamble
or in the body of the act), the
General Assembly shall, by a vote
of two-thirds of all the members

elected to each house, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journal."

Section 659, Revised Statutes Missouri 1929, provides when the laws shall take effect, in part, as follows:

"A law passed by the general assembly shall take effect ninety days after the adjournment of the session at which it is enacted, subject to the following exceptions:

"(a) A law necessary for the immediate preservation of the public peace, health or safety, which emergency must be expressed in the body or preamble of the act and which is declared to be thus necessary by the general assembly, by a vote of two-thirds of its members elected to each house, said vote to be taken by yeas and nays, and entered on the journal, or a law making an appropriation for the current expenses of the state government, for the maintenance of the state institutions or for the support of public schools, shall take effect as of the hour and minute of its approval by the governor; which hour and minute may be endorsed by the governor on the bill at the time of its approval.

* * *

It is to be noted that appropriations for the support of public schools take effect 'the hour and minute of its approval by the Governor.'

Dr. J. C. Miller

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August 27, 1937

The court, in the case of Bishop v. Prairie Oil & Gas Company, 222 Pac. (Ok1) 954, l. c. 956, in defining the term 'approval,' states as follows:

"To give 'approval' is in its essential and most obvious meaning to confirm, ratify, sanction, or consent to some act or thing done by another."

That the Governor sanctioned or consented to the Act of the Legislature appropriating funds for the support of the state teachers colleges, on June 24, 1937, and released the funds appropriated to them is evidenced beyond dispute by the affidavits hereinabove set out.

We are of the opinion that it was mandatory, under the above statutory and constitutional provisions, that the Governor give his approval to the Bill to make the funds available, whether same be orally or in writing, and that when the Governor announced on June 24, 1937, that he was approving same and that the funds would be released they were available to the use of the State Teachers Colleges as of that date.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW LC

DOG TAX: Section 12881, R. S. Mo. 1929, providing for a local option dog tax is not affected by House Bill No. 140, 1937 Session Acts of Missouri.

December 2, 1937.

12-4



Mr. Willis H. Mitchell,
Prosecuting Attorney,
Ava, Missouri.

Dear Mr. Mitchell:

We wish to acknowledge your request for an opinion of November 27, 1937, which is as follows:

"Owing to a difference of opinion of some of the attorneys of this section, I would like further interpretation of the "dog tax" law,

"Under Section 12881 of R. S. 1929, it provides the tax, only when voted upon by the people of the county. Is it your idea that the 1937 law overrides this voting section by the counties. And is a law whether or not voted? Or does it have to be voted as provided in 12881? If you will notice the new law repeals certain sections of the 1929 R. S., but does not repeal Section 12881.

"I would like very much to have your opinion on this at as early date as is convenient."

Article 12, Chapter 88 of the 1929 Statutes, has a title, which is as follows:

"Dog Tax - Determined by Local Option."

The proviso in Section 12881 of said Article 12 provides the local option feature which must be submitted to each county by petition, if the county desires such a law. Section 12881 being, in part, as follows:

"* * * Provided that upon the filing of petition signed by one hundred or more householders of any county and presented to the county court at any regular or special session thereof more than

Thirty days before any general election to be had and held in said county, it shall be the duty of the county court to order the question, as to whether or not there should be adopted the law, creating a license tax on dogs, submitted to the qualified voter, to be voted upon at the next election. Upon the receiving of such petition it shall be the duty of the county court to make an order as herein recited, and the county clerk shall see that there is printed upon all ballots to be voted at the next election the following:

'For creating a license tax on dogs.
Yes. No.

(Erase the word you do not wish to vote.)' "

Article 12, supra, was in part amended by House Bill No. 140, 1937 Session Acts of Missouri, but such amendments do not purport to repeal and do not repeal by implication said Section 12881 of said Article 12.

CONCLUSION

Therefore, it is the opinion of this department that Section 12881, providing for a local option dog tax, is not affected by House Bill No. 140, 1937 Session Acts of Missouri.

Yours very truly,

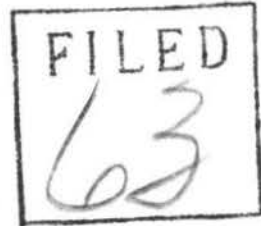
S. V. MEDLING,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR.
(Acting) Attorney-General.

CORPORATIONS: Small loan companies not permitted to contract a charge for attorney fees and collection costs when making loans.

February 8, 1937.



Honorable O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Sir:

We acknowledge your request for an opinion dated January 27, 1937, which reads as follows:

"A company licensed to operate under the 'Small Loan Act' has submitted the enclosed note to this Department for an opinion as to whether the incorporation of the phrase 'together with costs of collection and a reasonable attorney's fee, if placed in the hands of an attorney for collection' in the note is contrary to the provisions of the Small Loan Law and whether or not collection of such fees would be a violation of the Small Loan Law.

"I, therefore, am referring the above matter to you and will appreciate an opinion thereon at your early convenience."

Corporations organized under the small loan act are licensed by the State of Missouri to make loans in accordance with the provisions of Article VII, Chapter 34, R. S. Mo. 1929, and Section 5547 R. S. Mo. 1929, provides:

"Upon the filing of such application and the approval of said bond and the payment of said fee the licensing official shall issue a license to the applicant to make loans in accordance with the pro-

visions of this article for a period which shall expire with the first day of July next following the date of its issuance. Such license shall not be assignable."

Section 5556 R. S. Mo. 1929, provides for the small loan corporations' powers and limitations in contracting a loan, and reads:

"Every licensee hereunder may loan money, not exceeding in amount the sum of \$300.00, and may charge, contract for and receive thereon interest at a rate not to exceed two and one-half per centum per month. Interest shall not be payable in advance or compounded and shall be computed on unpaid balances. In addition to the interest herein provided for, no further or other charge or amount whatsoever for any examination, services, brokerage, commission or other thing or otherwise shall be directly or indirectly charged, contracted for or received, except the fees allowed by law actually and necessarily paid out by the licensee to any public officer for filing, recording or releasing in any public office any instrument securing the loan, which fee may be collected when the loan is made or at any time thereafter. No interest or charge in excess of those permitted by this article shall be made, contracted for or received, and if any such is charged, made, contracted for or received, the contract of loan and all evidence thereof and security and lien therefor shall be void and of no effect, and the licensee shall have no right to collect or receive any principal, interest or charge whatsoever of or for such loan."

Section 655, R. S. Mo. 1929, provides in part:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import, * * * *."

CONCLUSION.

You have presented a matter of statutory construction.

This department is of the opinion that the above statutes prohibit a small loan company from contracting with a client to charge that client for costs of collection and attorney's fees should the loan note be placed in the hands of an attorney for collection.

The language of section 5556, supra, is unequivocal, and the Legislature expressly prohibits such loan company from making charges, other than interest charges, and fees allowed by law actually and necessarily paid out to a public officer for filing, recording or releasing any instrument securing the loan. Such extraneous charges are not allowable, even indirectly. When such anticipated items of expenditure, such as costs and attorney's fees are contracted for in the loan note, evidencing the contract of a loan, then the note becomes a void instrument and the licensee loses all right to receive principal or interest which he otherwise would have been entitled to have received.

Respectfully submitted

APPROVED:

WM. ORR SAWYERS
Assistant Attorney General.

J. E. TAYLOR
(Acting) Attorney General.

SMALL LOAN ACT:) Authorization for insurance plan for "Small
) Loan Companies" not approved. Sec. 5556, R. S.
BANKS & BANKING:) 1929, discussed.

February 12, 1937.

2.16

FILED
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Honorable O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Moberly:

This is to acknowledge receipt of your letter of January 12, in which you request the opinion of this Department. Your letter is as follows:

"This Department heretofore has held that a licensee under the Small Loan Law could not withhold funds from a borrower for the purpose of paying the premium on an insurance policy covering personal property pledged as security for a loan.

"I now have an inquiry from Mr. John W. Creekmur, Attorney, Chicago, Illinois, enclosing a copy of an opinion of the Attorney General of the State of Illinois and an approved form of Authorization to Purchase Insurance, all bearing upon the particular question referred to herein. The Small Loan Law of the State of Missouri is substantially the same as that of the State of Illinois, particularly as to charges which may be made, contracted for or received. In view of the opinion of the Attorney General of the State of Illinois, bearing upon the question of withholding funds from the borrower for the purpose of paying the insurance premium on personal property mortgaged to the licensee, I would like an opinion from

Feb. 12, 1937.

Your office on the same question, in order that the future policies of this Department, relative thereto, may be definitely established.

"For your information I am enclosing the letter received from Mr. Creekmur, together with the copy of the opinion from the Attorney General of the State of Illinois and approved form of Authorization to Purchase Insurance, which enclosures you will please return with the opinion requested herein."

As we understand your question it is whether or not the plan submitted to you, whereby the borrower gives written authority to the "Small Loan Company" (licensee) to purchase insurance on the property given as security to the company to secure the loan, and whether your Department may approve the submitted Authorization to Purchase Insurance, enclosed with your request.

We note that you say that you have heretofore held that a licensee under the Small Loan Law could not withhold funds from a borrower for the purpose of paying the premium on an insurance policy covering personal property pledged as security for a loan, and we agree with that statement.

Under the provisions of the "Small Loan Act," Section 5556, R. S. Mo. 1929, it is provided as follows:

"Every licensee hereunder may loan money, not exceeding in amount the sum of \$300.00, and may charge, contract for and receive thereon interest at a rate not to exceed two and one-half per centum per month. Interest shall not be payable in advance or compounded and shall be computed on unpaid balances. In addition to the interest herein provided for, no further or other charge or amount whatsoever for any examination, services, brokerage, commission or other thing or otherwise shall be directly or indirectly charged, contracted for or received, except the fees allowed by law actually and necessarily paid out by the licensee to any public

officer for filing, recording or releasing in any public office any instrument securing the loan, which fee may be collected when the loan is made or at any time thereafter. No interest or charge in excess of those permitted by this article shall be made, contracted for or received, and if any such is charged, made, contracted for or received, the contract of loan and all evidence thereof and security and lien therefor shall be void and of no effect, and the licensee shall have no right to collect or receive any principal, interest or charge whatsoever of or for such loan."

It will be noted that said section provides that in addition to the interest, namely, two and one-half per centum per month, that no further or other charge or amount whatsoever for any examination, services, brokerage, commission or other thing or otherwise shall be directly or indirectly charged, contracted for or received, except the recording fees. And if the licensee does violate any of the provisions of this section the contract of loan and all evidence thereof and security and lien therefor shall be void and of no effect, and the licensee shall have no right to collect or receive any principal, interest or charge whatsoever of or for such loan.

We do not think it advisable for your Department to endorse any particular plan of authorization to purchase insurance to secure the loans for the reason that a particular plan as submitted in your letter, handled in a certain way, might be in direct violation of the "Small Loan Act" and we can really see that endorsement of a certain plan might be used as an excuse to violate this act. While it is true that any approval given by your Department would not in any way change the law, and if under a given state of facts the statutes had been violated the loan might be void and of no effect.

The "Small Loan Act" was enacted for a very salutary purpose and to correct certain evils growing out of the making of small loans.

Feb. 12, 1937.

In connection with the opinion of the Attorney-General of Illinois we have examined the statutes of Illinois, and particularly Section 54, Chapter 74, Illinois Revised Statutes, 1935, and we find a direct provision of the statute under the Small Loan Law, authorizing and empowering the department having supervision of the Small Loan Act "to make and enforce such reasonable relevant rules, regulations, directions, orders, decisions, and findings as may be necessary for the execution and enforcement of the provisions of this Act and the purposes sought to be attained herein, in addition thereto and not inconsistent therewith." And said section further provides that all such "rules, regulations, and directions, which are of a general character, shall be printed and copies mailed to all licensees." We find no such similar section in the Missouri "Small Loan Act."

It will also be noted that in the opinion of the Attorney-General of Illinois, in approving the submitted regulation, it is stated that it "would not be in conflict with the letter or spirit of the act and that it would not be unreasonable, provided care is taken and the regulation drawn in such a way as to see that there is no financial connection between the licensee and the company or person furnishing the insurance." It will be seen that in his opinion it was recognized that the submitted plan might be used in a way that would be a violation of the statute.

Conclusion.

From the above and foregoing, we are of the opinion that you should not give your approval to the plan submitted for the reason that each particular case would stand or fall on the facts in each case, and it is beyond your power and authority to issue a regulation inconsistent with the act which would be binding on the parties to the transaction. The licensee should not retain or receive any commissions from any insurance policy purchased by the customer on security pledged as collateral for a loan, and the premium cannot be deducted from the amount of the loan and must be an entirely separate transaction.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR

(Acting) Attorney General

INSANE PAUPERS: County liable for support.

March 22, 1937.



Mr. Alfred F. Moeller,
Attorney at Law,
Ste. Genevieve, Mo.

Dear Sir:

We are in receipt of your request for an opinion
wherein you state as follows:

"I desire your opinion on the following
question:

Do the provisions of Section 12952,
R. S. Missouri 1929, providing for a
residence period of twelve months in
the county apply to insane poor per-
sons?

The situation here leading up to this
question is as follows: The person
alleged to be insane was brought into
this county by her family four months
ago being at that time in the same
mental condition she is now and the
point at issue is whether the county
from which she came or this county
should be liable for her care and sup-
port as a state institution."

Under date of May 18, 1935, this department rendered
an opinion to Dr. E. F. Hooton, Superintendent of State
Hospital No. 4 at Farmington, Missouri, a copy of which is
enclosed, wherein it was determined which county should

March 22, 1937.

assume the charge of an insane poor person.

However, to answer your question more fully, we need only cite the case of State ex rel Yarnell vs. the Cole County Court, 80 Mo. 80, 1. c. 84, wherein it is said:

"It seems to have been the purpose of the legislature to provide that before the support of an insane poor person of one county can be shifted to or cast upon another county, such insane person must have ceased to reside in the former county for the period of one year. The same policy has been indicated in the law regulating the support of the poor, (2. R. S., p. 1289, Sections 6579, 6581,) (Section 12952, R. S. Mo. 1929) where it is provided that poor persons shall be received, maintained and supported by the county of which they are inhabitants; and that no person shall be deemed an inhabitant, within the meaning of the chapter, who has not resided in the county for the space of twelve months next preceding the time of any order being made respecting such person, or who shall have removed from another county for the purpose of imposing the burden of keeping such poor person on the county where he or she last resided for the time aforesaid."

From the foregoing, we are of the opinion that the provisions of Section 12952, supra, providing for a residence period of twelve months in the county applies to insane poor persons, and therefore the individual having been absent but four months, the county from which she came is liable for her care and support at a state institution.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:RT

BANK: BANKING: Records and files in possession of Commissioner of Finance for defunct banks, open for inspection of examiners of Federal Deposit Insurance Corporation.

June 9, 1937.



Honorable O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Moberly:

This is to acknowledge your letter of June 2, 1937, in which you requested the opinion of this Department. For convenience we are setting forth your letter, which includes the request made of your Department for an opinion from Mr. Fred C. Kellogg, Chief, Division of Liquidation, Federal Deposit Insurance Corporation, Washington, D. C., as follows:

"I am quoting below a letter under date May 27th, received from Mr. Fred C. Kellogg, Chief, Division of Liquidation, Federal Deposit Insurance Corporation, Washington, D. C.:

"In accordance with the various recent discussions which Mr. Vance Sailor of this Corporation has had with you, this Corporation would appreciate having the opportunity of examining into the affairs of the insured banks in Missouri which have closed. We are making this request on the basis that the Corporation is now the substantial creditor of such closed institutions by reason of the assignments of deposits now held by it.

"If this request meets with your approval and that of any other official concerned, we would greatly appreciate hearing from you at an early date."

June 9, 1937.

"My hasty conclusion is that your opinion of October 24, 1934, would justify my compliance with the request of Mr. Kellogg to examine into the affairs of the insured banks in Missouri which have closed; but since this is a blanket request to examine into the affairs of any and every closed insured bank in this State I felt I should refer the matter to your office for an opinion."

You are correct in your assumption that our opinion to you of October 24, 1934, in which we stated "that the files and records of your Department pertaining to failed banks and trust companies in your hands for purpose of liquidation, may be inspected by litigants and other parties at reasonable times" is applicable to and is authority for the officials and examiners of the Federal Deposit Insurance Corporation to examine into the affairs of the insured banks in Missouri which have closed their doors.

In the case of *Ex parte French*, 315 Mo. 75, 285 S. W. 513, 1. c. 516, the Supreme Court of Missouri, in interpreting Section 11679, R. S. Mo. 1919 (now Section 5291, R. S. Mo. 1929), stated the following:

"We are unable to conceive of any reason why general knowledge of the affairs of a defunct bank discovered in a trial in court would injuriously affect the public morals, public health, or public safety. What public interest can be served by concealing the methods by which banks are guided to destruction by those intrusted with their control? Ordinarily, we would say the public is entitled to know all about the inside jobs which cause banks to fail, because through such knowledge the people's representatives may apply a remedy for the conditions revealed. So far as appears on the surface, the only persons served by concealment of such condition would be those concerned in bringing it about. "

June 9, 1937.

The Federal Deposit Insurance Corporation, as an insurer of the bank which has closed its doors and as the principal creditor, is vitally interested in the affairs of the closed bank and in the preservation of its assets, and, therefore, should have access to the books and records of such bank.

There appears to be no good reason why official representatives and examiners of the Federal Deposit Insurance Corporation should not be permitted to examine the affairs of such banks, and it is, therefore, our opinion that such representatives and examiners as it may designate may examine into the affairs of said banks at all reasonable times.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

SCHOOLS: Board of Directors cannot do indirectly what it is prohibited from doing directly.

June 15, 1937

6-16



Honorable Charles A. Moon
Assistant Prosecuting Attorney
Springfield, Missouri

Dear Mr. Moon:

This is to acknowledge your letter dated
May 7, 1937, as follows:

"The County School Superintendent
has requested an opinion from you
on the following questions:

"Can the employment of a teacher
without a valid certificate to teach,
be made by indirection by a school
board, as by employing a person,
with a valid certificate, under
written contract with an increased
salary, with a verbal understanding
that he will employ and pay the sal-
ary of a person, without a valid
certificate, to also teach in the
school? Can a Member of the School
Board be indirectly employed in this
same manner, regardless of whether or
not he has a certificate to teach?

"Can a School Board pay for incident-
als by indirection out of the teachers
fund, as by employing a qualified
teacher under written contract, with
an increased salary, with a verbal
understanding that said teacher is to
either do the janitor work himself or
employ and pay the salary of another
person to do the janitor work; or with
a verbal understanding that said

June 15, 1937.

teacher shall return a certain amount of his salary each month to the School Board to enable said School Board to purchase a set of reference books?"

Your two questions are inter-related to the extent that a school board is seeking by indirection to do something that it cannot do by statute. In other words, the board for all intents and purposes of the record provides for the doing of certain acts, but the records are a subterfuge to the real accomplishment of what the board wants done.

A school teacher cannot be employed without a valid certificate to teach, either directly or indirectly. Section 9209 R. S. Mo. 1929, provides in part as follows:

"The board shall have power * * * *
to contract with and employ legally
qualified teachers * * * * the con-
tract shall * * * * specify the
number of months the school is to be
taught and the wages per month to be
paid, * * * * shall be signed by the
teacher and the president of the board,
and attested by the clerk of the dis-
trict when the teacher's certificate
is filed with said clerk. * * * * The
certificate must be in force for the
full time for which the contract is
made."

Section 9210 R. S. Mo. 1929 provides that the contract between the teacher and the school board shall be construed under the general laws of contract and provides in part as follows:

"But should the teacher's contract be revoked said contract is thereby annulled."

From the above two statutes it is seen that the Legislature commanded and intended that the person who taught pupils must be a legally qualified teacher and have a certificate at all times to enable such person to teach. A member of the school board cannot be indirectly employed for the reason that he cannot be directly employed; in fact he is prohibited from accepting employment by virtue of his office of director if he be a member of a public school board of any city, town or village in this state having less than 25,000 inhabitants. Section 9360 R. S. Mo. 1929.

A school board should not pay for incidental expenses at the expense of the teacher by giving an increased salary by written contract, and then requiring her to part with any portion of it in order to pay the salary of a janitor, or to enable the school board to purchase reference books. The teacher's contract with the board must be written, and all of his or her duties contained in the contract. In a small school district perhaps it would be a reasonable exaction from a teacher to require such to do janitor work, and if the teacher agreed in writing, no criticism could come to the Board of Directors. However, for the Board of Directors to make a written contract with a teacher to the effect that the salary will be stated in the contract at a certain amount, but a percentage of that salary must be turned over to the board for other and different purposes is clearly wrong, and we are of the opinion the Board of Directors would be derelict in their duty and unfaithful to the trust reposed in them by such an arrangement.

The Board of Directors of a school district are liable for misappropriation of school funds, notwithstanding good faith and absence of wilfull intent. Consolidated School District No. 6 vs. Shawhan, 273 S. W. (2d) 182.

Honorable Charles A. Moon

-4-

June 15, 1937.

In *Eisensmith et al vs. Buhl Optical Co. et al*,
178 S. E. (W. Va.) 695, the Supreme Court of Appeals of
West Virginia said: (page 697)

"A person * * * * individual or
corporation may not do by in-
direction what he or it is pre-
cluded from doing directly."

From the above and foregoing it is our opinion
that if the School Board employs a teacher by contract,
with a verbal understanding that the teacher will divide
or use part of the contract stated salary with other
persons or for other purposes, that such arrangement is
illegal and non-enforceable. The Board should not by
indirection do what it is prohibited from doing direct.

Yours very truly,

James L. HornBostel
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

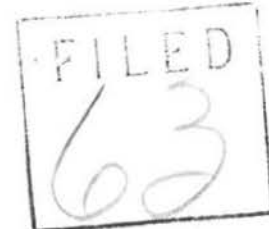
JLH/R

DEPOSITORIES:
COUNTY DEPOSITORY:
BANKS & BANKING:

) Duty of County Court to select county depositories
) which will pledge its securities to protect
) the county funds.
County Court should select depositories outside
county if none in county will pledge assets.

December 6, 1937.

12-8



Honorable Alfred F. Moeller
Prosecuting Attorney
Ste. Genevieve County
Ste. Genevieve, Missouri

Dear Sir:

We have received your request for an opinion dated
November 27th, which is as follows:

"The County Court of Ste. Genevieve
County has designated two Ste.
Genevieve banks as county depositories.
These banks have failed to make the
deposit of securities as required by
section 1 Laws of Missouri 1937 page
502. Please give me your opinion as
to whether the provisions of section
4 Laws of Missouri 1937 page 504 make
it mandatory for the County Court to
deposit the county funds in a banking
institution outside the county."

The General Assembly of 1937 materially changed the
depository laws of the State of Missouri with reference to the
payment of interest and the securities to be given by the
banking institutions selected as depositories to safeguard and
protect the public funds of the State, its various institutions
and the political sub-divisions of the State.

Laws of Missouri, 1937, page 502, Section 1 thereof,
provides in part as follows:

"Notwithstanding any provisions of law
of this State or of any political sub-
division thereof, the public funds of

every county * * * * *
which shall now or hereafter be deposited in any banking institution acting as a legal depository of such funds under the provisions of the statutes of Missouri requiring the letting and deposit of the same and the furnishing of security therefor, shall be secured by the said legal depository making deposit, as hereinafter provided, of securities of the same character as are required by Section 11469 and all amendments thereto for the security of funds deposited by the State Treasurer under the provisions of Article 1 and 2 of Chapter 72 of the Revised Statutes of Missouri, 1929, and all amendments thereto. * * * * *

Said section further provides how the securities so pledged shall be deposited with a fiscal officer or the governing body of the municipal corporation or other depositor of said funds or deposited with the trustee as may be satisfactory to both parties.

Section 2 of said Act provides:

"The value of the securities deposited and maintained by a legal depository under the foregoing section, shall at all times be not less than one hundred per cent of the actual amount of the funds on deposit with said depository, less \$5000.00 where the depository is insured by the Federal Deposit Insurance Corporation."

Section 3 provides that it is not necessary to advertise for bids when interest is not paid on demand public funds, as is the case at the present time.

Section 4 of said Act further provides:

"In the event that there shall be no banking corporation, association, trust company or individual banker in the territory within which the depository or depositories of any public fund must, under the applicable laws of this state, be located to become eligible for selection, or in the event that the selected

depository or depositories within such territory shall fail to accept such award or awards of such public funds as may be made, then the authority or authorities which are by law empowered to make such selection of depositories and awards of public funds thereto, are authorized and empowered to select as depository or depositories such banking institutions located outside the territorial limits aforesaid as such authority or authorities may deem the safest and most convenient depository or depositories for such public fund."

(Underscoring ours.)

It will be noted in Section 1 that the public funds of the county "shall be secured by the said legal depository making deposit of securities of the same character as are required by Section 11469 and all amendments thereto for the security of funds deposited by the State Treasurer etc."

Upon an examination of Section 11469, as amended by Laws of Missouri, 1937, page 521, we find that the statute is specific as to the class and character of securities that may be pledged by the selected depositories to safeguard and protect the State public funds. And the county funds should be protected by the same class and character of securities as the State funds are secured. And Section 2 is specific that securities to the value of not less than one hundred per cent shall be pledged by the legal depository selected, less \$5000.00 if the depository is insured by the Federal Deposit Insurance Corporation.

It will be seen from a reading of the above sections that the law contemplates that at all times the public funds shall be secured in the specific and particular manner as therein set out. The policy of this State has been at all times that its public funds deposited in the selected depositories shall be protected by personal bonds or the pledging of assets.

In your letter of request you state that the County Court of Ste. Genevieve County has designated two Ste. Genevieve banks as county depositories and that they have failed to comply with the statutes relative to the pledging of securities to safeguard and protect the county's deposits, and your question is, as we understand it, whether it is the duty of the county court, under the above conditions, to select a depository or depositories located outside the territorial limits of Ste. Genevieve County, which are willing and able to comply with the statutes relative to the pledging of securities.

It must be remembered that under the present State and Federal laws and regulations it is unlawful for banking institutions to pay interest on public demand deposits. The State Legislature in consideration of this and other reasons has required that the depositories selected by the governing authorities shall be secured by the pledging of the highest quality of securities.

From a reading of the 1937 Depository Act, and keeping in mind the public policy of this State relative to the securing of public funds and the cardinal principle running through all of our depository statutes, that of protection for the public funds, we are driven to the conclusion that it is the duty of the county court, which is the governing authority in the selection of the depositories for the county funds, to select same in the statutory manner, that is, by requiring the selected depositories to pledge the securities in the manner and form as required by Section 11469, as amended by Laws of Missouri, 1937, at page 521, as the State funds are secured.

It is, therefore, our opinion that the county court has no authority to select county depositories and waive the requirements of the statute relative to the pledging of securities to safeguard and protect the county funds when it is authorized and empowered to select depositories outside the territorial limits of the counties which are able and willing

Hon. Alfred P. Moeller

-5- Dec. 6, 1937.

to comply with the statutory mandate of the pledging of securities to protect the county funds.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

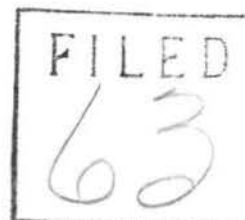
(Acting) J. E. TAYLOR
Attorney-General.

CRH:EG

COUNTY COLLECTOR: Can not collect partial payment of
State, County and School taxes

December 15, 1937

12-16



Mr. Alfred F. Moeller
Prosecuting Attorney
Ste. Genevieve County
Ste. Genevieve, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of December 11, 1937, with reference to the collection of state and county taxes by the county collector. Your letter reads as follows:

"At an election held in April of last year the city limits of the city of Ste. Genevieve were extended to include considerable new area. On the 1937 county tax books the taxpayers in the new area are assessed as being in the school district of Ste Genevieve. Some of these taxpayers have appeared at the office of the county collector and have offered to pay all of the items of their 1937 taxes except the school tax. They refuse to pay the school tax until the final determination of a suit pending in the circuit court of this county in which the validity of the city extension is being attacked.

"These 1937 tax bills contain the following items: State tax, County tax, County Road and Bridge tax, Special Road and Bridge tax, School tax; and these taxpayers are offering to pay the amounts involved in

all of the items except the school tax.

"Please give me your opinion as to whether the county collector is required to or can be compelled to accept payment of the other items when the school tax is not paid, or can he insist that all of the items embraced in the 1937 taxes be paid at one time."

In answering this request for an opinion as set out in your letter, this Department is not passing on the legality of the annexation by the city of Ste. Genevieve of the new area, but in *State v. Brown*, 31 S. W. (2d) 215, 224 Mo. App. 1197, the court held:

"Extension of city limits of the city of Kirkwood, such city having less than fifty thousand population, held to have extended limits of Kirkwood School District correspondingly. Revised Statutes Missouri 1919, Section 11236."

Section 11236, Revised Statutes 1919, is identical with and the same section as is Section 9325, Session Laws of 1937, page 449, as to the extension of the city limits including the school district.

The county collector is an office that is not created by the Constitution but is an office created by the Legislature under Section 14, Article IX, of the State Constitution. This was so held in *State v. Hering*, 208 Mo. 708. The collector is merely an agent of the State and must follow the statute in every respect. In *State ex rel. Waddell, Revenue Collector, v. Johnson, et al.*, 296 S. W. 806, the court held

that;

"In suit to enforce lien for taxes for de facto school district, under Rev. St. 1919, Section 12928, collector is agent of state, de facto district not being party to suit, and hence liability for taxes cannot be defeated on ground that collector, as agent of district, cannot collect taxes after district has been disorganized; there being no principal to represent."

The tax collector's duties being purely statutory, he is confined to the law as set out by the statute alone.

In State v. Young, 38 S. W. (2d) 1021, 327 Mo, 909, the Court held that,

"The power to collect taxes is purely statutory and collection of taxes can only be made in accordance with tax books as actually made and furnished to the collector."

In State ex rel. Johnson, Collector of Revenue v. St. Louis, San Francisco Railway Company, 286 S. W. 360, the Court held:

"Public officials connected with taxes are presumed to have properly discharged their proper duties as to levying them, and this presumption can be overcome only by clear testimony."

The collector of Ste. Genevieve County has been furnished with tax books which set out the description

of the land, the amount of tax and especially the name of the school district in which the school tax should be paid.

In the case of State ex rel. Johnson v. St. Louis, San Francisco Railway Company, as above set out, the county collector is bound by the amounts set out in the tax book furnished him by the county assessor and county clerk. The same finding was held in State ex rel. v. Dungan, 177 S.W. 604, 265 Mo. 353,

In the above case, State ex rel. v. Dungan, the Court held that

"Where the assessor has made a valid assessment of lands and has prepared his books containing such assessment, jurisdiction to collect the taxes attaches, and the provisions for the subsequent proceedings are only directory."

Under Section 9880, Revised Statutes Missouri 1929, the collector is charged with the taxes that appear on the tax books and which are furnished him under Section 9877 of the Session Laws of 1933.

Under Section 9886, Revised Statutes Missouri 1929, a bond requires the county collector to faithfully collect all taxes certified to him.

In State ex rel Stone, Internal Revenue Collector v. Kansas City, Ft. Scott and Memphis Railway Company, et al., 178 S. W. 444, a suit was brought by the Internal Revenue Collector against the railroad and its receivers for taxes. The suit was for taxes against the defendant's property in Bates County for the year 1912 and was for \$2,349.01, and for the year 1913 they were \$2,257.44. The railroad company paid all the taxes for the year 1912 except \$23.56,

and in December, 1913, tendered to the collector \$2,228.48 in full payment of the taxes for 1913. The tender was refused. The issue at the trial was in regard to the unpaid balance for the year 1912 and the difference of \$28.96 between the total tax for the year 1913 and the amount tendered. Those two disputed amounts represented that portion of the school taxes which defendants contended were illegal, in this; that various school districts in the county, which were formed of cities and adjoining territory, had increased their rate of levy beyond sixty-five cents on the hundred dollars assessed valuation, and that such excess had resulted in the increase of defendants' taxes by the amounts so in dispute. The court, in affirming the judgment of the lower court which allowed payments of penalty for the non-payment of the taxes when due, said:

"They say that section 11459, Rev. Stat. 1909, requires the collector to receive and receipt for the taxes which may be tendered on any part of a tract of land. That section does not apply to any taxes, except taxes on land. It contemplates the payment of all taxes on a specified part or on an undivided part of the whole tract; but it does not contemplate the payment of a part of the taxes on the whole property. That section has no application to the facts in this case. We know of no law requiring the collector to accept a part of the taxes under the circumstances of this case. The collector's refusal to accept the amount tendered did not result in relieving defendant of the payment of the penalty on the amount tendered.

"We have no power to relieve the defendants of the penalty, nor to

diminish it. Appellants cite Cottle v. Railroad, 201 Fed.39, 119 C. C. A. 371. In that case the railroad company paid the taxes admitted to be due and sued to enjoin the collection of the balance. It was decided on that appeal that a portion of the unpaid balance was valid, and the other part void, and the collection of the latter part was enjoined. The Circuit Court of Appeals refused to enforce the penalty of 18 per cent. provided for by the statute of the state of Wyoming, but gave judgment for interest at 8 per cent. It should suffice to say that there is a broad difference between that case and this. There a portion of the tax was held void; here it was all adjudged valid. That was a proceeding in equity; this is a suit at law. This court, in this case, must follow the statute.

"The judgment is affirmed."

In the above case, State ex rel. Stone v. Kansas City, Ft. Scott and Memphis Railway Company, et al., the Court, in the syllabus of its opinion, passed on Section 11459, Revised Statutes Missouri 1909. This section of 1909 is identical with Section 12905, Revised Statutes 1919, and Section 9913, Revised Statutes 1929. The county collector, although his office was created by the Legislature and not the Constitution, is bound by Article X, Section 3, of the Constitution of the State of Missouri, which is as follows:

"Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

Under this article and section the county collector, if he accepted part of the taxes as set out in your letter, would be collecting in the same county different amounts from the people of the city of Ste. Genevieve who had been in the city for some time previous to the new citizens of the city, by reason of the annexation as set out in your letter. It is not discretionary with the collector as to his procedure in collecting the taxes certified to him by the county assessor and county clerk.

In the case of *Walden v. Dudley*, 49 Mo. 419, the Court held:

"A county collector is not personally liable for levying on land embraced within town limits and regularly assessed for town taxes, although the lands were used exclusively for agricultural purposes. It is his duty to collect all taxes contained in the assessor's list; and he has no discretion in the matter, except where property is expressly exempt by law, and the assessment is simply void."

Section 9913, Revised Statutes Missouri 1929, should not be construed to mean that the taxpayer can pay a part of the taxes on one piece of property, but can pay on certain tracts or lots or upon different items at different places and refuse to pay on either of the other lots or tracts providing they are specifically described.

This section has been construed in *State v. Harnsberger*, 14 S. W. (2d) 554, and by construing *State v. Harnsberger* with *State ex rel. Stone v. Kansas City, Ft. Scott and Memphis Railway Company*, 178 S. W. 444, the distinction can readily be seen.

Mr. Alfred F. Moeller

-8-

December 15, 1937

CONCLUSION

Under all of the authorities set out above, and especially under the decision of State v. Kansas City, Ft. Scott and Memphis Railway Company, it is the opinion of this office that the county collector is not required to or cannot be compelled to accept payment of other items in the tax bill when the school tax payment is refused, and he can insist that all of the items embraced in the 1937 taxes be paid at one time.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED

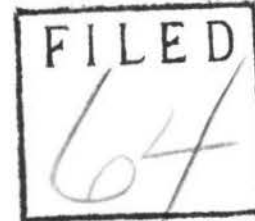
J. E. TAYLOR
(Acting) Attorney General

WJB LC

COUNTY COLLECTORS AND COUNTY ASSESSORS:

Entitled to stationery
Record Books, Printed
Receipts and Stamps from
County Treasury.

January 20, 1937.



Honorable Morgan M. Moulder
Prosecuting Attorney
Camden County
Camdenton, Missouri

Dear Sir:

We acknowledge your request for an opinion dated
January 9, 1937, which reads as follows:

"Please advise me as to whether or
not county officers (the county col-
lector and county assessor) who re-
ceive fees and commissions as the
sole compensation for their services
as such county officers are entitled
to charge the county for stationery,
records, receipts, postage, etc."

County Courts in Missouri are limited in their power
to expend county funds. Article VI, Section 36 of the
Missouri Constitution provides in part:

"In each county there shall be a
county court, which shall be a court
of record, and shall have jurisdic-
tion to transact all county and such
other business as may be prescribed
by law. * * * *"

It is a general rule of law that one who asks pay-
ment of a claim against a county in Missouri must show
some Statute authorizing the claim, or show that the
claim arises from a contract which finds authority of
law. In Person v. Ozark County, 82 Missouri, 491, 1. c.
492, the Supreme Court of Missouri said:

"In 1880, the subject matter of the
claim passed upon by the county court,
could not be made the basis of a law-
ful demand against the county. There

being no authority whatever, under any circumstances, for such an allowance, as was made to the sheriff of Oregon county, the warrant drawn in pursuance thereof was a nullity. It was a mere gratuity, and cannot be enforced against the county. The failure of the legislature to make provision for the payment of such necessary expenses as were incurred by the sheriff in this case, was doubtless an accidental omission, as they are now provided for by the act of March 8th, 1883, (Sess. Acts 1883, p. 80); but this fact cannot alter our judgment, which must follow the law in force at the time the warrant was issued."

Our Supreme Court has held that a probate judge in Missouri was entitled to be furnished with books, records, stationery, postage, etc., under a Statute providing the probate court with certain stipulated office necessities, "and other necessities". The court in construing that statutory phrase "and other necessities" in *Sayler v. Nodaway County*, 159 Mo. 520, 1. c. 524; 60 S. W. 1057, said:

"By the same rule of interpretation the judgment of the circuit court herein must be reversed, for in this case it was agreed at the trial, that the stamps, for which the probate judge presented his bill to the county court for allowance, were used in the discharge of the official business of his office and that they were necessarily required in the performance of his official duty. While everything that an official may use to facilitate him in the accomplishment of the work he is directed by law to perform, may not be said to fall within the meaning of the term 'all other necessities,' as used in section 1726, supra, certainly everything that he is directed to use, or that must necessarily be used in the performance of a designated act

or acts required to be performed by him, should be held to be included within the meaning of that term, unless something previously or subsequently used in the section or act so providing, should clearly indicate a contrary intention.

"To suggest that an officer is oftentimes called upon, and may be compelled, to perform certain services for which no compensation has been provided, and for which he can collect nothing, is no answer to the proposition that an officer should not be compelled to directly contribute his own means for the public welfare without recompense."

In the case of *Ewing v. Vernon County*, 216 Mo. 681, the county recorder had sued the county for reimbursement for expenditures which he made for janitor service and stamps, and he took judgment in the lower court. The Missouri Statutes provide that he "keep his office at the seat of justice in each county" and the Statutes also provided that he deliver deeds when recorded "to the party or his order". He took judgment in the lower court. On appeal the judgment of the lower court was affirmed and the Supreme Court said at 694:

"It is argued by defendant that it ought not to pay for stamps used by the recorder in his official business. The evidence disclosed that the plaintiff charged up to the county his stamp account for returning recorded instruments to those residing in the county. * * * The legal duty of an officer is to be obliging and courteous. * * *. Conceding there are no fees allowed for the delivery of a deed after recording or for transmitting a deed from one county to another, yet the statute does not contemplate that he should pay money

out of his pocket in the performance of his official duty. Fees are the income of an office. Outlays inherently differ. An officer's pocket in no way resembles the widow's cruse of oil. Therefore those statutes relating to fees, to an income, and the decisions of this court strictly construing those statutes, have nothing to do with this case relating to outgo. * * * *. Further, if the custom was to deliver a deed to the U. S. Government to be transmitted by mail, as seems to have been the case, then such delivery is reasonably well within the contemplation of the statutory duty to deliver 'to the party or his order.'

"It must not be expected that this court will throw down statutory safeguards for the protection of the treasuries of the counties of this State, or in any way countenance looseness in their business affairs. But on the other hand we shall not construe our statutes so as to produce a harsh or ridiculous result and one not within the fair meaning of our laws. * * * *.

"The statute relating to recorders ordains that he 'keep' his office, etc.; the word keep is one of wide and flexible meaning, one meaning being to maintain, to provide for. It involves the idea of continued effort in that line, i. e., that the office shall be carried on, enjoyed, etc. In this view of the case, the great breadth of the statutory word 'keep' permits of the notions that it was the legislative intent that the recorder of deeds should have the power to maintain and provide for his office in a reasonable way for the benefit of the public, and (by implication) at

the public expense, where county courts violate or renounce their duty in that regard."

Let us look to the Statutes as they relate to county collectors and county assessors and see if they prescribe that these officers be furnished with stationery, record books, printed receipts, postage, etc. We find no specific provision of law to this effect, but we do find in the Statutes that these officers are required to make written entries in record books, to execute written receipts and to execute written papers which require the use of stationery.

Section 9912 R. S. Mo. 1929, makes it the duty of the county collector to mail tax statements and tax receipts, and reads:

"It shall be the duty of the collector to furnish to all nonresident taxpayers a statement of the amount of taxes assessed against any tract of land or town lot in his county for any year or years during which he is collector, and send the same by mail to the address of any person applying to him by letter for the same; and if no taxes are due on any such tracts or lots, he shall answer such letters of inquiry, stating the fact; and whenever any funds are remitted by mail or otherwise to any collector for the payment of any taxes appearing to be due on his tax book, it shall be his duty to receive the same and send a receipt therefor by mail to the person remitting the same; Provided, that he may charge all sums which he may have to pay for postage as costs against the person applying or remitting to him, but no other costs."

January 20, 1937.

As to the county assessor, Section 12330 R. S. Mo. 1929, provides "that all necessary blank lists, books and stationery shall be furnished by the county clerk, to be paid for out of the county treasury."

CONCLUSION.

It is true that county courts in Missouri must limit their expenditures to those expenditures where there is statutory authority for same, but it is just as true that this "authority of law" for a county to expend money to reimburse county officers for necessary expenditures made in keeping and maintaining their office is usually legally justified by virtue of a broad construction of the existing statutes. In the Nodaway County case, supra, the probate judge had the statutory authority to make "necessary expenditures", and the Supreme Court construed this phrase to mean the county court is to pay for postage stamps. In the Vernon County case, supra, the county recorder had statutory authority to "keep" an office, and the Supreme Court construed this word to mean that the county court was to pay him for janitor service and stamps, as these items were said to be indispensable keeping his office.

The courts are prone to liberally construe the Statutes so that county officers are not forced to personally bear office incidental expenses in order that their office be managed efficiently, and as the Statutes provide. We take the same liberty as the courts, in our logic.

This department is of the opinion that the county collector and county assessor are legally entitled to look to the county court for stationery, record books, printed receipts and postage necessary to the courteous and efficient maintenance incidental to their respective statutory duties. In performing their public statutory duties it is reasonable that these necessary incidental office expenses be borne by the public for whose benefit the service is required and performed, since these officers receive no fees conditioned upon these articles being a personal expenditure.

Respectfully submitted

APPROVED:

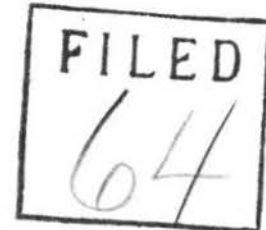
J. E. TAYLOR
(Acting) Attorney General.

WM. ORR SAWYERS
Assistant Attorney General.

ROADS AND BRIDGES:) If bonds are voted for road purposes such is put in
FUNDS:) a "road construction fund" and can be used for no other
purpose whatever; moneys raised from taxes go into
special fund to pay for bonds and interest and
surplus may be disbursed by county court as it deems
wise.

April 28, 1937.

51



Honorable L. I. Morris
Prosecuting Attorney
Lafayette County
Lexington, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

"The Honorable County Court of Lafayette County, Missouri, requests this letter of transmittal be handed you with the further request that you inform the county court as to their powers with relation to the expenditure of money now in their hands.

"The following set of acts will direct your attention to the source of this request. 'In August, 1921, Lafayette County, Missouri, under Revised Statutes of 1919, Sections 10744, and 10746 held a special election for the issuance of bonds specifying that the money received from the sale of such bonds was to be expended for road purposes in the construction of bridges, culverts and roads, as authorized under the statutes. Under Section 10691, Missouri Revised Statutes 1919 Lafayette County was authorized to join with the Ray County Court in the construction of a bridge over any water course forming a county boundary and to pay their proportionate cost under those sections of the statutes. You are also referred to Section 10889 and 10890 referring to the creation of the Highway Commission. Election was duly held in both counties, bonds were issued in accordance with the election and the money raised by the sale of said bonds was placed in the road construction fund for bridges and culverts, and as a result

the bridge across the Missouri River at Lexington, Missouri, was constructed. Lafayette County, Missouri, now finds itself in this position; they have \$173,981.87, in their county treasury and the bonds outstanding, together with interest at retirement date, will not require this sum of money. The court finds itself with a considerable sum of money over and above their obligations under these bonds, and they now wish to use this money for road purposes in other road districts in the county.'

"The question before the court is whether this sum, over and above the sum necessary to retire bonds and pay interest, can be pro-rated to road districts in Lafayette County for road repairs, reconditioning and for bridge maintenance and repair?

"A further question is propounded as to whether the court could spend this money for any other purpose, for example--the purchase of right-of-ways and payment of damages under condemnation proceedings in the county. The third question proposed is as to whether the county court may expend this sum for any other purpose, for example--the repair of the county jail and court house.

"Your attention is directed to State ex rel Hackman, 245 S. W. 554 and State vs Drain, 73 S. W. (2) 804."

Sections 10744, 10746 and 10691, R. S. of Mo. 1919, referred to in your letter, are Sections 7957, 7959 and 7903 in the R. S. Mo. 1929. We have also read the cases referred to in your letter, "State ex rel Hackman, 245 S. W. 554 and State vs Drain, 73 S. W. (2) 804."

We gather from your letter that the county court by virtue of Sections 7957 and 7959, R. S. Mo. 1929, issued bonds

Apr. 28, 1937.

which were to be used primarily for the purpose of erecting a bridge over the Missouri River at Lexington, Missouri, jointly with Ray County, permitted by virtue of Section 7903, R. S. Mo. 1929. Section 7957 permits county courts to issue "bonds for and on behalf of their respective counties for the construction, reconstruction or improvement of the public roads and bridges in said county to an amount, including the existing indebtedness, of not exceeding ten per centum of the assessed valuation of such county." Section 7959 provides that when two-thirds of the voters, voting at the election, vote in favor of issuing the bonds the county court shall provide for a levy by a direct annual tax of a sufficient sum of money "to provide for the payment of the principal and interest of the bonds."

It is thus seen by a reading of Sections 7957 and 7959 that whenever a county is in need of funds for the construction and reconstruction or improvement of public roads and bridges that a bond issue may be had in which to raise funds. When a bond issue is had provision must be made for the levying and the collection of a tax on property in order to pay the principal of the bonds as well as the interest.

Section 7959 also provides:

"The proceeds of all bonds sold shall be paid into the county treasury and shall be used for the grading, construction, paving or maintaining of paved, graveled, macadamized or rock roads and necessary bridges and culverts in said county and for no other purpose whatever, and the proceeds of such bonds shall be kept in a separate fund to be known as the "road construction fund."

It is thus provided that the bonds are to be sold and the proceeds placed in a "road construction fund" and only the proceeds in said fund used on the roads. The proceeds in that fund can be applied to no other purpose whatever. The money received from the tax levied to pay the bonds and the interest would be in a different fund and would be used to retire the bonds and pay the interest and not used for road purposes.

As we understand your letter, the county has a surplus in the fund to retire the bonds and pay the interest. Consequently, no additional levy will be necessary in order to retire the bonds or pay the interest. The surplus in the fund is a special fund raised solely to pay an outstanding indebtedness. It is not a "road construction fund." Therefore, if we have

assumed the premise correctly, said surplus will be found in a special fund, and hence it is our opinion that Sections 12167 and 12168 will govern the disposition of said surplus.

Section 12167 reads as follows:

"Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

Section 12168 reads as follows:

"Nothing in the preceding section shall be construed to authorize any county court to transfer or consolidate any funds not otherwise provided for by law, excepting balances of funds of which the objects of their creation are and have been fully satisfied."

The Supreme Court of Missouri, en banc, in 1910 in the case of Decker et al. v. Diemer et al., 229 Mo. 296, said (p. 336):

"The bald question then is: May county courts transfer a surplus and divert it from a fund, having a designated and given purpose, to another legitimate county purpose, by force and reason of the satisfaction of the original use or purpose? We answer that question in the affirmative."

You state, "they have \$173,981.87 in their county treasury and the bonds outstanding, together with interest at retirement date, will not require this sum of money." Thus, the object for which the special fund was created has not now been

fully satisfied. In other words, the bonds are still outstanding. Therefore, not until the bonds have been fully satisfied, will there be a legal surplus in the special fund. True, it may be determined at this date that there is sufficient money with which to pay the bonds and interest. However, Section 12168 does not permit of a transfer of the surplus if the bonds have not been fully satisfied. We have not been able to find any statute or case which would authorize the transfer of this surplus while the objects (bonds) are outstanding and not fully satisfied.

We also invite your attention to Sections 4091 and 9987. Section 4091 provides that any member of the county court knowingly and without authority of law voting for the "appropriation, disposition or disbursement" of any money "to any use or purpose other than the specific use or purpose for which the same was devised, appropriated and collected, or authorized to be collected" shall be deemed guilty of embezzlement. Said section, however, has this proviso:

"Provided, however, that in any case when any money has been or shall have been collected by any * * * county for any specific use or purpose, and it is or shall have become impossible to use such money for that specific purpose * * * then the members of any * * * county * * may appropriate such money to any other legitimate use or purpose without becoming liable of the afore-said penalties."

Section 9987 reads as follows:

"Any county court or judge thereof, or county treasurer, or county clerk, or other county officer, who shall order the payment of any money, draw any warrant or pay over any money for any purpose other than the specific purpose for which the same was assessed, levied and collected, or shall in any way or manner attempt so to do, shall be adjudged guilty of a misdemeanor, and on conviction thereof shall be punished as provided in section 9869."

Apr. 28, 1937.

In view of Section 12168, supra, it is our opinion that the moneys derived from the direct annual tax levied in which to pay the principal and interest of the bonds, constitute a special fund, and that until the bonds have been fully satisfied the surplus, if any, cannot be transferred.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

JLH:EG

TAXATION: County collector not required to determine legal question of status of redemptioner.

May 21, 1937



Hon. Morgan M. Moulder
Prosecuting Attorney
Camden County
Camdenton, Missouri

Dear Mr. Moulder:

We are in receipt of your communication of recent date requesting an opinion on the following matter:

"The collector of Camden County has requested that I ask your opinion as to whether or not he should permit any person to redeem real estate which has been sold for taxes.

The person who purchased the property at a tax sale, as provided for by sale of delinquent property, objects to the collector receiving payment from a person who desires to redeem the property, for the reason that the person offering to redeem has no interest in the property to entitle him to redeem the same.

The county collector takes the position that it is not his duty to investigate the title to the property which he has sold, to determine whether or not such person offering to redeem has sufficient interest therein, under the Statute, to redeem, and that he believes it his duty to accept the offer and redeem the property, and the purchaser at the sale of the delinquent property may bring a

suit to determine title on the ground that the person redeeming had no authority to do so."

Section 9956a, page 437, Laws of Missouri, 1933, sets out the manner in which property may be redeemed from sale under the law for the enforcement of delinquent state and county real estate taxes. This section provides that in any time during two years next ensuing the sale the owner or occupant of any land or any person interested therein may redeem the same

"by paying to the county collector for the use of the purchaser, his heirs or assigns the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten per centum annually with all subsequent taxes which have been paid thereon by his heirs or assigns with interest at the rate of eight per centum per annum on such taxes subsequently paid and in addition thereto the person redeeming any land shall pay the cost incident to entry of the recital of such redemption. Upon the deposit with the county collector of the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser his heirs or assigns at the last post office address, if known, and if not known then to the address of the purchaser as shown in the record of the certificate of purchase; notice of such deposit for redemption."

It therefore appears that the delivery of this money to the County Collector and the receipt thereof by him is but a ministerial duty imposed upon him. It is but the deposit of

May 21, 1937

the money for the use and benefit of the holder of the certificate of purchase. The County Collector is but an escrow agent or statutory depository for the money necessary to redeem the certificate. The general rule is stated in 61 C. J. 1288, Section 1791, as follows:

"Money paid to the proper officer of a county or city for the redemption of land does not belong to the municipality or the officer even temporarily but to the holder of the tax certificate * * * * *

An examination of Section 9956a, supra, reveals that it does not appear that it was intended that the county collector perform the judicial act of determining who is an owner or occupant of the land or person having an interest therein. That question is essentially a judicial one and an examination of that section fails to disclose any intent on the part of the legislature to clothe the county collector with the duty or the authority to make this judicial determination. We have examined the cases on the subject and fail to find a case passing upon the duty or authority of the county collector to pass upon a legal question such as presented by your inquiry.

In the case of Mitsch vs. Riverside Township, 86 N. J. Law, 603, 92 Atl. 436, the question was raised but not decided by the Court. However, in the course of the opinion the court state, page 439 (Atl.):

"Even when it came to the redemption of the property from the sale, Mitsch was given no chance to redeem. Although Schele, the purchaser, served a notice calling upon him to redeem, the collector refused him the right solely on the ground that he was a stranger of the title, thus assuming to pass on a legal question and deciding it wrong."

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The inference to be gained from this statement it seems is that the County Collector in that case was assuming to pass upon a question which was not properly before him. The Court set aside the tax deed, but did not do so upon the ground that the collector had wrongly determined that the person attempting to redeem was a stranger to the title. Accordingly, the decision is not of great value in determining your problem.

After reviewing the provisions of our tax law, we believe that the proper interpretation of the county collector's duties require him to act but ministerially in accepting the money, and that if the holder of the certificate of purchase is of the opinion that the person attempting to redeem is not, under the law, entitled to redeem such holder may refuse to accept the sum so deposited and retain the certificate of purchase and then at an appropriate time and in a proper proceeding have the fact of redemption determined. The general statement found at 61 C. J. 1248, Section 1695, is applicable:

"If a stranger tenders the redemption money to the holder of the tax sale certificate the latter may refuse to receive it, or if the money is paid to the proper officer the tax purchaser may repudiate it and in neither case is the title of the latter divested, nor will the attempted redemption be effective to convey title either to the redemptioner or to those claiming under him, or inure to the benefit of the real owner; but if the tax purchaser consents to the redemption and accepts and retains the money, he will be estopped to deny the effect of the transaction as a redemption, and it seems that in such case the act of the stranger will inure to the benefit of the true owner of the land at least if he chooses to ratify it and claim the advantage of it."

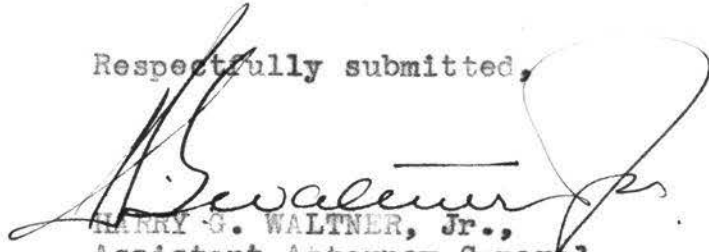
CONCLUSION

Hon. Morgan M. Moulder -5-

May 21, 1937

It is, therefore, the opinion of this office that under the facts stated in your communication the county collector may properly accept the money from the person attempting to redeem the property and the holder of the certificate of purchase may, if he desires, refuse to accept from the county collector the money so deposited and at a proper time and in a proper proceeding have the issue of redemption judicially determined.

Respectfully submitted,



HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

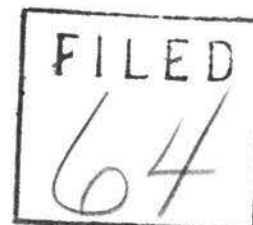
J. E. TAYLOR
(Acting) Attorney General

HGW:MM

TAXATION: When a landowner gives a license to a person to search and segregate minerals, the property right is taxable against the landowner.

May 28, 1937.

5-28



Honorable J. H. Mosby,
Prosecuting Attorney,
Linn, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion which reads as follows:

"Enclosed herewith you will please find a question, which I would like to submit for an opinion.

This matter arises on May 29th, and I would like to have the opinion by that date."

"A Landowner, by a written lease, grants to another the right to enter upon the premises of the Landowner and prospect for, mine, remove and ship fire-clays. In consideration therefor the Lessee agrees to pay an annual rental of \$200.00 per year; which sum shall be an advance payment on any sums that may due for fire clays subsequently mined, removed and shipped therefrom. The lease is subject to renewal upon payment of said annual rental. The Landowner retains possession of all the premises, subject to the right of the Lessee to enter for the purposes aforesaid. The Lessee agrees to pay the sum of \$1.00 per ton for the fire clay mined, removed and shipped.

"Is the right granted to the Lessee, taxable, under the laws of Missouri?"

The facts, as presented in your request, seem to be that the landowner has given the right to a certain person or corporation to go upon his land and search and prospect for fire clay, and if such is found, to separate and remove said clay. In consideration for this right, the landowner is paid \$200.00. After the fire clay is extracted, the landowner sells the clay removed for \$1.00 per ton.

This opinion is restricted to the facts presented in your letter.

In an opinion rendered by this department to Honorable Richard Chamier, Prosecuting Attorney of Randolph County, this department held that when coal or other minerals in place are owned separately from the surface estate such coal and minerals must be separately assessed. A copy of this opinion is herewith enclosed. However, it must be noted that this opinion dealt with separate fee simple estates and does not refer to any lesser estates.

Section 9742, R. S. Mo. 1929, provides as follows:

"For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Section 9977 of Article II, Chapter 59, R. S. Mo. 1929, which relates to taxation and revenue, provides as follows:

"The term 'real property,' 'real estate,' 'land' or 'lot', wherever used in this chapter, shall be held to mean and include not only the land itself, whether laid out in town or city lots or otherwise, with all things contained therein, but also all buildings, structures and improvements and other permanent fixtures, of whatsoever kind thereon, all shot towers and all machinery therewith connected, all smelting furnaces and all machinery therewith connected, all grist mills, sawmills (except portable mills of every description), oil mills, tobacco, hemp and cotton factories, tobacco stemmeries, rope walks, manufactories of iron, nails, glass, clocks, and all other property belonging to manufactories of whatever kind, all wool carding machines, all distilleries, breweries, all tanneries, all iron, copper, brass and other foundries, and all rights and privileges belonging or in anywise pertaining thereto, except where the same may be otherwise denominated by this chapter."

The rule, as given in 61 C.J. 180, is:

"Still less does a mere license or privilege to search for and extract minerals affect such a severance of the title as to make the interests of the lessee taxable as realty."

Cooley on Taxation, Vol. II, para. 566, states:

"It is clear that a mere license to search for and extract minerals is not separately taxable."

Hughes v. Vail, 57 Vermont, 41, aptly states the relationship existing under this set of facts:

"It is apparent from this instrument, that Clayton retained the control and dominion of the land for all purposes except as required for the slate business; he parted with no title to the slate, as it lies in the rock constituting a part of the land. No title passes until the slate has been transformed into personal property, and payment made as stipulated; the ownership of the land remains in Clayton. The party of the second part took and hired certain rights and privileges only,* * *."

In Kansas National Gas Company v. The Board of County Commissioners of Neosho County, 75 Kas. 335, 89 Pac. 750, the Supreme Court of Kansas held:

"The lease grants no estate in the land or in the oil or gas which it may contain. It creates an incorporeal hereditament only - a license to enter and explore for oil and gas, and if they are discovered, to produce and sever them. Until discovered and brought to the surface, no severance of title occurs. The minerals not only remain a constituent part of the land, but they belong to the owner of the surface soil beneath which they lie."

Honorable J. H. Mosby, 4.

5-28-37.

CONCLUSION.

It is, therefore, the opinion of this department that where a landowner grants a license to a person or corporation to search for and extract minerals, the title to remain in the landowner, and then such minerals are sold to the person or corporation, that such minerals in place should be assessed and taxed against the landowner and not the licensee.

Respectfully submitted,

APPROVED:

OLLIVER W. NOLEN,
Assistant Attorney-General.

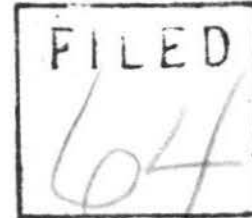
J. E. TAYLOR
(Acting) Attorney-General.

AO*K/LD

MUNICIPAL CORPORATIONS: Record necessary to incorporate cities of the fourth class.

June 8, 1937.

6-16



Mr. Morgan M. Moulder,
Prosecuting Attorney,
Camdenton, Missouri.

Dear Sir:

We wish to acknowledge your request for an opinion under date of June 4th, wherein you state as follows:

"Sections 6093, 6094, and 6095, Revised Statutes of the State of Missouri, 1929, provide and give authority to towns having a certain population to organize and to be incorporated as a city of the fourth class.

"The town of Camdenton, on the 8th day of November, 1934, did, or attempted to, organize as a city of the fourth class, as provided by the aforesaid sections of Article One, Chapter 38, Revised Statutes, 1929.

"I herewith attach to this letter and a request for your opinion the records, to-wit, the minutes and the ordinance book of the city or town of Camdenton, and I would appreciate your opinion as to whether or not all of the proceedings and requirements of the statutes of this state were complied with in the organization and incorporation of the town of Camdenton as a city of the fourth class. After your examination of the records of the city, we desire your opinion as to whether or not the city of Camdenton is legally organized and incorporated as a city of the fourth class."

Ordinance No. 30 of the town of Camdenton reads as follows:

"Ordinance No. 30

"Whereas, it is provided by the Revised Statutes of the State of Missouri 1929, that any town in this State existing by virtue of the present general Laws relating thereto, may elect to become a City of the class to which its population would entitle it under the provisions of this article, by passing an ordinance or proposition submitting the same to the legal voters of said town for their ratification. And whereas the Laws of the State of Missouri provide that all towns in this State containing five hundred and less than three thousand inhabitants which shall elect to become Cities of the fourth Class shall become Cities of the fourth class. And whereas the Board of Trustees of the town of Camdenton, State of Missouri, have requested the Governor of the State of Missouri to have a census taken, and whereas the Governor of the State of Missouri on the 29th day of August, 1934, did appoint a census supervisor and cause a census to be taken in the City of Camdenton, Missouri, which census revealed there to be 739 persons within the corporate limits of the town of Camdenton;

"Be it ordained, resolved and enacted by the Board of Trustees of the Town of Camdenton, Missouri, that it be and is hereby proposed to the inhabitants of the town of Camdenton, Missouri, to incorporate our City as a City of the fourth class, to be known as the City of Camdenton, as provided by Chapter thirty eight (38) of the Revised Statutes of Missouri 1929. That an election for that purpose be held on

the 4th day of December, 1934, and that the City Clerk be instructed to give proper notices of such election, and make all necessary preparations.

TED WILLARD

Ted Willard, Chairman of
Board of Trustees.

Attest. E. E. LEWIS

E. E. Lewis, Secretary
of Board of Trustees."

The Proclamation of the Chairman of the Board of Trustees reads as follows:

"Camdenton, Missouri
Dec. 5, 1934

'Proclamation'

"Declaring the Town of Camdenton duly organized and created, as a City of the Fourth class.

"Whereas, it is provided by the Revised Statutes of the State of Missouri 1929 that any city in this state existing by virtue of the present general law, may elect to become a city of the class to which its population would entitle it under the provisions of this Article by passing an Ordinance or proposition submitting the same to the legal voters of said city or town, etc., cities and towns of 600 and less than 5000 inhabitants shall be cities of the Fourth Class, etc.

"Therefore, be it resolved by the Board of Trustees of the inhabitants of the town of Camdenton, that it be and is hereby proposed to the inhabitants of the Town of Camdenton to incorporate our said town as a city of the Fourth Class, to be known as the City of Camdenton, as provided by Chapter 38 of Revised Statutes Missouri 1929.

June 8, 1937.

"Whereas, The Board of Trustees of the town of Camdenton, on the _____ day of _____, 1934, passed and submitted to the legal voters of said Town a proposition to organize said town into a city of the Fourth Class under Article 8, Chapter 38, Revised Statutes of 1929 and gave due notice thereof, and,

"Whereas, said election was duly held therefor on the 4th day of December, 1934, and the vote on said proposition duly taken, returned and canvassed and that there was a majority of the vote cast in favor of the proposition.

"I, therefore, declare said proposition carried and ratified by a majority of Forty-seven votes cast at said election, and that said town of Camdenton, by virtue of said vote, is incorporated under the general law into a city of the Fourth Class from and after this date.

TED WILLARD,
Chairman, Board of Trustees.

Attest:

E. E. LEWIS, Clerk."

Section 6093, R. S. Mo. 1929, provides the population necessary in order that cities or towns may elect to become cities of the fourth class:

"All cities and towns in this state containing five hundred and less than three thousand inhabitants, and all towns existing under any special law, and having less than five hundred inhabitants, which shall elect to be cities of the fourth class, shall be cities of the fourth class."

Section 6095, R. S. Mo. 1929, provides how cities or towns may be incorporated in their respective classes, in part, as follows:

"Any city or town in this state, existing by virtue of the present general law, or by any local or special law, may elect to become a city of the class to which its population would entitle it under the provisions of this article, by passing an ordinance or proposition, and submitting the same to the legal voters of such city or town, at an election to be held for that purpose, not less than twenty nor more than thirty days after the passage of such ordinance or proposition; and if a majority of such voters voting at such election shall ratify such ordinance or proposition, the mayor or chief officer of such city or town shall issue his proclamation, declaring the result of such election, and thereafter such city or town shall, by virtue of such vote, be incorporated under the provisions of the general law providing for the government of the class to which such city belongs, which class shall be determined by the last census taken, whether state or national."

The town of Camdenton sought to organize as a city of the fourth class under the above statutory provisions (1) by determining that its population was five hundred and less than three thousand inhabitants, (2) by passing an ordinance on the 8th day of November, 1934, and submitting same to the legal voters of the town at an election held on the 4th day of December, 1934, for the purpose of determining whether it would elect to become a city of the fourth class, (3) by submitting the ordinance to the voters not less than twenty nor more than thirty days after the passage of such ordinance, and (4) by having the chief officer of the town of Camdenton issue his proclamation that a majority of the voters voting at such election had ratified the above ordinance.

No mention is made in the above records showing the time and place where the election was to be held on the proposition, and the question arises whether such amounts to a defect in the incorporation.

The statute makes no requirement that the ordinance shall show the time and place where the election is to be held, it merely provides that an election be held, which, as shown by the proclamation, was held.

43 Corpus Juris, Sec. 45, p. 96, in referring to the record that must be made in the incorporation or classification of municipalities, states:

"The record need not contain matters not required by the particular statute * * *."

In the case of State ex rel. v. Westport, 116 Mo. 582, 591, 22 S. W. 888, the incorporation of a city was challenged because the ordinance submitting the proposition to the people stated that such vote should be taken at the town hall, and did not provide that the people of each ward should vote in their respective wards on such proposition. The Court in holding that this was at most an irregularity, and did not make the election absolutely void, said:

"The first section of the ordinance now under consideration provides that the proposition to become a 'city of the fourth class' shall be submitted to the legal voters of the town of Westport at an election to be held for that purpose on the fourth day of June, 1881.

"In pursuance of this ordinance, an election was held at the town hall, and a majority of those voting voted in favor of the proposition, whereupon the mayor issued his proclamation, declaring Westport to be a city of the fourth class. At the time of the election there were four wards in the town of Westport and it is contended by counsel for relator that there were four separate election districts and that the law required each voter to vote in the ward in which he lived; and as there was but one place of voting designated by the ordinance, to-wit: the town hall, that therefore, the election as well as the ordinance was also void.

June 6, 1937

"The mere fact of there being but one voting place, was at most an irregularity and did not make the election absolutely void. In the case of Davis v. State, 75 Tex. 424, where the evidence showed that the city of 'San Marcos' incorporated and divided into four wards; that but two election precincts had been established in the city by the commissioners, and that they were established without reference to the wards, and that they included parts of the surrounding county, it was held that when the place of voting had been fixed, and the election had been held, it ought not to be set aside because they have failed to make each ward of a city an election precinct, unless it be shown that the election was fraudulent. Bell v. Faulkner, 19 S. W. Rep. 480; Peard v. State, ex rel., 51 N.W. Rep. 828.

"There is no claim or pretense that there was any fraud or unfairness connected with the promulgation of the ordinance or in the election thereunder, but everything seems to have been conducted with the utmost good faith and fairness."

The ordinance in the instant case made provision for the holding of the election, and ordered that the City Clerk be instructed to give proper notices of such election and take all necessary precautions. The mere fact that the ordinance did not declare the exact form of notice, ballot, etc., could be at most an irregularity, and we are of the opinion that there being no claim or pretense that there was any fraud or unfairness connected with the promulgation of the ordinance, or in the election thereunder, the town of Camdenton is legally organized and incorporated as a city of the fourth class.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

ASSESSORS:

Compensation in counties containing less
than 40,000

June 21, 1937.

6-73

Mr. Morgan M. Moulder
Prosecuting Attorney
Camden County
Camdenton, Missouri



Dear Sir:

This Department is in receipt of your letter of May 15, 1937, in which you request an opinion upon the following question:

"To what compensation is the assessor of Camden County; a county containing less than 40,000 inhabitants, entitled with reference to the real property owned by the Union Electric Light and Power Company, a corporation, which owns all the lands inundated by the Lake of the Ozarks, and the Union Electric Land and Development Company, a corporation, which owns several thousand acres of land bordering said lake."

Section 9806, R. S. Missouri, 1929, as amended in Laws of Missouri, 1931, page 358, in part, is as follows:

"The compensation of each assessor shall be thirty-five cents per list in counties having a population not

exceeding forty thousand, thirty cents per list in counties having a population of more than forty thousand; and not exceeding seventy thousand, and twenty-five cents per list in counties having a population in excess of seventy thousand inhabitants, and shall be allowed a fee of three cents per entry for making real estate and personal assessment books, all the real estate and personal property assessed to one person to be counted as one name, one-half of which shall be paid out of the county treasury and the other half out of the state treasury; Provided, that nothing contained in this section shall be so construed as to allow any pay per name for the name set opposite each tract of land assessed in the numerical list:"

This section was again amended in Laws of Missouri, 1933, page 375, but this amendment concerned counties containing 75,000 to 90,000 inhabitants and does not concern us here.

A "tax list" as this term is used in Section 9806, supra, is that account or enumeration of taxable property, both real and personal, made by the owner thereof upon oath and delivered to the assessor, or prepared by the assessor in accordance with the provisions of Section 9760, R. S. Missouri, 1929, when for any cause a list is not given the assessor. This is an inescapable definition in view of Section 9756, R. S. Missouri, 1929, which enumerates the items of property to be contained in a "tax list".

In *State v. Gomer*, 101 S. W. (2d) (Missouri Supreme) 57, the court had before it a question which required a comprehensive review of the law relating to assessors. In that case the compensation and duties of an assessor are discussed in detail and certain conclusions are drawn by the court which we shall set out here.

"First. That an assessor should obtain a list in the form prescribed

by Section 9756, R. S. 1929 (Mo. St. Ann. Section 9756, p. 7872), from every person who owns 'taxable personal property in his county,' and should require such list to contain 'a list of all the real estate and its value' owned by such persons.

Second. That whenever from any cause a list of any taxable personal property is not delivered to him by the owner or his representative, then the assessor shall make a list thereof as required by Section 9760, R. S. 1929 (Mo. St. Ann. Section 7877), or if the owner of such property is deceased then as required by Section 9763, R. S. 1929 (Mo. St. Ann. Sec. 9763, p. 7879).

Third. That an assessor is not required to take the list described in Section 9756, R. S. 1929, from persons who own no 'taxable personal property in his county', and is, therefore, not required to make the list required by Section 9760, R. S. 1929, for only real estate owned by non-residents of his county.

Fourth. That an assessor is required to make 'Part First' of his book, denominated 'The Land List' from the list of taxable lands in his county furnished by the Secretary of State, the government maps and plats on file in his county, the last assessor's book and other information or records (see Section 9797, R. S. 1929 (Mo. St. Ann. Section 9797, p. 7901); and that he shall use the information obtained from the lists taken from personal property owners and from other sources to aid him in obtaining a correct description of all tracts of land, in placing

the name of the true owner opposite each tract, and in ascertaining its value.

Fifth. That an assessor is required to make 'Part Second' of his book denominated 'Personal Property' from the lists taken by him from property owners, or made out by him whenever, for any cause, it has not been possible to obtain from the owner a list of any taxable personal property which he has been able to locate.

Sixth. That as compensation for making the numerical assessment in the land list, an assessor should be paid such amount as may be allowed by the county court not to exceed the sum of 3 cents for each and every tract so assessed; but that all contiguous tracts in the same section and all contiguous lots in the same square or block which can be consolidated into one tract, lot, or call shall be counted as one tract.

Seventh. That as for compensation for taking the lists required to be delivered to him by owners by personal property (in counties of not more than 40,000 population) an assessor should be paid 35 cents for each list taken and should also be paid a fee of 3 cents per entry for each entry, of a property owner's name and the personal property assessed to him, in the alphabetical list in the part of his book covering personal property.

Eighth. That an assessor is entitled to thirty-five cents per list for each list he takes which contains personal property, whether he takes it from the owner or makes it on his own view or

other information obtained as specified under Section 9760 or Section 9763, R. S. 1929 (Mo. St. Ann. Sec. 9760, 9763, pp. 7877, 7879), but he is not required to make or entitled to receive any compensation for making a list containing only real estate.

Ninth. That the county and the state shall each pay one-half of the compensation for taking lists, and for making proper entries in both the land list and the personal property list."

In *Sparks v. Clark*, 57 Mo. 58, and *Davidson v. Laclede Land and Development Company*, 253 Mo. 223, it is said by the court that all subdivisions of a section of land belonging to the same person should be counted as one tract although such subdivisions may not be contiguous.

In the instant case, for example, assume that the Union Electric Light and Power Company owns land situated in one hundred different sections in Camden County, and also has personal property situated in said county. In making out this "tax list" the company describes and accounts for all their taxable property, both real and personal, in one list, or if the company fails to make a list the assessor prepares one in the same manner. The compensation of the assessor, in this instance, would be thirty-five cents for taking the tax list containing all the real and personal property of the company, (this thirty-five cents only allowable if the tax list contained personal property); three cents for entering all the personal property opposite the name of the company under "personal property" in his book kept for that purpose; and a sum not to exceed three cents for each tract entered under the "land list" in said book (counting all land lying in the same section as one tract), making a total of not to exceed three dollars and thirty-eight cents (\$3.38) for the personal property and land lying in the one hundred sections, if the county court should allow the full three cents for the numerical entering of each tract in the "land list".

CONCLUSION

Therefore, it is the opinion of this Department, as we have attempted to illustrate, and in view of the Gomer Case, supra, that the assessor of Camden County, a county containing less than forty thousand inhabitants, is entitled to thirty-five cents per list as compensation for taking the tax list of the personal property of the Union Electric Light and Power Company and of the Union Electric Land and Development Company. That for making the alphabetical entry of the personal property of said companies, under "personal property" in the book kept for that purpose, the assessor is entitled to three cents for listing all of said personal property opposite the name of its owners. That for making the numerical (or alphabetical if used) entry of the real property of said companies, under the "land list" in said book, the assessor is entitled to a sum, to be fixed by the county court, not to exceed three cents per entry for each tract so entered. That for the purpose of determining the compensation for the entry of real property under the "land list" in said book all land lying in the same section shall be considered as one tract.

Respectfully submitted,

LLB MR

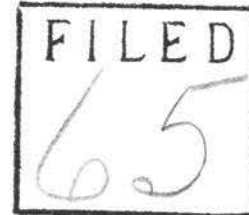
AUBREY R. HAMMETT, JR.,
Assistant Attorney-General.

APPROVED:

J. E. TAYLOR (Acting)
Attorney-General.

RECORDER OF DEEDS: Fee must be paid or tendered to recorder
before instrument entitled to record;
Recorder not liable on his bond for neglect
unless fee is paid or tendered.

January 22, 1937. 127



Honorable Chas. E. Murrell, Jr.,
Prosecuting Attorney
Adair County
Kirkville, Missouri

Dear Sir:

This is to acknowledge receipt of your letter
of January 9, 1937, in which you request the opinion of
this Department. Your letter is as follows:

"The Circuit Clerk and Ex-officio
Recorder of Adair County has request-
ed this office to obtain from you
an opinion as to the construction
and effect of Section 11566 R. S.
Mo. 1929, when taken in connection
with Sections 11564 and 11565. The
question is this: Will the Recorder
acting under Section 11566 in refus-
ing to record any instrument when
the fee allowed by law is not paid
or tendered be liable for damages
under Section 11564 and 11565? "

We shall set forth in their entirety the sections
of the statutes referred to in your letter.

Section 11564, R. S. Mo. 1929, pertaining to the
liability of the recorder for neglect of duty, provides:

"If any recorder to whom any deed
or other writing, proved or acknow-
ledged according to law, shall be
delivered for record: First, neglect
or refuse to make an entry thereof,
or give a receipt therefor, as re-
quired by section 11546; or, second,

neglect or refuse to record such deed or other writing within a reasonable time after receiving the same; or, third, record any deed or other instrument in writing before another first brought into his office and entitled to be recorded; or, fourth, record any deed or other instrument of writing untimely or in any other manner than as herein before directed; or, fifth, neglect or refuse to provide and keep in his office such an index as is required by this chapter, he shall pay to the party aggrieved double the damages which may be occasioned thereby, to be recovered by civil action on the official bond of the recorder."

Section 11565, R. S. Mo. 1929, provides for the prosecution of the recorder under the criminal laws for willfully neglecting or refusing to perform any of the duties as required by this chapter or in willfully performing them in any other manner than is required by law; and also provides for forfeiture to the county in a sum not exceeding \$300.00 to be recovered by civil action; which section is as follows:

"If any recorder shall willfully neglect or refuse to perform any of the duties required of him by this chapter, or shall willfully perform them in any other manner than is required by law, he shall be deemed guilty of a misdemeanor in office, and proceeded against accordingly; and shall, moreover, forfeit and pay to the use of the county a sum not exceeding three hundred dollars, to be recovered by civil action."

Section 11566, R. S. Mo. 1929, provides:

"The recorder shall not be bound to make any record for which a fee may be allowed by law, unless such fee shall have been paid or tendered by the party requiring the record to be made."

Your question is, will the recorder acting under Section 11566 in refusing to record any instrument when the fee allowed by law is not paid or tendered be liable for damages under Section 11564 and 11565?

Corpus Juris, Vol. 53, p. 1081, Sections 38 and 40, says the following:

"In the absence of contrary statutory provisions, the register may demand payment in advance of his fees for performing a given service."

"Mandamus will not lie to compel a register to perform a duty pertaining to his office without payment of his fee therefor in advance, even though the fee demanded is claimed to be excessive, where it appears that relator is able to pay the fee and can recover the alleged excess by ordinary action."

Under the last quoted section of the statute, it is therefore our opinion that one desiring to have an instrument recorded in the recorder's office which is entitled to record, the required fee must first have been paid or tendered by the person presenting same for record to the recorder of deeds, and if such payment is not made or tendered as provided by Section 11566, supra, the recorder of deeds would not be liable by civil action on his official bond under Section 11564, supra, nor to the penalties under Section 11565, supra, for failure to record such instrument so presented for record.

Very truly yours,

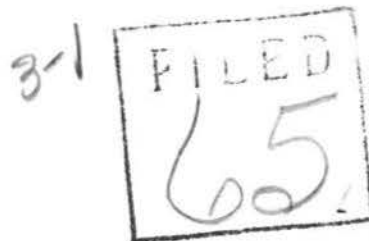
COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRIMINAL COSTS: Prosecuting Attorney not personally
liable for costs in felonies and
misdemeanors.

February 27, 1937



Mr. Arthur C. Mueller
Prosecuting Attorney
Gasconade County
Hermann, Missouri

Dear Sir:

This Department is in receipt of your letter
of February 25, wherein you make the following in-
quiry:

"Will you kindly give me your
opinion on the following matter,
to-wit:

"Is a prosecuting attorney liable
for costs in criminal cases when
he officially signs the complaint
and the cases are dismissed or
the defendant acquitted? Kindly
give me your opinion on this
question in both misdemeanors
and felony cases.

"Thanking you for your prompt
attention in this matter,"

There are no statutes making a prosecuting
attorney liable for costs that we can locate, nor have
we been able to locate any decisions placing the
liability for costs in a criminal case on the prosecut-
ing attorney. There are certain sections of our
statutes which make the prosecutor liable for costs;
the word "prosecutor", as used in the statutes, refers
to the prosecuting witness or to the person injured
and desiring a prosecution.

Section 3510, Revised Statutes Missouri 1929,
makes the prosecuting witness liable for the costs in
certain instances. We think it also decides the ques-
tion propounded by you, said section being as follows:

"When the information is based on an affidavit filed with the clerk or delivered to the prosecuting attorney, as provided for in section 3505, the person who made such affidavit shall be deemed the prosecuting witness, and in all cases in which by law an indictment is required to be indorsed by a prosecutor, the person who makes the affidavit upon which the information is based, or who verifies the information, shall be deemed the prosecutor; and in case the prosecution shall fail from any cause, or the defendant shall be acquitted, such prosecuting witness or prosecutor shall be liable for the costs in the case not otherwise adjudged by the court, but the prosecuting attorney shall not be liable for costs in any case."

The last clause to the effect "but the prosecuting attorney shall not be liable for costs. in any case," therefore, we are of the opinion the prosecuting attorney is not liable personally for any costs in prosecuting misdemeanors and felonies.

We are further fortified in this conclusion by the fact that Kelley's Criminal Law and Procedure, an authority on criminal law, at page 10086 states:

"(a) And in every other case of acquittal if the justice or jury trying the case shall state in the finding that the prosecution was malicious, or without probable cause, the justice must enter judgment for costs against the prosecutor or party at whose

Mr. Arthur C. Mueller

³
-2-

February 27, 1937

instance the information was
filed, and issue execution
therefor; but in no case will
the prosecuting attorney be
personally liable for costs."

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

FEDDLERS:) Merchant who takes merchandise from one farm sale
) to another to sell at auction must have peddler's
LICENSE:) license.

May 10, 1937.

5-13

Honorable Richard H. Musser
Prosecuting Attorney
Johnson County
Warrensburg, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of recent date in which you request the opinion of this Department on the facts stated therein. Your letter is as follows:

"Dixon Brothers of Carolton, Missouri, dealers in harness, have been operating in this County by going to various sales and putting up their harness for auction along with the commodities the farmer having the sale is selling.

"At One such sale here the harness was put up and bid in for \$34.50 but Mr. Dixon refused to let it be sold for a lower bid than \$36.00, stating at the time he would not let it be sold unless \$36.00 was bid. He has been causing considerable disturbance in this County among hardware merchants and harness dealers because of his method of operation.

"He claims to have an opinion from your office stating that he is permitted to carry on business in this manner without taking out license in each County wherein he operates. His method of operating is to send a light pick-up truck to the sale, loaded with collars, halters, sets of harness and other incidental articles. His employee who attends the truck has been charged with selling direct from the truck but we have no definite proof of that, however, near the end of the sale he puts the harness up for auction, as mentioned above.

"Will you please tell me, first, did you give these gentlemen any opinion approving their methods and stating that they could operate in this manner without a pedlers license? If so, may I have a copy of same? Second, Do you not believe the proper charge would be based on failure to procure a peddlers' license."

The statutes of Missouri have undertaken to regulate the selling of certain goods, wares and merchandise in this State and require a license to be taken out by the sellers, namely, merchants, itinerant vendors and peddlers. There are three separate and distinct classes defined by the statute: merchant, itinerant vendor, and peddler, and by your question you asked us whether or not the facts, as set forth in your letter, bring the seller mentioned therein within the classification of a peddler or either of the other classifications defined in the statute.

A "merchant" is defined by Section 10075, R. S. Mo. 1929, in the following language:

"Every person, corporation or copartnership of persons, who shall deal in the selling of goods, wares and merchandise, including clocks, at any store, stand or place occupied for that purpose, is declared to be a merchant." (italics ours.)

No doubt, the persons mentioned in your letter have a merchant's license to sell goods, wares and merchandise in their store, stand or place in Carrollton, Missouri. The fact that they have a merchant's license does not, in our opinion, give them authority to sell goods, wares or merchandise away from their store by peddling same from place to place or house to house at other places in the State.

An "itinerant vendor" is defined by Section 10103, R. S. Mo., 1929, in the following language:

"The words 'itinerant vendor,' for the purposes of this article, shall mean and

Hon. Richard H. Musser -3- May 10, 1937.

include all persons, both principal and agents, who engage in, or conduct, in this state, either in one locality or in traveling from place to place, a temporary or transient business of selling goods, wares and merchandise with the intention of continuing in such business in any one place for a period of not more than one hundred and twenty days, and who, for the purpose of carrying on such business, hire, lease or occupy, either in whole or in part, a room, building, or other structure, for the exhibition and sale of such goods, wares and merchandise. The provisions of this article shall not apply to sales made to dealers by commercial travelers or selling agents in the usual course of business, nor to bona fide sales of goods, wares and merchandise by sample for future delivery, nor to hawkers on the streets or peddlers from vehicles, nor to any sale of goods, wares or merchandise on the grounds of any agricultural society during the continuance of any annual fair held by such society."

We do not believe that the description of the transactions as set forth in your letter makes them an itinerant vendor within the meaning of the statute.

The remaining classification of a seller of goods, wares and merchandise is defined in Section 13312, R. S. Mo. 1929, as a "peddler" and is as follows:

"Whoever shall deal in the selling of patents, patent rights, patent or other medicines, lightning rods, goods, wares or merchandise, except pianos, organs, sewing machines, books, charts, maps and stationery, agricultural and horticultural products, including milk, butter, eggs and cheese, by going about from place to place to sell the same, is declared to be a peddler."

The question is whether or not these dealers come within the definition of a "peddler" requiring them to secure a peddler's license under the provisions of Chapter 96, R. S. Mo. 1929. Since

May 10, 1937.

a peddler is defined by the statute it then becomes a question as to whether the dealers mentioned in your letter come within the meaning of this statute.

In 29 Corpus Juris, p. 219, it is said:

"To constitute one a peddler he should have no fixed place of dealing but travel around from place to place, or from house to house; he should carry his wares with him, and expose them for sale, and not merely carry and show samples of them; he should sell them at the time he offers them, and not merely enter into an executory contract for a future sale; he should deliver them then and there, and not merely contract to deliver them in the future; the sales made by him should be at retail, to consumers, and not confined exclusively to dealers in the articles sold by him."

The sellers of merchandise, according to your letter, can be said to have no fixed place of dealing (as to the sales mentioned in your letter) and they do travel around from place to place to sell their harness; they carry their wares with them, and expose them for sale; they sell them at the time they are offered and deliver them at the time of the sales; the sales are made at retail and are made to consumers. We do not think that for an isolated sale or an occasional sale the persons mentioned in your letter would be required to take out a peddler's license, but if it is a continuous practice over a period of time by going from sale to sale over an extended territory they would be required to take out a peddler's license. It is the practice rather than a sporadic act of peddling that the law regards. The fact that the harness is put up at auction at a sale does not change, in our opinion, their status but brings them within the definition of a peddler as set forth in the statute above and the definition as given in Corpus Juris, supra. If the rule were otherwise any person could load his truck or other vehicle with thousands of dollars of merchandise and move from sale to sale throughout the State without paying any license whatsoever to the state or county and thereby defeat the purposes of the statute and thereby be in competition with the legitimate merchant having a fixed place of doing business and paying a license and taxes in support of the government.

Hon. Richard H. Musser

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May 10, 1937.

It is, therefore, our opinion that the persons mentioned in your letter come within the definition of a "peddler" as defined by the statutes, and required to secure a license as required by Chapter 96, R. S. Mo. 1929.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

TAXATION***Initial Proceedings under Senate Bill 94 constitute first advertisement of sale.

June 5, 1937



Mr. Arthur C. Mueller
Prosecuting Attorney
Gasconade County
Hermann, Missouri

Dear Mr. Mueller:

We are in receipt of your request for an opinion on the following matter:

"When do taxes on real estate due and payable on or before Dec. 31, 1931, become outlawed by the statute of limitation?

Does the fact that the tax certificates for the above taxes having been advertised and offered for sale in November 1936, and not sold for lack of bidders take said taxes out of the 5 year Statute of Limitation and in that case, could said 1931 taxes still be legally collected in spite of the fact that they are delinquent over five years."

On September 4, 1934, this office rendered an opinion to Honorable Charles M. Hay, then City Counsellor of the City of St. Louis, in which it was determined that Senate Bill 54 of the 1933-1934 Extra Session, found at page 154, Laws of Missouri Extra Session, 1933-1934, modified the Jones-Munger Law, page 425, Laws of Missouri 1933, and arrived at this conclusion:

"It is therefore the opinion of this office that the provisions of Senate Bill 94, passed by the 57th General Assembly in Regular Session have been modified by the passage of Senate Bill 54 of the 57th General Assembly in Extra Session, so as to permit initial proceedings to be instituted at any time within five years of the date of delinquency."

We herewith enclose to you a mimeographed copy of that opinion and direct your attention particularly to part two thereof. This opinion of course was based upon the enactment of Section 9961 by the 57th General Assembly in Extra Session, page 154, Laws of Missouri Extra Session, 1933-1934, reading as follows:

"No proceedings for the sale of land and lots for delinquent taxes under the provisions of Chapter 59, Revised Statutes of Missouri, 1929, relating to the collection of delinquent and back taxes and providing for foreclosure sale and redemption of land and lots therefor, shall be valid unless initial proceedings therefor shall be commenced within five (5) years after delinquency of such taxes, and any sale held pursuant to initial proceedings commenced within such period of five (5) years shall be deemed to have been in compliance with the provisions of said act in so far as the time at which such sales are to be had is specified therein, provided that proceedings for the sale of lands and lots on which taxes are delinquent for the year 1928 may be commenced at any time prior to December 31, 1934. Provided further, that in suits or actions to collect delinquent drainage and/or levee assessments on real estate such suits or actions shall be commenced within five years after delinquency, otherwise no suit or action therefor shall be commenced, had or maintained."

The pertinent part of that section is:

***any sale held pursuant to initial proceedings commenced within such period of five (5) years shall be deemed to have been in compliance with the provisions of said act* * *.

When we consider the history of this legislation, it is certain that "initial proceedings" as used in this section had specific relation to "initial proceedings" under Senate Bill 94, otherwise known as the Jones-Munger Law, as this section was enacted the session following the one at which the Jones-Munger Law was adopted and after this office had rendered an opinion that Section 9961 R. S. Missouri 1929, did not operate as a statute of limitations upon the procedure prescribed by Senate Bill 94.

We are next confronted with the problem of what constituted "initial proceedings" under the Jones-Munger law. An examination of the law itself indicates that the first step in the enforcement of the collection of delinquent taxes is the advertisement of the sale. This is the "beginning" of the proceeding.

Bouvier's Law Dictionary defines "initial" as "Beginning; placed at the beginning," and shows that the word was taken from the Latin "initum" meaning "beginning".

In the case of Beard vs. St. Louis A. & T.H. Railway Company, 44 N.W. 803, 804, 79 Iowa 527, it is held that the first carrier receiving goods is an "initial carrier".

Words of course are used in their common and ordinary sense and are to be so construed when interpreting laws. The conclusion is inescapable that the first advertisement constitutes the initial proceedings which is sufficient to stay the running of the statute of limitations. If the land is not sold pursuant to the first advertisement and is again advertised the second year the first advertisement is still the "initial" proceeding looking toward the enforcement of the collection of the tax as the prior advertisement and failure to receive a sufficient offer authorizes

Mr. Arthur C. Mueller

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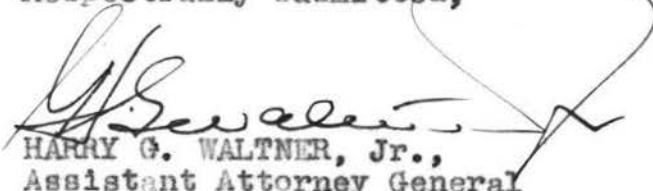
June 5, 1937

the subsequent further advertisement and offer, and the third advertisement and offer authorizes the sale of the property for what it will bring. To justify or permit any final sale for less than the full amount of the tax, penalty, interest and costs there must have been two prior advertisements and offers of sale. This we believe shows that under such circumstances it is but one proceeding, the beginning of which was the first advertisement of sale.

CONCLUSION.

It is therefore the opinion of this office that taxes for the year 1931 which became delinquent January 1, 1932, must be advertised and offered for sale in November of 1936, but if not sold for lack of sufficient bid the taxes should be again advertised the November of 1937, and if on that sale no sufficient bid is received the land may be offered for sale the third and final time in November of 1938, at which time the County Collector is authorized to sell the certificate for whatever sum it will bring.

Respectfully submitted,


HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HGW:MM
Enclosure.

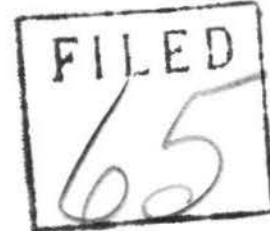
COUNTY DEPOSITARIES:

Length of time funds may be held
under Section 12188, R. S. Missouri,
1929.

June 17, 1937

7-9

Hon. F. E. Murrell,
Prosecuting Attorney,
Schuyler County,
Lancaster, Missouri.



Dear Mr. Murrell:

We wish to acknowledge your request for an opinion
under date of June 8th, wherein you state as follows:

"I would like an early opinion from
your office as to the construction you
place on Section 12188 R. S. 1929,
especially the first part thereof which
reads as follows:

'As soon as such bonds shall have
been given and approved, the court
shall make an order designating such
successful bidders as depositaries
of said funds UNTIL SIXTY FIVE DAYS
AFTER THE TIME FIXED BY THIS ARTICLE
FOR ANOTHER SELECTION;" etc.

"Our county court advertised as provided
by law for a county depositary, bids re-
ceived, etc. Bonds given and approved by
the Court. The Court has made an order
designating the successful bidders as
depositaries.

"Now the question arises regarding the
transferring of the funds by the County
Treasurer, as to when he must do so in
order to protect his bond, etc.

"How long can the old depositaries withhold
the funds after the county court has ap-

proved the bonds and made an order designating the successful bidders as depositaries?

"Can the old depositaries hold the funds they may have for a period of 65 days after the approval of the bond and the order of court designating the new depositaries? What is the meaning of this 65 day provision?

"How long has the County Treasurer after the order approving the bond and making the order designating the depositaries by the County Court has he to make the transfer of any funds from old depositary to the newly designated one?"

Section 12184, R. S. Mo. 1929, makes it the duty of the county court, at the May term in every odd year, to receive proposals from banks desiring to be selected as depositaries of the funds of the county, as follows:

"It shall be the duty of the county court of each county in this state, at the May term thereof, in the year 1909, and every two years thereafter, to receive proposals from banking corporations, associations or individual bankers in such county as may desire to be selected as the depositaries of the funds of said county."

Section 12185, R. S. Mo. 1929, provides that such banks in the county as desire to bid shall deliver to the clerk of the court on or before the first day of the term a proposal setting out the rate of interest that the bank offers to pay the county, in part, as follows:

"Any banking corporation, association or individual banker in said county desiring to bid shall deliver to the clerk of said court, on or before the

June 17, 1937

first day of the term of said court at which the selection of depositaries is to be made, a sealed proposal, stating the rate of interest that said banking corporation, association or individual banker offers to pay on the funds of the county * * *."

Section 12186, R. S. Mo. 1929, makes it the duty of the county court, at noon on the first day of the May term in every odd year, to open the bids and select depositaries of public funds, in part, as follows:

"It shall be the duty of the county court, at noon on the first day of the May term in 1915, and every two years thereafter, to publicly open said bids, and cause each bid to be entered upon the records of the court, and to select as the depositaries of all the public funds of every kind and description going into the hands of the county treasurer, and also all the public funds of every kind and description going into the hands of the ex officio collector in counties under township organization, the deposit of which is not otherwise provided for by law, the banking corporations, associations or individual bankers whose bids respectively made for one or more of said parts of said funds shall in the aggregate constitute the largest offer for the payment of interest per annum for said funds: * * *."

Section 12188, R. S. Mo. 1929, provides that the order designating the successful bidder as depositary be for a term beginning from noon on the first day of the May term in every odd year, the date fixed for the selection of depositaries, plus sixty-five days, and further that immediately upon the making of the order the county treasurer shall transfer the funds to the successful bidder, as follows:

June 17, 1937.

"As soon as such bonds shall have been approved, the court shall make an order designating such successful bidders as depositaries of said funds until sixty-five days after the time fixed by this article for another selection; and thereupon it shall be the duty of the county treasurer, and of the ex-officio collector if the county be under township organization, immediately upon the making of said order, to transfer to said depositaries the part or parts of all said funds respectively let to such depositaries under such selection, and immediately upon the receipt of any money thereafter to deposit the same with the said depositaries to the credit of the county, and the said treasurer shall, as nearly as may be, maintain with each of the depositaries so selected its due and proportionate share of the total of the funds let; and for any failure of the county treasurer to make transfer of such funds or to deposit all of said funds with said depositaries, whether the same shall come into his hands as treasurer or as ex officio collector of the revenue, or otherwise, he shall be liable to said depositaries, respectively, for ten per cent per month, during such failure, upon the respective part or parts of said funds not so deposited, to be recovered by civil action in any court of competent jurisdiction: * * *."

The above section declares in one breath that the old depositary may hold the funds it has for a period of sixty-five days after the approval of the bond and the order of the court designating the new depositary, and in another breath declares that immediately upon the making of the order the county treasurer shall transfer the funds to the new depositary. This, however, as we view it, has reference only to the original selection made under the statute, that is, when the first order

Hon. F. E. Murrell

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June 17, 1937.

was made by the county court selecting the successful depositary, it was immediately the duty of the county treasurer to transfer the funds to the said successful depositary.

From the foregoing, we are of the opinion that the depositary is selected for a definite and fixed period of time, extending sixty-five days after the first day of the May Term of the county court in the odd numbered years. The next selection thereafter is made two years hence, but the newly selected depositary does not receive the funds until the termination of the previous selection, which is sixty-five days after the first day of the May Term of court.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

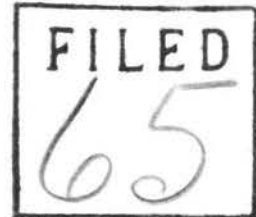
UNEMPLOYMENT COMPENSATION
COMMISSION-

Subject to Purchasing Agent
Act, Printing Commission, etc.

July 15, 1937

7-16

Honorable Andrew J. Murphy
Chairman, Unemployment
Compensation Commission
Jefferson City, Missouri



Dear Mr. Murphy:

You have requested the opinion of this office as to the applicability of the State Purchasing Agent Act, the Printing Commission Law, the Executive Budget Act, the statutes respecting the travel by state officers and employees, the statutes respecting the duties of the State Auditor and the State Treasurer to the Unemployment Compensation Commission, its officers and employees.

Your request covers a considerable amount of law, and we assume that you do not desire a detailed examination of each of these laws, but that a general opinion will be sufficient. We shall, therefore, deal with this problem in as general terms as possible.

An examination of the Unemployment Compensation Law identified as Committee Substitute for Senate Bill No. 36, adopted by the 59th General Assembly and approved by the Governor on June 16, 1937, reveals that that law, consisting of 25 sections, is a complete system of unemployment compensation and employment service. It provides for the establishment of an organization to administer the laws, provides for the levy of a tax to pay the benefits, provides for the making and approving of claims, it establishes the qualifications of recipients of benefits or the disqualification of certain applicants. Without making a detailed analysis of the law we may state that it is complete within itself, and places the

Honorable Andrew J. Murphy

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July 15, 1937

administration thereof in the Unemployment Compensation Commission of Missouri, a part and parcel of the Executive Department of our State Government. Such being the case it necessarily follows that the usual and general statutory provisions apply to the various departments, likewise apply to the Unemployment Compensation Commission, its officers and employees. You are particularly concerned with the application of the designated laws to the "Unemployment Compensation Administration Fund", which is established in Section 13 (a) of the law. If there could be any possible doubt as to the correctness of the foregoing conclusion the following part of Section 13 (a) allays any such fears or doubts. This sentence reads as follows:

"All moneys in this fund shall be deposited, administered and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State Treasury."

The fund therein referred to is the Unemployment Compensation Administration Fund, and by this specific provision it is our opinion that the deposit, administration and disbursement of this fund is subject to the general statutory provision which applies alike to funds administered by other State Departments.

For your convenience we supply you with the citations to the following laws:

Purchasing Agent Act, page 410,
Laws of Missouri 1933. Special
attention is directed to Sections
2, 3, 5, 6, 8 and 11 of this Act.
Pursuant to Section 8, rules and

July 15, 1937

regulations have been adopted by the State Purchasing Agent. Printed copies of these rules and regulations are available at the office of the Purchasing Agent.

State Printing Commission Laws, Article 1, Chapter 115, R. S. Missouri 1929, and particularly Sections 13782, 13783, 13784, 13790, 13793, 13795, 13799, 13804 and 13806 thereof.

Executive Budget Act, page 459, Laws of Missouri 1933. We direct particular attention to Sections 2, 4, 5, 10, 11, 12 and 15 thereof.

Travel regulations. Sections 11405 and 11406, R. S. Mo. 1929. The State Auditor from time to time lays down rules to be followed in the approval of expense accounts. These rules are not in any available form, but an example is the limit of five cents per mile for all transportation expenses when private cars are used on official business.

Duties of State Auditor and State Treasurer. Chapter 72 R. S. Mo. 1929 has specific reference to the State Treasury and Auditing Departments. We direct particular attention to the following Sections in reference to the duties of the State Auditor: Sections 11399, 11404, 11407, 11416, 11418, 11420, 11421. We direct particular atten-

Honorable Andrew J. Murphy

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July 15, 1937.

tion to the following Sections which have direct bearing upon the duties of the State Treasurer: Sections 11425, 11428, 11429, 11430, 11465 and 11469. See also Sections 11465 and 11469 enacted by 59th General Assembly and identified as Senate Bill 98, and approved May 18, 1937, and effective September 6, 1937.

CONCLUSION.

It is the opinion of this Department that the Unemployment Compensation Commission of Missouri is a part of the Executive Department of the State Government, and as such is subject to the provisions of the general law applicable to other departments, and is therefore subject to the provisions of the State Purchasing Agent Act, State Printing Commission law, the Executive Budget law, the statutes regulating travel by state officers and employees, and the statutes respecting the duties of the State Auditor and the State Treasurer as the same may be applied to the deposit, administration and disbursement of the Unemployment Compensation Administration Fund.

Respectfully submitted,


HARRY G. WALTNER, JR.
Assistant Attorney General

APPROVED:

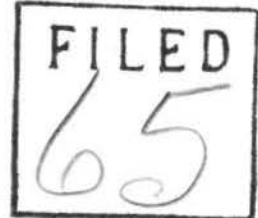

J. E. TAYLOR
(Acting) Attorney General

UNEMPLOYMENT COMPENSATION
COMMISSION-

Authorized to bond employees.

July 16, 1937.

7-16



Honorable Andrew J. Murphy
Chairman, Unemployment
Compensation Commission
Jefferson City, Missouri

Dear Mr. Murphy:

You have requested the opinion of this office as to the protection afforded the Unemployment Compensation Administration Fund by the general statutes and the Unemployment Compensation Law, having particular reference to the bonding of officers and the employees of the Commission.

In reply to your request we cite to you the following as authority for the bonding of Officers and such employees.

Section 13 (a) of the Unemployment Compensation Law establishes the Unemployment Compensation Administration Fund as a special fund in the State Treasury.

Under Section 11465 R. S. Mo. 1929, all moneys in the State Treasury are required to be deposited in depositories selected by the State Treasurer, with the approval of the Governor and Attorney General, and by virtue of Section 11469, page 378, Laws of Missouri 1931, such depositories are required to give security for all such funds. These two above mentioned Sections are now in full force and effect, but on September 6, 1937, Senate Bill 98 of the 59th General Assembly will become operative. This Bill amends these two Sections, strengthening these laws.

Under the provisions of Section 11390 the State Treasurer is required to supply a bond to the State of not less than five hundred thousand dollars, conditioned upon the faithful performance of his duties required by law,

July 16, 1937

"whether as State Treasurer or in any capacity in which he may be required to act ex officio by virtue of being State Treasurer, and for the safety of the State funds and securities in his custody or under his control".

By the foregoing provision each and every act of the State Treasurer, whether acting as State Treasurer or in some other capacity, authority to act for which is derived from the fact that he is State Treasurer, is covered by this bond. In addition to this the State Treasurer, by virtue of provisions of Section 13 (a) of the Unemployment Compensation Law is required to give additional bond for the faithful performance of his duties in connection with the Unemployment Compensation Administration Fund. A portion of this Section reads as follows:

"The State Treasurer shall give a separate and additional bond conditioned upon the faithful performance of his duties in connection with the unemployment compensation administration fund in an amount to be fixed by the Commission, and in a form prescribed by law or approved by the Attorney General. The premiums for such bond * * * shall be paid from the money in the unemployment compensation administration fund."

Honorable Andrew J. Murphy -3-

July 16, 1937

This authorizes and calls for an additional bond as a special protection for this particular fund.

While not necessary, I call your further attention further to provisions of Section 11390, requiring of the State Auditor a like bond in the sum of fifty thousand dollars. In the case of State ex rel. vs Thompson, 85 S.W. 594, our Supreme Court determined that the State Auditor is liable on his bond for the auditing of accounts and issuance of warrants for items the payment of which was not authorized by the Appropriation Act. Thus, in respect to the duties of the State Auditor in the disbursement of the Unemployment Compensation Administration Fund, this bond is a guarantee that the provisions of the law will be complied with.

In respect to the duties of the State Purchasing Agent, who, under the law, is charged with certain duties in respect to the purchase of supplies and equipment. Section 1 of the State Purchasing Agent Act, page 410, Laws of Missouri 1933, provides that the State Purchasing Agent

"* * * shall give bond with two or more sureties in the sum of twenty five thousand dollars".

This bond is, of course, conditioned on the faithful performance of his duties. Accordingly any dereliction of duty on his part in respect to the purchase of supplies, equipment, etc., out of moneys belonging to the Unemployment Compensation Administration Fund would be covered by this bond.

The State printing Commission is composed of the Secretary of State, State Auditor and the State Treasurer. As heretofore set out, the State Auditor and the State Treasurer are under bond conditioned upon the

Honorable Andrew J. Murphy

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July 16, 1937

faithful performance of their duties in ex officio capacities. These bonds would therefore cover them in respect to their duties as members of the Printing Commission, and would guarantee the faithful performance of their duties in respect to the printing and binding for the Unemployment Compensation Commission and the expenditure of the Unemployment Compensation Administration Fund for such purposes. Under the provisions of Section 11369, the Secretary of State is required to supply bond in the sum of ten thousand dollars, conditioned upon the faithful performance of his duties.

In respect to the employees and officers of the Unemployment Compensation Commission, we direct attention to the provisions of Section 5(d) of the Unemployment Compensation Law. This Section reads in part as follows:

"The Commission may delegate to any such person such power and authority as it deems reasonable and proper for the effective administration of this act, and may in its discretion bond any person handling moneys or signing check hereunder".

By this provision the Commission has ample power and authority to require any and all of its officers and employees to supply an adequate bond guaranteeing the faithful performance of their duties in respect to moneys handled by them.

Honorable Andrew J. Murphy

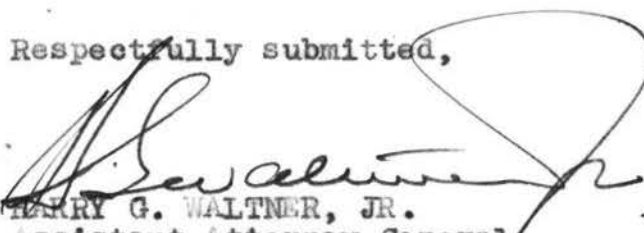
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July 16, 1937

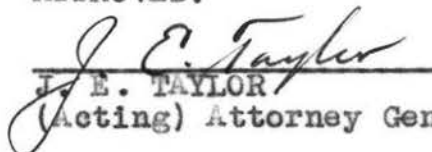
CONCLUSION

From the foregoing resume of the principal statutory provisions respecting the bonds of officers and employees charged with duties in respect to the handling of Unemployment Compensation Administration Fund, it conclusively appears that those officers charged with the handling of the fund are required under the law to be bonded, and that the Unemployment Compensation Commission is authorized by a specific statutory authority to require employers of the Commission handling the fund to supply adequate bond insuring the faithful performance of their duties in respect thereto.

Respectfully submitted,


HARRY G. WALTNER, JR.
Assistant Attorney General

APPROVED:


J. E. TAYLOR
(Acting) Attorney General.

TAXATION AND REVENUE:

A person selling at wholesale at a particular place is a merchant and must comply with Article 17, Chapter 59, R. S. Mo. 1929.

September 22, 1937. 9/23



Honorable Arthur C. Mueller
Prosecuting Attorney
Gasconade County
Hermann, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

"Will you kindly give me your opinion on the following question?

"Is a man, engaged in the wholesale distribution of merchandise selling only at wholesale, required to file a statement showing the greatest amount of merchandise on hand at any one time between the first Monday in March and the first Monday in June? And must he pay tax on his stock the same as retail merchants?"

Section 10075, R. S. Mo. 1929, defines a merchant as follows:

"Every person, corporation or copartnership of persons, who shall deal in the selling of goods, wares and merchandise, including clocks, at any store, stand or place occupied for that purpose, is declared to be a merchant."

The above statute has been reviewed by the courts many times and in each instance the decision reached was that the Court would not give a different definition to the word "merchant" than that contained in Section 10075, supra. The statute clearly makes no distinction between a whole sale merchant and a retail merchant, but is leveled at persons

Sept. 22, 1937.

"who shall deal in the selling of goods." We understand from your letter that the merchant is selling goods at wholesale, and we assume from a store occupied for the purpose of selling the goods therefrom.

In *State of Missouri v. Wittaker*, 33 Mo. 457, the Court, after quoting Section 10075, supra, held that such was exclusive as to the definition of a merchant and stated (page 459): "We can not go beyond the statute to find any other definition of a merchant." See also, *Town of Canton v. McDaniel*, 188 Mo. 207, 223; *Campbell Baking Co. v. City of Harrisonville*, 50 F. (2) 670.

The case of *State of Missouri v. Reiheson et al.*, 45 Mo. 575, was a prosecution wherein it was charged that a corporation was doing business as a merchant without complying with Article 17, Chapter 59, R. S. Mo. 1929. The Court, after quoting Section 10075, supra, said (page 578): "So that it does not matter whether a person buys and sells, as merchants ordinarily do, or manufactures and sells; if he 'shall deal in the selling' at any particular place, he is a merchant."

From the above and foregoing, it is our opinion that a person selling only at wholesale at any particular place is a merchant and must comply with the provisions of Article 17, Chapter 59, R. S. Mo. 1929, and "pay tax on his stock the same as retail merchants."

Yours very truly,

AUBREY R. HAMMETT, Jr.,
Assistant Attorney-General

APPROVED:

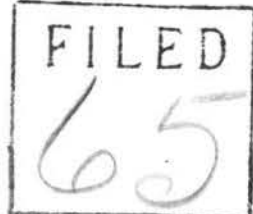
J. E. TAYLOR
(Acting) Attorney-General

ARH:EG

INTOXICATING LIQUOR :
BOND:

Prosecuting Attorney may bring
suit on liquor bond to recover
fine adjudged against licensee

November 8, 1937



Honorable Charles E. Murrell, Jr.
Prosecuting Attorney
Adair County
Kirksville, Missouri

Dear Sir:

This will acknowledge receipt of your request for
an opinion, which reads as follows:

"I would like an opinion from
your office, of the construction
and application of Section 19 of
the Intoxicating Liquor Laws pass-
ed by Missouri Legislature at the
Extra-Session 1933-34, page 83.
Also section 13-a found on page 82
of the same session acts, particu-
larly the last paragraph of 13-a.
I particularly want the following
information: Can the fine and
costs assessed for the violation
of any section of the intoxicating
liquor laws be collected from the
bond that is required in the above
mentioned sections?

"The case that I am inquiring about,
is one where the defendant sold in-
toxicating liquor to a minor. He
has a surety bond on file in the
Supervisor's office. If I can bring
suit in this County to collect the
fine, please advise me the procedure
to be taken."

The bond referred to and which said licensee is
required to furnish before he shall be granted a license
is by virtue of Sections 13a and 19 of Laws of Missouri,

Extra Session, 1933-34, pages 82-83, respectively, which said sections read as follows:

"Any person who possesses the qualifications required by this act, and who meets the requirements of and complies with the provisions of this act, and the ordinances, rules and regulations of the incorporated city in which ~~such licensee~~ proposes to operate his business, may apply for and the Supervisor of Liquor Control may issue a license to sell intoxicating liquor, as in this act defined, by the drink at retail for consumption on the premises described in the application. Provided, that no license shall be issued for the sale of intoxicating liquor, other than malt liquor containing alcohol not in excess of five (5%) per cent by weight, by the drink at retail for consumption on the premises where sold, in any incorporated city having a population of less than twenty thousand (20,000) inhabitants, until the sale of such intoxicating liquor, by the drink at retail for consumption on the premises where sold, shall have been authorized by a vote of the majority of the qualified voters of said city. Such authority to be determined by an election to be held in said cities having a population of less than twenty thousand (20,000) inhabitants, under the provisions and methods set out in this act. The population of said cities to be determined by the last census of the United States completed before the holding of said election. Provided further, that for the purpose of this act, the term 'city' shall be construed to mean any municipal corporation having a population of five

hundred (500) inhabitants or more. Provided further, that no license shall be issued for the sale of intoxicating liquor, other than malt liquor containing alcohol not in excess of five (5%) per cent by weight, by the drink at retail for consumption on the premises where sold, outside the limits of such incorporated cities. In each instance, a bond in the sum of two thousand (\$2,000.00) dollars, with sufficient surety, to be approved by the Supervisor of Liquor Control, must be given for the faithful performance of all duties, imposed by law upon the licensee, and for the faithful performance of all the requirements of this act, and any violation of such conditions, duties or requirements shall be a breach of said bond and shall automatically cancel and forfeit the license granted hereunder; provided, that no person financially interested in the sale of intoxicating liquor at wholesale shall be accepted as surety on any such bond."

"Application for license to manufacture or sell intoxicating liquor, under the provisions of this act, shall be made to the Supervisor of Liquor Control. Before any application for license shall be approved the Supervisor of Liquor Control shall require of the applicant a bond, to be given to the state, in the sum of Two Thousand Dollars, with sufficient surety, such bond to be approved by the Supervisor of Liquor Control, conditioned that the person obtaining such license shall keep at all times an orderly house, and that he will not sell, give away or otherwise dispose of, or suffer the

same to be done about his premises, any intoxicating liquor in any quantity to any minor, and conditioned that he will not violate any of the provisions of this act and that he will pay all taxes, inspection and license fees provided for herein, together with all fines, penalties and forfeitures which may be adjudged against him under the provisions of this act."

Section 19, supra, provides that before any application for a liquor license shall be approved the Supervisor of Liquor Control shall require of the applicant a bond to be given to the State. Therefore, the bond runs in the name of the State, a copy of which we are herewith inclosing.

The sureties are liable only in case said licensee fails to perform all duties imposed by law upon him. Section 19, supra, also provides that said bond is conditioned that he will pay all taxes, inspection and license fees provided for herein, together with all fines, penalties and forfeitures which may be adjudged against him under the provisions of this Act.

In *City of St. Louis v. Senter Commission Co.*, 85 S. W. (2d) 21, 1. c. 24, the court held the primary rule of construction was to determine the legislative intent, and said:

"The primary rule of construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent. *Meyering v. Miller*, 330 Mo. 885, 51 S. W. (2d) 65; *Cummins v. Kansas City Public Service Co.*, 334 Mo. 672, 66 S. W. (2d) 920. This should be done from the words used, if possible, considering the language honestly and faithfully to ascertain its plain and rational meaning and to promote its object and manifest purpose."

Therefore, while the law provides that the bond shall run in the name of the State, it is apparent that the legislative intent while enacting the liquor control act was that when a breach of the bond occurred, as in the instant case, whereupon a conviction and fine was adjudged against said licensee who had furnished the State with a bond and was unable to pay said fine, that the prosecuting attorney of the county wherein the violation was committed and fine adjudged, could sue on the bond for the amount of the fine. In support of this we refer you to the underlined portion of Section 19, supra.

Section 9 of the Liquor Control Act specifically prohibits the sale of intoxicating liquor to a minor and no penalty is provided for such violation. Said Section 9 provides as follows:

"No person or his employee shall sell or supply intoxicating liquor or permit same to be sold or supplied to a habitual drunkard or to any person who is under or apparently under the influence of intoxicating liquor. Intoxicating liquor shall not be given, sold or otherwise supplied to any person under the age of twenty-one years, but this shall not apply to the supplying of intoxicating liquor to a person under said age for medicinal purposes only, or by the parent or guardian of such person or to the administering of said intoxicating liquor to said person by a physician, No person under the age of twenty-one years shall sell or assist in the same or dispensing of intoxicating liquor."

While there is no penalty for a violation of the above provision of the Liquor Control Act, Section 43 of the Laws of 1935, page 282, provides a penalty for the violation of any provision of the Liquor Control Act where

there is no specific penalty given. Section 43, supra, provides:

"Any person violating any of the provisions of this Act, except where some penalty is otherwise provided, shall upon conviction thereof be adjudged guilty of a misdemeanor and punished by a fine of not less than Fifty (\$50.00) Dollars, nor more than One Thousand (\$1,000.00) Dollars, or by imprisonment in the county jail for a term not exceeding one year, or by both such fine and jail sentence."

In view of the foregoing, the sale of intoxicating liquor to a minor is a violation of the Liquor Control Act for which there is a penalty of a fine or imprisonment in the county jail, or both, as provided by Section 43, supra.

Therefore, in view of Section 19, supra, providing the bond is conditioned that the licensee will pay all fines and penalties which may be adjudged against him under the provisions of this Act, and Section 9, supra, holding the sale of intoxicating liquor to a minor a violation of said Act, and Section 43, supra, making the penalty for such a violation, there is no doubt but what the bond may be sued on upon conviction for a violation of the Liquor Control Act when a fine is adjudged against the licensee and he is unable to pay same.

The courts have held that even though a bond may run to the State and no provision is made as to who may sue on same, that where one suffers from a breach of the bond and to whom the obligation is owed may sue thereon.

In Thomas v. Kindley, 27 N. W. 231, 1. c. 233, the court held that even though the bond should have been taken out in the name of the State, as provided by statute, instead of taking same out in the name of the village of Hebron, State of Nebraska, the bond was held valid and was

for the use of any person who may sustain injuries by reason of the sale of intoxicating liquors and any injured party may sue upon it as provided by statute.

In the above case there was a suit on a bond, the bond being much more specific than the bond in question, setting forth the fact that the licensee shall pay all damages, fines and forfeitures which may be adjudged against him under the provisions of the statutes of the State of Nebraska. A reversal was sought on the ground that the bond ran in the name of the village of Hebron, State of Nebraska, instead of the State of Nebraska, as required by statute, and the court said:

While the statute requires the bond to be payable to the State of Nebraska, yet it provides that it 'may be sued upon for the use of any person or his legal representatives who may be injured by reason of the selling or giving away any intoxicating liquor by the person licensed or is adjudged,' so that the bond is not for the use of the state but for persons who may sustain injuries by reason of the sale of intoxicating liquors. The state, therefore, is merely a nominal party, a trustee, but there is no provision that if another obligee is named the bond will therefore be void. In the absence of such a provision we must hold the bond to be valid and available to any person who may have sustained injuries by the sale of liquors by the principal in the bond."

In like manner our statute, Section 19, provides the bond required herein shall be given to the State but further provides said bond shall be conditioned that said licensee will pay all fines and penalties which may be adjudged against him under the provisions of this Act. The bond also specifically makes said bond null and void if said principal shall faithfully perform all the duties imposed by law.

Section 698, Revised Statutes Missouri 1929, reads as follows:

"Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the next preceding section; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract."

In *Lynch v. Brennan, et al.*, 154 N. W. 795, the court said:

"There can be no question that the facts alleged are sufficient to charge defendant Brennan with liability at common law. *Curran v. Olson*, 88 Minn. 307, 92 N. W. 1124, 60 L. R. A. 733, 97 Am. St. Rep. 517. The liability of defendant Surety Company is a different matter. Its liability, if any exists, is contractual and is predicated upon its bond. The bond must be construed in connection with the statutes which prescribe the terms to be contained in the bond and prescribe its scope and effect. There are two such statutory provisions."

In *State v. Hailer*, 203 S. W. 664, 1. c. 667, the court held that even though the bond was made separate to the State where one suffering a special injury from a breach of the bond and to whom the obligation was owed, may sue thereon:

"In other words, the statute having required a bond for the faithful performance of duty, and relator, as a peaceable, unoffending patron, legally in the dramshop keeper's place of business, is entitled to an observance of that duty, and,

being personally and specially injured by the failure to perform that duty, has a cause of action on the bond. Being the party injured by the breach of the bond, he is the real party in interest, and, as relator, is entitled to have the suit maintained. Section 1729, R. S. Mo. 1909. Frequently statutes provide for the giving of bonds, made payable to the state, for the performance of some duty or obligation concerning which it is not provided who may sue thereon, but 'where there's a right there's a remedy,' and it has been held that one suffering a special injury from a breach of the bond and to whom the obligation is owed may sue thereon. For instance, a recorder of deeds is required to give bond for the faithful performance of his duties, and no provision is made as to who may sue thereon or under what circumstances suit may be brought. And yet a recorder was held liable on his bond for a breach thereof toward one to whom he owed that duty and who was specially injured by the breach thereof. State ex rel v. Green, 124 Mo. App. 80, 100 S. W. 1115. See, also, Scott v. Missouri Pacific R. Co., 38 Mo. App. 523. That a bond inures to the benefit of one entitled to the performance of the duty for which the bond is given, and can be sued on by such an one injured by the breach thereof, is held in Young v. Young, 21. Ind. App. 509, 52 N. E. 776; American Surety Co. v. Thorn-Halliwel Cement Co. 9 Kan. App. 8, 57 Pac. 237; People v. Cotteral, 115 Mich. 43, 73 N. W. 19, 74 N. W. 183; School District v. Livers, 147 Mo. 580, 49 S. W. 507; City of St. Louis v. Von Phul, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695; Devers v. Howard, 144 Mo.

671, 46 S. W. 625.

"In *Squires v. Michigan Bonding Co.*, 173 Mich. 304, 138 N. W. 1062, 43 L. R.A. (N. S.) 76, it is held that a saloon keeper's bond, being for the benefit of the public and not strictly contractual in nature, is to be construed according to the purpose, intent, and meaning of the statute pursuant to which it is given, and not according to the strict rules applicable to private contracts of suretyship. Certain it is that if the action in the case at bar cannot be maintained, then individual citizens or members of the body politic have no protection by reason of said bond. If a person is beaten up and abused by the saloon keeper or his agents while in the saloon, then the only redress afforded by the bond is to have two reputable taxpaying citizens to bring suit for the forfeiture thereof, provided they will volunteer to run the risk. We do not think this is the intent and meaning of the statute nor the limit of its purpose in requiring the saloon keeper to give security against the happening of such occurrences. The business engaged in is of a character likely to result in such things, and the saloon keeper gives a bond that he will not permit or suffer them to be done, and his sureties are well aware of the nature of the business they agree to guarantee shall be conducted in an orderly manner, and for a saloon keeper, through his agent and bartender, to beat up an unoffending patron of his place of business and then go free of all liability on the bond because it does not cover such matters is to restrict within too narrow limits the language of the bond and the object and intention of the statute requiring one to be given."

Honorable Charles E. Murrell, Jr. -11- November 8, 1937

Section 2-a of the Liquor Control Act makes it the duty of the prosecuting attorney to prosecute anyone violating the provisions of the liquor control act, and reads as follows:

"For the purpose of enforcing the provisions of this act and acts amendatory thereto, the prosecuting attorneys of the respective counties and the circuit attorneys, or at the request of the Governor, the Attorney General shall investigate and prosecute all violations of any provision of this act; * * * * *"

Therefore, in view of the foregoing, it is the opinion of this Department that it was the intention of the Legislature in requiring a bond of each licensee to not only protect the State but also the county upon any licensee violating any provision of the Liquor Control Act, and, therefore, the prosecuting attorney of the county wherein the act was committed may bring suit upon the bond.

Relative to the procedure to be taken, we suggest that suit be brought in the same manner as you would on any other bond. Suit should be brought in the name of the State at relation of or to use of the County of Adair. We can furnish you with a certified copy of the bond given for the purpose of filing the petition and forward you the original bond for use in the trial of the lawsuit.

We are inclosing a copy of a petition filed by this Department which may be used as a guide, wherein suit was instituted for the full amount of said bond. However, in the instant case you are only suing to recover the amount of the fine and costs.

Yours very truly,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

ARH LC

January 7, 1937



Mr. Anthony A. O'Hallaron,
Attorney at Law,
Suite 950 Telephone Building,
1010 Pine Street,
St. Louis, Missouri.

Dear Mr. O'Hallaron:

This department is in receipt of your request for
an opinion as to the following:

"On November 19, 1901, Benjamin C. Sanford,
then a single man, conveyed all of his property
in trust to August Berthold, who has been succeeded
by the Mississippi Valley Trust Company. Copy of
the trust instrument is attached hereto.

Under the terms of this trust agreement,
Virginia B. S. Lawnin was the last beneficiary
apacifically named, the instrument giving to her,
as such last specifically named beneficiary, the
power to nominate the person to whom the property
was finally to be conveyed. Mrs. Lawnin died on
June 28th, 1936 and left a will nominating her
husband, Albert W. Lawnin to receive the property
held by the Mississippi Valley Trust Company under
the trust conveyance of Mr. Benjamin Sanford, a
copy of which said will is attached hereto. The
estate consists of property on which the trust
company placed a marketable value as of the date
of the death of Mrs. Lawnin in the amount of
\$73,283.64, subject to a commission that they
claim will be due upon disbursement in the amount
of \$3,644.18. Most of the trust property consists
of ready marketable bonds.

We are of the opinion that this property
will pass to Mr. Lawnin from the Mississippi Valley
Trust Company, free from any inheritance or gift taxes
under our law. We are attaching herewith a brief
memorandum and the law as we interpret it.

Our purpose in addressing you at this time is
to give your office full facts to enable you to pass

January 7, 1937

upon the correctness of our opinion. If you are satisfied, we ask you to give us tax waivers to enable the trustees to make conveyance when the proper time is reached.

Will you please advise of your opinion in the matter and tell us what forms or further information you desire? "

Our conclusion is that this transfer of property to Mr. Lawnin is, without question, subject to the inheritance tax laws of Missouri and for the following reasons:

Section 571, Revised Statutes of Missouri 1929, provides, in part, as follows:

"Whenever any person or corporation shall exercise the power of appointment derived from any disposition of property made either before or after the passage of this law, such appointment when made shall be deemed a transfer taxable under the provisions of this law in the same manner as though the property to which said appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by the donor by will; ***** "

In a power of appointment, the transfer takes its potency from the exercise of the power, and no rights have vested prior to the exercise which can clash with any attempt of a statute to include the property within its domain.

Your position in this matter, briefly speaking, is that Mr. Lawnin's interest vested prior to the enactment of our inheritance tax law, and that the transfer in 1936 whereby Mr. Lawnin came into possession of the property is not now subject to tax. We disagree with this position absolutely. How can it be said Mr. Lawnin's interest became vested in 1901 (the date of the creation of the trust with the power of appointment) when, at that time, he was not even married to Mrs. Lawnin, the donee of the power of appointment, and further, when it would have been entirely possible for Mrs. Lawnin to have exercised her power of appointment in favor of anyone else until the moment of her death?

In any event, the Supreme Court of the United States in the case of Orr v. Gilman, 183 U. S. 278 concluded that a state might legally exact a succession tax in a case precisely on all fours with the case here under discussion. Mr. Justice Shiras said:

January 7, 1937.

"It is claimed that, under the law of the State of New York as it stood at the time of his death, in 1890, David Dows, Senior, had a legal right to transfer, by will, his property or any interest therein, to his grandchildren, without any diminution, or impairment, then imposed by the law of the State upon the exercise of that right; that his said grandchildren acquired vested rights in the property so transferred, and that the subsequent law, whose terms have been above transcribed, operates to diminish and impair those vested rights. In other words, it is claimed that it is not competent for the State, by a subsequent enactment, to exact a price or charge for a privilege lawfully exercised in 1890, and to thus take from the grandchildren a portion of the very property the full right to which had vested in them many years before.

The answer to be given to this question must, of course, be that furnished us by the Court of Appeals in this case. Matter of Dows, 167 N. Y. 227:

'Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that, in reality and substance, it is the execution of the power that gives the grantee the property passing under it. The will of Dows, Senior, gave his son a power of appointment, to be exercised only in a particular manner, to wit, by last will and testament. If, as said by the Supreme Court of the United States, the right to take property by devise is not an inherent or natural right, but a privilege accorded by the State, which it may tax or charge for, it follows that the request of a testator to make a will or testamentary instrument is equally a privilege and equally subject to the taxing power of the State. When David Dows, Senior, devised this property to the appointees under the will of his son he necessarily subjected it to the charge that the State might impose on the privilege accorded to the son of making a will. That charge is the same in character as if it had been laid on the inheritance of the estate of the son himself, that is, for the privilege of succeeding to property under a will.'

January 7, 1937.

This decision was followed in the case of Chanler v. Kelsey, 51 L. Ed. 882 and a similar transfer held subject to the inheritance tax laws of New York (the law of which state being the basis of our own law). In the course of the opinion, Mr. Justice Day said:

"However technically correct it may be to say that the estate came from the donor, and not from the donee, of the power, it is self-evident that it was only upon the exercise of the power that the estate in the plaintiffs in error became complete. Without the exercise of the power of appointment the estates in remainder would have gone to all in the class named in the deeds of William B. Astor. By the exercise of this power some were divested of their estates and the same were vested in others. It may be that the donee had no interest in the estate as owner, but it took her act of appointment to finally transfer the estate to some of the class and take it from others."

CONCLUSION

In view of the foregoing, it is the opinion of this department that the transfer of property to Mr. Lawnin accomplished by the will of Mrs. Lawnin is a taxable transfer under the inheritance tax laws of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, JR.
ASSISTANT ATTORNEY GENERAL.

APPROVED:

(Acting) ATTORNEY GENERAL

J. E. Taylor.

JWH:EG

(Interest received from school loans cannot be reinvested
SCHOOLS: (but must be apportioned to school districts; county court
(cannot take second mortgages for security; property should
(be foreclosed in the event of default of interest payments
(with the exception that security may be taken in order
(to secure interest payments if the facts warrant such.

January 14, 1937.

1-19

Honorable Edwin C. Orr
Prosecuting Attorney
Boone County
Columbia, Missouri



Dear Mr. Orr:

This is to acknowledge your letter as follows:

"The County Court has asked me to render them an opinion on the following questions, to-wit:

"1. Can the County Court reinvest interest, or the proceeds derived from the loaning of county school funds?

"It has been their practice in the past not to reinvest the income from school fund mortgages. The law, as they understand it, is that they must divide the income among the various districts.

"2. In the event some borrower of county funds does not pay his interest, and becomes delinquent for one or several years, can the County Court take a mortgage either on real estate or personalty to secure the payment of the interest?

"3. If the County Court can take security for the payment of interest, would there be any objection to the County taking a second mortgage for the security?

"Of course delinquent interest on the note and deed of trust becomes principal by the provisions of the deed of trust, and in the event it is not paid, what is there to keep the County Court from taking additional security to secure the payment of interest?"

The county court has imposed upon it the duty of collecting, preserving and investing school funds. Sections 9243 to 9255, inclusive, R. S. Mo. 1929. Section 36, Article VI, Constitution of Missouri.

In *Veal v. Chariton County*, 15 Mo. 412, the Supreme Court of Missouri said (p. 414):

"In relation to these funds, the county courts are trustees. They have no authority to dispose of the principal intrusted, or any of its interest, otherwise than is prescribed by law. There is no difference in this respect between the principal and the interest on these funds. If they can give away the one they can give away the other."

See also, *Montgomery County v. Auchley*, 103 Mo. 492; *Lafayette County v. Hixon*, 69 Mo. 581.

Section 9458, R. S. Mo. 1929, places the duty upon the county superintendent of schools to examine the records relative to school funds in order to ascertain that the law is being strictly observed as to such funds.

I.

Can the county court reinvest interest,
or the proceeds derived from the loan-
ing of county school funds?

Section 9257, R. S. Mo. 1929, relates to "Apportionment of public school fund" and has this provision:

"* * *; and in making such distribution, each county clerk shall apportion * * * and all moneys on account of interest of the funds accruing from the sale of section sixteen or other lands in lieu thereof * * * and all other moneys, for the use of schools in the county, and not otherwise apportioned by law, to the proper district."

The school funds are permanent ones and the interest derived from such is apportioned to the school districts by the county clerk. There is no discretion left with the county court as to what interest it shall cause to be apportioned to the school districts because such are trustees and they have no authority otherwise than prescribed by law. The benefit the school districts receive from the school funds is the interest derived from such funds. The principal is never apportioned. If the county court could reinvest the interest received from the funds then the school districts would derive no benefit from such funds. We grant that in many instances it would be best for the county court to use their best judgment as to the handling of these funds, but the Legislature has decreed otherwise and the county courts have no discretion in the matter.

It is our opinion, in answer to your first question, that the county court cannot reinvest interest derived from school fund loans but that such interest is to be apportioned as provided by Section 9257, supra.

II and III.

In the event some borrower of county funds does not pay his interest, and becomes delinquent for one or several years, can the County Court take a mortgage either on real estate or personalty to secure the payment of the interest?

If the County Court can take security for the payment of interest, would there be any objection to the County taking a second mortgage for the security?

Your questions, 2 and 3, are inter-related, so we will answer both of them at the one time.

Section 9251, R. S. Mo. 1929, provides for the security for loans, and reads in part as follows:

"When any moneys belonging to said funds shall be loaned by the county courts, they shall cause the same to be secured by a mortgage in fee on real estate within the county, free from all liens and encumbrances, of the value of double the amount of the loan, with a bond, and may, if they deem it necessary, also require personal security on such bond; * * * In all cases of loan, the bond shall be to the county * * and shall specify the time when the principal is payable, rate of interest and the time when payable; that in default of payment of the interest, annually, or failure by principal in the bond to give additional security when thereto lawfully required, both the principal and interest shall become due and payable forthwith, and that all interest not punctually paid shall bear interest at the same rate of interest as the principal. * * *"

Section 9254, R. S. Mo. 1929, provides in part as follows:

"Whenever the principal and interest, or any part thereof, secured by mortgage containing a power to sell, shall become due and payable, the county court may make an order to the sheriff * * * and a copy * * * being delivered to the sheriff shall have the effect of a fieri facias on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly."

Jan. 14, 1937.

You will note that when the interest becomes due and payable that such by virtue of Section 9251, supra, bears interest and in addition makes both the principal and the interest due and payable forthwith, and by virtue of Section 9254, supra, the county court, if the mortgage so provides, has the power to sell by a special procedure. Section 9256, R. S. Mo. 1929, authorizes the county courts to sell property conveyed in trust and also gives the right to the county to become the purchaser at such sale. As was heretofore pointed out in *Veal v. Chariton County*, supra, that the county courts were trustees and that they had no authority to dispose of the principal and interest, other than was prescribed by law, therefore, in our opinion the payment of interest on a school loan should be required annually or when due. We do not understand what advantage could be gained by the county by taking additional security in order to protect the interest payments, because, by virtue of Section 9251, supra, additional security can be obtained at any time in order to protect the debt. No advantage accrues by virtue of taking a second mortgage because the county might find itself in a position of having to pay off the first mortgage in order to protect its second. The taking of additional security or second mortgages would only delay the payment of the interest and as the county court are trustees of the fund, such should not violate their trust in any particular so that the school funds would suffer. That is, if the county court should take a second mortgage and delay the payment of the interest and not foreclose the property or collect the interest as is required of them, it might be that the second mortgage would be worthless and by virtue thereof the fund would suffer.

It is therefore our opinion that the county court should not take second mortgages for security. It is our further opinion that the county court should use all reasonable means to provide for the payment of the principal as well as the interest and upon default should take necessary action in order to secure the loan. If a borrower from the school fund is unable to pay the interest, then no money is apportioned to the school districts so that the school districts receive no benefit from the school fund.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

J. E. TAYLOR

INSURANCE: Amendment to Articles of Incorporation of
Missouri Casualty Company approved.

March 24, 1937.



Honorable R. E. O'Malley,
Superintendent, Insurance Department,
State Capitol,
Jefferson City, Missouri.

Dear Sir:

Re: Missouri Casualty Company

In reply to your letter of March 15, 1937, we have examined the proposed amendments to the Articles of Incorporation of the Missouri Casualty Company of Clayton, Missouri, and find that the amendments in question are in accordance with the provisions of Article VII, Chapter 37, R. S. No. 1929, and not inconsistent with the Constitution and Laws of this State and the United States.

Respectfully submitted,

JOHN W. HOFFMAN, JR., Assistant
Attorney General

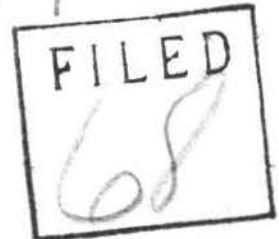
JWH:EG

APPROVED:

(Acting) ATTORNEY GENERAL.

INSURANCE: Amendment to Declaration of State National Life
Insurance Company valid.

April 16, 1937.



Honorable R. E. O'Malley,
Superintendent of the Insurance Department,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of April 14th, requesting an opinion as to the validity of an amendment of the "Declaration of Intention of Corporators to Form Joint Stock Company" of the State National Life Insurance Company, St. Louis, Missouri.

We have examined this amendment and find that the same is in accordance with the provisions of Article II, Section 37, Revised Statutes of Missouri 1929, and not inconsistent with the Constitution and Laws of this State and the United States. In this connection, we assume that the special meeting of the stockholders held on September 18, 1934, and the annual meeting of the stockholders held on March 2, 1937, were duly called and held.

Respectfully submitted,

JOHN W. HOFFMAN, JR., Assistant
Attorney General.

APPROVED:

Acting Attorney General

*Insurance - Approval of Documents - Utilities
Insurance Company.*

July 19, 1937.

11/9



Honorable R. E. O'Malley
Superintendent of the Insurance
Department of the State of
Missouri
Jefferson City, Missouri

Dear Sir:

We have examined the enclosed minutes of the meeting of the stockholders and the Directors of the Utilities Insurance Company, whereby said stockholders and Directors are seeking to decrease the capital stock of said company from \$203,500.00 to \$200,000.00; also to increase the number of shares of prior preferred stock of the corporation from 1500 shares to 10,000 shares and to decrease the par value thereof from \$65.00 per share to \$5.00 per share; also to decrease the number of participating preferred stock of said corporation from 10,000 shares of the par value of \$5.00 each to 6,000 shares of the par value of \$5.00 each; also to increase the number of shares of common stock of the said corporation from 8,000 shares to 24,000 shares and to decrease the par value of the shares of common stock from \$7.00 per share to \$5.00 per share, and we find these documents to be in proper legal form and in accordance with the Constitution and laws of the State of Missouri, and not inconsistent with the laws and Constitution of the United States.

Respectfully submitted

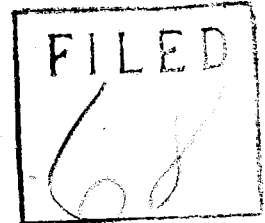
J. E. TAYLOR
(Acting) Attorney General.

JET:H

PROSECUTING ATTORNEY:

Is entitled to re per stenographic hire and the county court can pay the same from any surplus funds or out of Class 6, providing the prosecuting attorney has complied with the terms of the Budget Act in compiling estimate.

September 16, 1937.



Honorable Edwin C. Orr
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Sir:

This Department is in receipt of your letter of September 10th, wherein you request an opinion based on the following facts:

"I wonder if you would please give me an opinion as to whether or not I am entitled to my stenographic hire in this county in view of the particular facts of my case; when I filed my budget the beginning of the year, I put in there a reasonable amount for my stenographer. The County Court, in the absence of statutory authority, struck that item from the budget. I am wondering if under those circumstances I would be entitled to be reimbursed that amount of money which I am now paying.

"What effect would the new budget law have upon this situation, and what authority would the County Court have to pay money in the event there was a surplus left over at the end of the year?

* * * * *

P. S. - If it is possible to draw a distinction between the claimant who did set up his claim in his budget, and the one who did not set up the item in his budget, it would be very helpful in this particular instance."

On April 24, 1936, this Department rendered an opinion to Honorable Forrest Smith, State Auditor, in which it was held in effect that if it was necessary for the prosecuting attorney to hire a stenographer or other clerical assistance to perform certain necessary duties in his office and as a result he was compelled to pay such expenses from his own funds, he was entitled to reimbursement from the county in reasonable and necessary amounts.

We, therefore, in view of the above mentioned opinion, do not consider in rendering you this opinion the question as to whether or not it constitutes a legal claim by you against the county, for the reason that we must assume that it is a legal claim.

In determining whether the claim should be paid by the county court it is necessary to consult the County Budget Act passed by the Legislature in 1933.

Under Section 3, Laws of Missouri, 1933, page 342, it is made the "duty of every officer claiming any payment for salary or supplies to furnish to the clerk of the county court, on or before the 15th day of January each year an itemized statement of the estimated amount required for the payment of all salaries or any other expense for personal service of whatever kind during the current year * * * *".

The facts as contained in your letter show that you complied with the terms of Section 3, quoted supra, and included a reasonable amount for stenographic expenses.

Section 8, Laws of Missouri, 1933, page 345, among other provisions, contains the following:

"The court may alter or change any estimate as public interest may require and to balance the budget, first giving the person preparing supporting data an opportunity to be heard but the county court shall have no power to reduce the amounts required to be set aside for classes 1 and 3 below that provided for herein."

It appears from your letter that the county court struck the stenographic item from your budget for the reason that the Statutes of Missouri did not give you the authority to hire and pay a stenographer out of the county funds. By the terms of Section 3, hereinbefore referred to, you made an attempt and did comply with the various steps as set forth in the Budget Act. Disregarding the reason for the County Court striking the stenographic hire from your budget, we are of the opinion that you could not be precluded from asserting and receiving payment of a valid claim by reason of a failure to comply with the budget act, as the facts show that you did comply with it. We are, therefore, of the opinion that you are entitled to be reimbursed in a reasonable amount for the money you have expended for stenographic hire.

The funds from which payment might be made, or the manner of payment, is discussed in the conclusion reached in an opinion by this Department to Honorable Henry Cain, Prosecuting Attorney of Stoddard County, in which it was held that the use of surplus funds remaining after all provisions of the Budget Act had been complied with, could be used for certain purposes. We are enclosing a copy of the opinion for the reason that it discusses the manner in which a surplus may be used by the county court. It also contains the most recent decision by the Supreme Court, styled *Harry Traub v. Buchanan County, Missouri*, No. 34883, in which it is held that the Budget Act must be strictly complied with.

As to your postscript question as contained in your letter, we are of the opinion that if an officer does not comply or attempt to comply with the Budget Act, especially Section 3, the contents of which were hereinbefore quoted, that such officer could not obtain reimbursement or compensation for the year in which he failed to make such estimate. Section 3, *supra*, p. 342, also contains the provision that,

"No officer shall receive any salary or allowance for supplies until all the information required by this section shall have been furnished."

Sept. 16, 1937.

But the facts which you present show conclusively that you made an attempt to comply in every respect with the terms of the Budget Act. Therefore, that defense could not be offered against your claim as in the case of an officer failing to include such item in his estimate.

Having heretofore ruled that you were entitled to reimbursement, based on the opinion to Honorable Henry Cain, we are of the further opinion that any surplus remaining at the end of the year can be used by the county court to reimburse you for a reasonable amount for stenographic hire.

We further call your attention to an opinion recently rendered to you in which the question of the surplus at the close of the fiscal year in the funds in class 6 could be, by complying with the provisions of class 6, used for the payment of the county treasurer and the circuit clerk. The law's logic and reason as contained in that opinion is applicable to the question which you present, insofar as the manner of reimbursing you for stenographic hire is concerned.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

COUNTY COURTS: Authorized, by order, to pay real estate commission for sale of lands repossessed by purchase under section 9256, 1929 statutes, if they deem such order best for the interest of said school district or districts. Commission must be paid from the funds of such school district or districts.

October 11, 1937



Mr. Edwin C. Orr
Prosecuting Attorney
Columbia, Missouri

Dear Mr. Orr:

This office is in receipt of your request for an opinion as follows:

"I have been asked by the County Court for an opinion upon this question: Can the County Court pay a real estate commission for the sale of lands which belong to the county, and which have been acquired through foreclosure of loans made from the county school fund?

I have looked at Section 9256 R. S. 1929, page 7104, R. S. Ann., where it says:

'The county court of any county holding property acquired as aforesaid may appoint an agent to take charge of, rent out or lease or otherwise manage the same, under the direction of said court; but as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be resold in such manner and on such terms, at public or private sale, as said court may deem best for the interest of said school or schools; and the money realized on such sale, after the payment of the necessary expenses thereof, shall become part of the school fund out of which the original loan was made. (R.S. 1919, p. 11178.)'

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which in my opinion gives the County Court the authority to employ a real estate man to sell its school fund property if it sees fit to do so. In so far as there are no cases directly in point in this state that I have been able to find, the court desires your opinion on the question, which I would appreciate very much myself.

In my judgment the statute itself is sufficient authority for the payment of the commission for the sale of the land but in addition to that the cases dealing with trustees universally hold that the trustee in charge of real estate may pay real estate commissions or other necessary expenses in selling land, and the Missouri law on school funds enables the county court to hire attorneys to protect the fund and to do such other things as may be necessary in the judgment of the court to preserve the school fund, therefore, in my judgment there is no question but what the county court has the authority to pay a real estate commission for the sale of its lands."

As we understand your inquiry you ask for an interpretation of that part of Section 9256 R. S. Missouri 1929, as hereinabove quoted in your letter.

We are unable to find a decision construing the quoted part of the above statute.

The Supreme Court in the case of Morrow vs. Pike County, 189 Mo. 622, recognized the right of the County Court to employ counsel to aid in protecting a public school fund in the following excerpt:

"The county court properly placed the burden of protecting this fund upon the fund itself and this arises from the following propositions: the public school fund does not belong to the county in a technical sense. It is a trust fund, and

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the county court is merely a trustee to carry out the policy defined by the law-making power in relation to the fund (Ray County to use vs. Bentley, 49 Mo. l. c. 242); it may not divert the general county revenue to its protection, and, on the other hand, it can not apply the school fund to the payment of ordinary county debts. (Knox County vs. Hunolt, 110 Mo. l. c. 75.) But it is fundamental that, conceding the right to make the contract in question, the burden of protecting the trust fund shall fall upon the fund itself on well-recognized equitable principles."

In that case there was no claim that there was any statute which expressly gave the county court power to employ such an attorney in such capacity but the court held that the county court had implied authority to order such expenditure to protect the funds of the school district and further held that the payment for such services must be made from the school funds.

In the case of Township Board of Education vs. Boyd, 58 Mo. 276, the county court was trustee for the care and management of the school fund of the township. It instituted certain injunction proceedings for the protection of the fund and gave an injunction bond signed by J.K. Boyd and J.B. Johnson, two of the justices of the county court. Upon dissolution of the injunction a judgment was issued against said obligors, one of whom, paid the same, and by a court order he was reimbursed out of the township school fund. In this case the court said:

"The County Court was a trustee for the 'care and management' of the school fund of the township. In this capacity, and in the exercise--for aught that appears to the contrary--of its soundest judgment and discretion, it instituted certain injunction proceedings for the protection of the fund. The law required personal security for the purpose, which was given. A judgment against

the surety following, which judgment he was bound to pay, and did pay, it would be strange if the law should refuse to indemnify him from the interest which his suretyship had so served at a sacrifice."

There being no statute giving the county court, as trustee for the public and township school funds, the power to pay a real estate commission for the sale of real estate repossessed by the county court and purchased (for the use of the township, out of the school fund of which the loan was made, or in its own name where such loan was made out of the general school fund), the question is, whether said court would have such implied power as is necessary to carry out or make effectual the purposes of the authority expressly granted.

The county court may under said section

First, appoint an agent to take charge of, rent out, lease or otherwise manage the property under the direction of the county court;

Second, resell said property as soon as practicable and advantageous to the school or schools' interested therein, and to make such resale in such manner and on such terms at public or private sale, as said court may deem just for the interest of said school or schools.

A trustee or agent always has the implied right to protect the corpus of the property or funds under their control and in this case the court would have the right to take necessary steps to enjoin the stealing of timber from valuable wooded land belonging to a school district and not rely on the criminal statutes for a remedy; to employ an attorney to replevy timber wrongfully taken from such premises and the like.

In the case of Lincoln County vs. Magruder, 3 Mo. App. 14, the County Court brought a suit of ejectment for the possession of land which had been bid in and purchased by said court, for the use of the townships whose school funds were secured by the mortgage. The Court held:

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"We see no reason why the County of Lincoln should not bring ejectment for real estate which it owns and holds and in which it is entitled to possession."

The County Court as trustee of school lands, being given the right to sell such lands by statute certainly has the implied right to use its soundest judgment and discretion in employing an agent to affect the sale of such lands and pay him a commission therefor if they believe it to be to the best interest of such school district or districts.

CONCLUSION

It is therefore the opinion of this Department that the County Court may, by order of Court, pay a real estate commission for the sale of lands repossessed by purchase under Section 9256, R.S. Missouri 1929, if in the exercise of its discretion it deems such order best for the interest of said district or districts, but such commission must be paid from school funds.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

SVM:MM

INQUESTS AND CORONERS: Cost incurred in inquest to be paid
CRIMINAL COSTS: by county.

October 14, 1937

Honorable J.R. Oliver
Clerk of the County Court
Dunklin County
Kennett, Missouri



Dear Sir:

This department is in receipt of your letter of September 13, 1937, in which you request an opinion as follows:

"In this county there was recently held an inquest over a person's body who met her death by murder. The criminal has received a sentence to the State Penitentiary.

There is a question as to who is liable for the inquest costs in this case, as some of the officers believe it to be a case for which the State is liable.

Will you kindly advise me whether or not the county is liable in this case?"

Section 11630, Revised Statutes 1929, is as follows:

"If an inquest be held over the body of a minor, the parent, guardian or master of the same shall be liable for the costs and expenses, if there be any such person able to pay the same. If the person over whose body an inquest shall be held shall have any estate, the cost and expenses of inquest and

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burial shall be paid out of his estate; but where there is no person liable and able to pay such expenses, they shall be allowed by the county court out of the county treasury."

Section 11632, Revised Statutes 1929, is as follows:

"The coroner or other officer holding an inquest, as provided for by this chapter, shall present to the county court a certified statement of all the costs and expenses of said inquest, including his own fees, the fees of jurors, witnesses, constables and others entitled to fees for which the county is liable; and the county court shall audit and allow the same, and shall make a certified copy of the same, without delay, and deliver such copy to the county treasurer, which copy shall be deemed a sufficient warrant or order on the treasurer for the payment of the fees therein specified to each person entitled to such fees. The county treasurer shall pay to each person on demand, or to his legal representatives, the fees to which he is thus entitled, and shall take the proper receipt therefor, and produce the same in his settlements with the county court as vouchers for the money so paid out by him."

Section 11802, is, in part, as follows:

"Coroners shall be allowed fees for their services as follows:
Provided, that when persons come

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to their death at the same time
or by the same casualty, fees
shall only be paid as for one
examination:

* * * * *

"The above fees, together with
the fees allowed jurors, con-
stables, and witnesses, in all
inquests, shall be paid out of
the county treasury as other
demands. For performing the
duties of sheriff, the coroners
shall be entitled to the same
fees as are for the time being
allowed to sheriffs for the
same services."

Section 3855, Revised Statutes 1929, is, in part,
as follows:

"All fees accruing in any inquest
case where the verdict of the jury
is that the deceased came to his
death by other than unavoidable
accident or natural causes, shall
be deemed criminal costs, and
shall be paid in like manner and shall
be subject to all the offsets herein
provided for."

In Houts vs. McCluney, 102 Mo. 13, the court, in
determining whether the county or the estate of deceased
should pay the fees incurred at a coroner's inquest,
said, at l.c. 16:

"Sections 5156 and 5613 (R.S.
1879, now Sections 11632 and
11802, R.S. 1929) are clear and
unambiguous. They make the
county liable for the fees allowed
the coroner, jurors, witnesses and
the constable in all inquests where
the coroner has reasonable cause to
believe that the person, over whose

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body the inquest is held, came to his death by violence or casualty."

It will be noticed that in Section 11630, Revised Statutes 1929, it is provided that in the case of an inquest of a minor, where there is no person able to pay "such expenses, they shall be allowed by the county court out of the county treasury." In Section 11632, Revised Statutes 1929, it is provided that the coroner shall present to the county court a certified copy of all the expenses and fees of an inquest "and the county court shall audit and allow the same." Again, in Section 11802, Revised Statutes 1929, it is provided that the fees of the coroner "together with the fees allowed jurors, constables and witnesses, in all inquests, shall be paid out of the county treasury as other demands." In Section 3855, Revised Statutes 1929, it is provided that in the event a certain verdict is returned, the inquest cost "shall be deemed criminal costs".

Section 3826, Revised Statutes 1929, provides in what cases the state will be liable to pay criminal costs and this section in no way mentions inquest costs.

CONCLUSION

Therefore, it is the opinion of this department that the cost of an inquest is properly chargeable to the county and is to be paid out of the county treasury and that the state is not liable for any part of said cost.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

STATE BOARD OF HEALTH--CITY OF ST. LOUIS: The Health Commissioner of the City of St. Louis is without authority to promulgate a rule requiring that the dead bodies of deceased persons must be embalmed before removal from said city.

August 23, 1937.

Honorable Harry F. Parker
State Health Commissioner
Jefferson City, Missouri



Dear Sir:

This is to acknowledge your request for an opinion, reading as follows:

"I am requesting an opinion on Sections 9028 and 9029 of the Revised Statutes of Missouri, 1929.

"I have received a letter from the office of the Health Commissioner in St. Louis requesting this information, a copy of which is attached."

Appended to your request is a copy of a letter directed to your attention which is also set forth, reading as follows:

"Will you please obtain for me an opinion from the Attorney General as to whether Section 9028 and 9029 of the Revised Statutes of Missouri, 1929, give our Health Commissioner, Doctor Joseph F. Bredeck, the authority to rule that the body of every deceased person dying in St. Louis be embalmed before such body could be removed from the city?

"We are desirous of enforcing this rule in the interest of Public Health and should appreciate the opinion at your earliest convenience."

We particularly note from the second paragraph of the letter appended that the rule sought to be invoked is in "the interest of Public Health". Such an interest should evince due consideration since the care and

August 23, 1937.

disposition of dead human bodies by burial, or otherwise, is closely related to the general health and welfare of the community. It is unnecessary to point out the danger that may or may not arise from dead human bodies that have been infected by an infectious or communicable disease.

With this observation it is sufficient to say that it has challenged the attention of the Legislature, and statutes have been enacted which regulate the transportation of dead human bodies; permits providing for interment and removal of such bodies, and statutes for the compilation of vital statistics. These statutes must necessarily pass our scrutiny in order to arrive at a conclusion.

We have considered the statutes mentioned in your request, sections 9028 and 9029 R. S. Mo., and deem them to be inapplicable as they relate to the present inquiry, excepting however, that section 9029 imposes the requirement that all cities having a population of over 75,000 must furnish such statistical information as the State Board may require concerning communicable diseases.

In the case of the City of St. Louis v. Galt, 179 Mo. 8, 18, the Supreme Court discussed the power of the City of St. Louis to enact ordinances in conformity with State laws, and said:

"The Constitution granted to St. Louis the right to adopt a charter, subject only to the limitations that it should be subject to and in harmony with the Constitution and laws of the State. (Const., art. 9, secs. 20 to 25.) Pursuant to this grant of power, St. Louis adopted its charter, which gave it the power, 'to declare, prevent and abate nuisances on public and private property, and the causes thereof; 'to secure the general health of the inhabitants by any means necessary; 'and 'to pass such ordinances not inconsistent with the charter as may be expedient, in maintaining the health and welfare of the city.'"

We have examined the Charter of the City of St. Louis, subdivision (a) Section 14 of Article 13, Revised Code of 1926, at page 1305, reading in part as follows:

"* * * the health commissioner is authorized and empowered, with the approval of the director of public welfare, to make such rules and regulations, not inconsistent with this charter or any law or ordinance, as will tend to preserve or promote the health of the city;* * * *."

From the above charter provision you will notice that the Health Commissioner may promulgate rules and regulations with the approval of the Director of Public Welfare, where such rules are not inconsistent with the charter or any law or ordinance. We have examined the charter provisions and ordinances of St. Louis and fail to find any provision requiring that the body of every deceased person dying in St. Louis must be embalmed before such body may be removed from the city, nor have we found any ordinance or charter provision that would imply or contemplate that the body of every deceased person dying in St. Louis be embalmed before such body could be removed from the city.

We examine applicable State statutes.

Your attention is directed to Section 9064 R. S. Mo. 1929, relating to the preparation of dead bodies for shipment, which reads as follows:

"The body of any person having died of diphtheria (membranous croup), scarlet fever (scarlatina or scarlet rash), glanders, anthrax, leprosy or smallpox, shall not be offered to or accepted by any common carrier for transportation unless, first, it shall have been thoroughly embalmed by arterial and cavity injection with a disinfecting fluid, the orifices disinfected and packed with cotton, and the whole exterior of the body washed with a disinfecting fluid; or, second, unless it shall have been completely wrapped in a sheet that

that is saturated with a solution of bichloride of mercury, in the proportion of one ounce of bichloride of mercury to one gallon of water, and encased in an air-tight metal or metal-lined burial case, coffin, casket or box that is closed and hermetically sealed."

Section 9063 R. S. Mo. 1929, relating to when certain dead bodies are not to be transported provides:

"The body of any person having died of Asiatic cholera (cholerine), typhus or ship fever, yellow fever, or bubonic plague, shall not be offered to or accepted by any common carrier for transportation unless it shall have been prepared for shipment in accordance with section 9064, and under the supervision of an officer of the state board of health, or supervision of a member of the state board of embalming."

Section 9065 R. S. Mo. 1929, relating to the preparation of bodies who have died of certain communicable diseases, provide:

"The body of any person having died of tuberculosis, puerperal fever, typhoid fever, erysipelas, measles, or other dangerous communicable diseases other than those specified in sections 9063 and 9064, shall not be offered to or accepted by any common carrier for transportation, unless such body shall have been thoroughly embalmed by arterial and cavity injection with a disinfecting fluid, as specified in section 9064; or, if such body is not so embalmed, it must be encased in an air-tight metal or metal-lined burial case, coffin, casket or box that is closed and hermetically sealed. The body

of any person having died of a disease that is contagious, infectious or communicable must not be accompanied by clothing or articles that have been exposed to the infection of such disease."

Section 9066 R. S. Mo. 1929, relating to when the destination of any dead body may be reached within twenty-four hours from the time of death, reads as follows:

"The body of any person having died of a cause or disease that is not contagious, infectious or communicable, and from which no offensive odor emits, may be offered to and accepted by any common carrier for transportation; provided the destination can be reached within twenty-four hours from the time of death of such person, but if the destination cannot be reached within twenty-four hours from the time of such death, then the body must be thoroughly embalmed by arterial and cavity injection with a disinfecting fluid, or encased in an air-tight metal or metal-lined burial case, coffin, casket or box that is closed and hermetically sealed."

You will note that the above statutes set forth do not contemplate the embalming of any dead body, unless such dead body shall have died from one of the diseases specified, when such body is offered for transportation. You will further notice that under the provisions of Section 9065, supra, that even should the body have died of a communicable disease as designated in said section need not even be embalmed, if such body is encased in an air-tight metal box that is hermetically sealed. You will have further noted that the body of any deceased person, having died of a cause or a disease that is not contagious, need not be embalmed, provided that the destination can be reached within twenty-four hours of the death of such person. The statutes above set forth are plain and need no interpretation. Thus it will be seen when a dead body is to be transported by any common carrier that such dead body need not be embalmed, unless such dead body shall have died as a result of the diseases specified in the above sections of the statutes.

August 23, 1937.

For the purpose of effectively compiling the registration of all births and deaths occurring within this State, the State has been divided into registration districts. Section 9042 R. S. Mo. 1929.

Within each of the registration districts local registrars have been appointed by the State Board of Health for the purpose of recording vital statistics pertaining to births and deaths. Section 9043 R. S. Mo. 1929.

Section 9044 R. S. Mo. 1929, as amended, laws of Mo. 1933, p. 270, relating to the requirements of a removal or burial permit from the local registrar of the registration district from which the death occurs, reads in part as follows:

"The body of any person whose death occurs in the state shall not be interred, deposited in a vault or tomb, cremated or otherwise disposed of, or removed from or into any registration district until a permit for burial, removal or other disposition shall have been properly issued by the local registrar of the registration district in which the death occurs. Provided, no such removal permit shall be required when a dead body is removed for the purpose of preparing such body for burial, but no such body shall be interred, deposited in a vault or tomb, cremated or otherwise disposed of until a permit so to do has been properly issued by the local registrar of the registration district in which the death occurs. * * * *"

In construing the above part of the statute you will note that, before the body of any person may be removed from one registration district into another, a permit for such removal must be issued by the local registrar of the district wherein the death occurs. However, the proviso, which is a limitation upon the requirement for such a permit, *Brown v. Patterson*, 124 S. W. 1, does not require the permit when the body is to be removed for the purpose of preparing such body for burial. Thus it will be seen that the Legislature did not intend the dead body to be embalmed before leaving one district for removal into another district.

Hon. H. F. Parker

-7-

August 23, 1937.

Returning in our consideration to the proposed rule, it will have been noted that such rule, if promulgated, would be repugnant to the statutes hereinabove set forth, and when we throw back the portals which prompted the proposed enactment of such a rule, we find it to be discriminatory against embalmers and undertakers not engaged in business within the City of St. Louis, Missouri.

CONCLUSION.

In view of the above, it is the opinion of this department that the Health Commissioner of the City of St. Louis is without authority to make any rule which has for its purpose the embalming of the body of every deceased person dying in St. Louis, before removal of such body from the City, which would nullify the operation of the provisions of the State's statutes.

Yours very truly

RUSSELL C. STONE
Assistant Attorney General.

APPROVED:

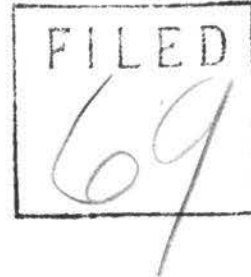
J. E. TAYLOR
(Acting) Attorney General.

RCS:H

STATE BOARD OF HEALTH: All applications for licenses to deal in narcotic drugs must be passed upon by the State Board of Health. Public officers and others constituting a governmental board accept office in view of additional burdens being placed upon them.

September 10, 1937 7/20

Dr. Harry F. Parker
State Board of Health
Jefferson City, Missouri



Dear Dr. Parker:

This will acknowledge receipt of your letter of recent date relative to the following facts:

"In taking up the provisions as set forth in this act, I would like to know whether or not the State Board of Health must pass on all applications for licenses, or may this duty be performed by the health commissioner himself. The State Board of Health receives only fees accruing to the division of medical licensure for its operation expense.

"The department of health of the State of Missouri receives from general revenue its biennial appropriation and for the 1937-38 appropriation, all funds appropriated were earmarked as to personal service for the various divisions and no specific appropriation was made to the department of health for the purpose of administering this particular act.

"As far as I can see, the health department is not in position to take on this added burden. At the last session of the Legislature, a gentlemen's agreement was made

wherein certain funds were asked for to meet matching funds of the United States Public Health Service, with a pledge that they would be used only for the specific purpose for which they were appropriated. This office is operating within its appropriation with the end in view that there will be no deficiencies for this department. Since the Federal Narcotic Act is similar to the State Act in every respect and would be an overlapping with the Federal act in order to enforce the State act identically as it relates to the Federal. The State act, in effect, provides that compliance with the Federal act should be deemed sufficient to carry out the mandates of the State act. To properly function, this department cannot, without a heavy deficiency, set up a division for the purpose of properly administering the above bill. Neither can the State Board of Health, as a board, pass on all applications for licenses under the present funds allotted to it, and I am respectfully requesting you to advise me just what should be done in this connection."

At the outset we observe that the act regulating the sale of narcotic drugs has been passed by the Legislature in the interest of the public welfare. The act is comprehensive in its scope, designed to embrace all persons who would choose to come within its terms, and the duty of enforcing the act has been placed upon the State Board of Health, Laws of Mo., 1937, p. 355.

In response to the first question - as to whether the State Board of Health must pass upon all applications for licenses to manufacture and/or wholesale narcotic drugs, your attention is respectfully directed to Laws of Mo., 1937, p. 347, Section 3 reading as follows:

"No person shall manufacture, compound, mix, cultivate, grow, or by any other process produce or prepare narcotic drugs, and no person as a wholesaler shall supply the same, without having first obtained a license so to do from the State Board of Health."

Section 4 reads in part as follows:

"No license shall be issued under the foregoing section unless and until the applicant therefor has furnished proof satisfactory to the State Board of Health.

"(a) That the applicant is of good moral character or, if the applicant be an association or corporation, that the managing officers are of good moral character.

"(b) That the applicant is equipped as to land, buildings, and paraphernalia properly to carry on the business described in his application.

"No license shall be granted to any person who has within five years been convicted of a will-

ful violation of any law of the United States, or of any state, relating to opium, coca leaves, or other narcotic drugs, or to any person who is a narcotic drug addict."

You will note that every person desiring to deal in narcotics must first obtain a license so to do from the State Board of Health, and also that before receiving such license, the applicant must have submitted proof satisfactory to the State Board of Health, as above indicated. The above sections are plain, without ambiguity and can admit of no other construction nor may any intent to the contrary be implied.

From this it follows: who is a State Board of Health? Under the provisions of Section 9013 of R. 3. Mo., 1929, it is stated in substance that seven persons shall constitute a board, which shall be styled the State Board of Health. Section 9015 provides that it is the duty of the State Board of Health to safeguard the health of the people in the state.

In the case of State ex rel Baria v. Alexander 130 So. 750, 756, the Supreme Court of Mississippi, in considering an act performed by two members of a board acting independently without a meeting said:

"When several persons are authorized to perform a public service, or to do an act of a public nature as an organized body, which requires deliberation, they must be convened in a body, in order that they may have the counsel and advise of every member. 24 R. C. L. p. 615, Sec. 72, and cases cited in the notes. Any action otherwise taken although with the consent of the

body is illegal. This principle is elementary * * * *

In 46 C. J. 1034, Section 297, a general proposition of law is stated as follows:

"An official board cannot delegate to others a power that can be exercised only by itself."

In the case of State v. Zimmerman, 197 N. W. 823, 829, the Supreme Court of Wisconsin, in discussing when a board has been created by statute that a majority may act, tersely said:

"The rule is too familiar to require any citation of authority that, when a board is created by statute, a majority may act."

Attention is again directed to the words as used in Section 4, supra, relating to when the license shall be issued to an applicant, reading as follows:

" * * * furnished proof satisfactory to the State Board of Health."

It is obvious from this part of the statute that a great deal of discretion is conferred on the State Board of Health with reference as to what constitutes "proof satisfactory", that the applicant is qualified to engage in the handling of narcotic drugs.

In the case of State v. Reber, 126 S. W. 2397, 2399, the court said:

"An officer to whom a discretion is entrusted by law cannot delegate to another the exercise of that discretion, but after he has himself exercised that discretion he may, under proper conditions, delegate to another the performance of a ministerial act to evidence the result of his own exercise of the discretion."

From these considerations you will have noticed that when several persons constitute a board organized to render a public service which requires deliberation, they must necessarily convene themselves for the purpose intended by law. In the instant matter all applications to manufacture and/or wholesale narcotics must be presented to the board sitting as a body in order that they may properly pass upon the applicants qualifications. You will have observed that a board, or officer in whom a discretion has been vested must exercise that discretion and after its exercise may delegate to another the performance of a ministerial act which flows as a result of the exercise of such discretion.

It is to be pointed out that a majority of the board may pass on any matter pending before it, provided that they have convened for that purpose. Thus, the majority of those constituting the State Board of Health may pass on an applicant as presented by the present inquiry.

In view of the above, we rule that all applications to manufacture or wholesale narcotic drugs must be passed upon by the State Board of Health sitting as a body convened for that purpose.

II.

We have considered the general appropriation

made by the legislature, Laws of Mo., 1937, p. 110, for the State Board of Health, and as you have stated the funds have been "earmarked" as to personal service and for other purposes, except as designated by subdivision D. of Section 40 of the appropriation relating to operation, reading as follows:

"General expenses: communication, printing and binding, transportation of things, travel, within and without the State, rent, other general expense; Material and supplies consisting of educational, scientific and recreational supplies, laundry, cleaning and sanitation supplies, medical, surgical and hospital supplies, stationery and office supplies: Maintenance, rent, repairs and other general expense incidental to the operation of the Trachoma Hospital . . . \$77,500.00",

may be applied to any of the general operating expense of the State Board of Health, whether it is the division of vital statistics or child hygiene. It is fundamental in construing appropriation acts that they shall be construed by the same rule as other legislation, and where the language is plain and obvious, they should not be construed as to defeat their purpose, 59 C. J. 262, Section 401; State ex rel Jacobs Meyer v. Thatcher 92 S. W. (2d) 640. Thus, when we consider the above part of the appropriation act, it is apparent that general expense of the State Board of Health must be paid from these monies appropriated.

Moreover, it is to be pointed out that legislators may appropriate wisely or unwisely, too sparingly, or too extravagantly, the wisdom of which we cannot be concerned in the face of a duty that is manifest. By analogy, the very apt statement expressed by

the Supreme Court of Georgia in the case of McFarlin v. Board of Drainage Commissioners, 113 S. E. 447, 451, is here applicable:

"Whenever a public officer accepts such office and enters upon the discharge of his duties as such, he takes it with all the burdens that are placed or may be placed upon such office according to law; and if he retains the office and undertakes to perform the duties thereof for a fixed compensation he does so with the possibility that such duties may be increased or diminished."

If it becomes necessary in the enforcement of the present narcotic act to incur expenses in its administration, such expense should be paid from the amount appropriated for the general expenses of the State Board of Health, except as hereinafter pointed out, for it is upon the board, its officers, agents and representatives to enforce the provisions of the act. Section 19, supra.

It is not unreasonable to assume that the legislature considered the present personnel of the State Board of Health, together with the amount of money appropriated for such personnel in all its departments and decided that since the present narcotic act was similar to the Federal Narcotic Act and a substantial compliance with the federal act would satisfy the requirements of the state act that no additional appropriation was needed to carry on the duties imposed by the state act.

In view of the above, it is the opinion of this department that all reasonable and necessary ex-

Dr. Harry F. Parker

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September 10, 1937

penses incurred in the enforcement of the provisions of the act relating to narcotic drugs shall be paid from the general appropriation made to the State Board of Health for general expenses. Further, that all duties placed upon members of the State Board of Health, its officers, agents and representatives by the provisions of the narcotic act are to be borne by the present personnel .

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS:JMW

STATE BOARD OF HEALTH: Persons included within the term "Persons on Relief" as used in Sec. 9060, Laws 1937, p. 356 as relates to fees of registrar.

October 21, 1937

Doctor Harry F. Parker
State Health Commissioner
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your letter of September 13, 1937, in which you request an opinion as follows:

"On September 6th, House Bill 464, entitled An Act to Repeal Sec. 9060, R.S. Mo. 1929, and to enact a new section, Laws 1937, p. 356, relating to fees to be paid State Registrar, became effective.

We are now confronted with the following questions in the application of the new law:

1. Are we permitted to issue free certified copies to the Missouri W.P.A.; to the W.P.A. in other states?
2. Are we permitted to issue free certified copies to county and city relief agencies receiving federal funds in Missouri and other states,
3. Are we permitted to issue free certified copies to Old Age Pension or Social Security Boards in Missouri; in other states? Would this apply to both state and local offices?

We propose to require a statement on the letterhead of the agencies requesting the copy, to the effect that the certified copy is required to perfect a claim of a person on relief or any dependent of any person who was on relief for a claim upon the government of the United States."

Section 9060 R.S. Missouri 1929, as reenacted, Laws Missouri 1937, page 356, is in part as follows:

"The state registrar shall, upon request, furnish any applicant a certified copy of the record of any birth or death registered under provisions of this article, for the making and certification of which he shall be entitled to a fee of fifty cents to be paid by the applicant.
 * * * * Except whenever a certified copy or copies of any public record in the State of Missouri is required to perfect the claim of any person on relief, or any dependent of any person who was on relief for any claim upon the government of the United States, the State Registrar shall, upon request, furnish a certified copy or so many certified copies as are necessary, without any fee or compensation therefor. * * *"

We have underlined the pertinent part of the above section.

The intention of the legislature is clear in this section in so far as they provided free certified copies of certain records for a certain classification of persons. The classification of the person entitled to the free certified copy is, that he must be a person on relief, or the dependent of a person who was on relief and need the same to substantiate a claim which that person has against the government of the United States.

The legislature in this act did not attempt to classify the type of relief a person must be on or what type of claim the person must have against the government of the United States. They merely said "any person on relief" and "any claim against the government of the United States".

"Relief", as defined in Webster's New International Dictionary 2nd Edition, means:

"Aid in the form of money or necessities for indigent persons."

In 53 C.J. p. 1295, "relief" is defined to mean:

"The assistance or support, pecuniary or otherwise, granted to indigent persons by the proper administrators of the poor laws."

In Bouvier's Law Dictionary, Baldwin's Edition 1934, the word "indigent" has been defined to mean:

"The needy, the poor, those who are destitute of property and the means of comfortable subsistence."

In Words & Phrases, 1st Edition, it is said:

"The word 'relief' in resolutions by a town making provisions for the 'aid and relief' of families of volunteer soldiers, implied want, need or necessity on the part of the applicants, and indicated that the provision there made was charitable".

In 48 C.J. p. 428, it is said:

"Generally the terms 'pauper', 'poor', 'poor person', 'indigent person', 'person in distress', etc., in statutes providing for the relief of such persons, are used to describe that class of persons who are so destitute and helpless as to be dependent for their support upon public charity."

While generally the above mentioned terms are used to describe a certain class of persons, the legislature of this state used the term "person on relief" which certainly could have no other meaning except those persons who, because of certain conditions, are dependent upon public charity for this support.

The term public charity is defined in Bouvier's Law Dictionary, Baldwin's Edition 1934, as:

"A charity which is so general and indefinite in its objects as to be of common and public benefit. It would be almost impossible to say what charities are public and what private in their nature. 2 atk. 87."

In *Newton v. Newton Burial Park*, 34 S.W. 2nd (Mo.) 1.c. 120 the court, quoting from 5 R.C.L. 293 said:

"A gift is a 'public' charity when there is a benefit to be conferred on the public at large, or some portion thereof, or upon an indefinite class of persons. Even if its benefits are confined to specific classes, as decrepit seamen, laborers, farmers, etc., of a particular town, it is well settled that it is a public charity. The essential elements of a public charity are that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite, unrestricted quality that gives it its public character. * * * A charity may restrict its admissions to a class of humanity, and still be public; it may be for the blind, the mute, those suffering under special diseases, for the aged, for infants, for women, for men, for different callings or trades by which humanity earns its bread, and as long as the classification is determined by some distinction which involuntarily affects or may affect any of the whole people, although only a small number may be directly benefited, it is public."

In view of the above definitions any money or necessities, whether from private sources or from governmental sources, when used to aid indigent persons who come within a certain classification, is public charity and the person receiving such aid is a person on relief. This is true, even though that person by performing certain labor, partially

supports himself. As is said in 48 C.J. p. 429:

"A person who is unable to provide for and maintain himself is a pauper, * * * * And where a family is in want, the members thereof are poor and unable to support themselves, (is) within the meaning of the various statutes, although the head of the family earns enough for their partial support."

Therefore, we think that the intention of the legislature by the use of the term, "person on relief", was to mean a pauper or indigent person who was receiving aid in the form of money or necessities from some public charity, even though that person may perform some service for the aid received or partially support himself.

The legislature did not in this act require that the claim, for which the person on relief needs the certified copy of a record to substantiate, be a particular kind or type of a claim against the government of the United States. The term "any claim" has a very broad meaning and would include any debt, demand or other evidence of liability arising out of contract or tort which the government of the United States is legally or morally obligated to pay. Had the legislature intended that the claim be a particular kind, they might have easily said so. The same is true with the question of whether or not the registrar may issue this free certified copy of a record to a person who does not reside within this state.

The language of this exception clause is couched in comprehensive and broad terms, and as is said in *State ex rel Bernero v. McQuillin*, 246 Mo. l.c. 534 "should receive a construction in aid of the broad intendments of the lawmaker". The law says any person on relief and any claim against the government of the United States, and we think this should be construed as any, every and all persons who come with the classification of person on relief, whether they reside in Missouri or not, and as any, every and all claims of whatever nature against the government of the United States.

In your request, you state that you propose to require a statement on the letterhead of the agencies requesting the certified copy of the record to the effect that the certified copy is required to perfect the claim of a person on relief, or any dependent of a person who was on relief for a claim upon the government of the United States. In this connection, we desire to call to your attention that this law does not contemplate that these requests are to come from others than the individual applicants themselves. Although

in all probability in practice the request will be made by someone on behalf of the individual who desires the certified copy. Yet, we wish to make it clear that the law does not require that the request for the certified copy must come through the agency from which the applicant receives his relief maintenance. Also, the act does not contemplate issuing the certified copy to boards or agencies which are in charge of the administration of aid to persons on relief but rather, contemplates that these certified copies are to be issued to the persons themselves instead of to the head of the organization or institution from which the person receives his relief.

The act makes no provisions as to the procedure to be followed by the registrar to determine whether or not the applicant for said certified copy is entitled to a free copy. With the law thus, it is within the power of the State Board of Health to promulgate some reasonable rule for each applicant to comply with so that the registrar may make his determination and such rule of necessity must require that the applicant submit information which discloses that he is on relief and that he does, in fact, have a claim against the government of the United States.

CONCLUSION

Therefore, it is the opinion of this department that the term "person on relief" is used in Section 9060, R.S. Missouri 1929, as reenacted Laws 1937, p. 356, includes those persons termed as indigent and receiving aid from a private charitable organization or some Federal, State, county or city governmental agency, whether the same is supported by its own funds or wholly or in part by federal funds. The act implies to those who come within its provisions in other states as well as Missouri. We think persons who are listed upon the rolls from which the W.P.A. draws its workers and the persons working on W.P.A. projects are included within this act, and those under similar schemes carried out by the States, counties and cities, if there be such. The act includes persons receiving aid from private charitable organizations, if by their administration of the relief given is such that it brings them within the

definition of public charity, and those persons receiving Old Age Assistance or other persons receiving relief aid under Social Security Laws and the inmates of public or private institutions for the indigent. Further, it is our opinion that the claim upon the government may be any type of claim for which there is reasonable cause to believe that the government is legally or morally obligated to pay.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

MUNICIPALITIES: Not subject to inspection as
provided in Section 13120
R. S. 1929.

4-23
April 19, 1937

Mr. Garland Pendleton, Inspector
Division of Food & Drug
State Board of Health
Jefferson City, Missouri



Dear Sir:

This Department is in receipt of your request
for an opinion under date of March 27th, 1937 wherein
you state as follows:

"As inspector in the Division of Food
and Drugs of the State Board of Health
of Missouri, I am writing for an opinion
on the following:

"The Mineral Water System in Excelsior
Springs, Mo., which is a municipal owned
plant, has been bottling soda and mineral
water for some time and selling same in
that city also in other cities and terri-
tory adjacent to that city to various
retailers, such as drug stores, hotels and
restaurants. This company claims exemption
from the State inspection tax of three fifths
of a cent a gallon on the grounds that they
are a municipal owned plant. Now as they
are in direct competition of all the bottling
companies in this part of Missouri, it would
seem that they should come under the same
inspection laws of the State as the other
companies and have the same regulation and
pay the same inspection fee as all the rest.

"I respectfully request a ruling or your
opinion on the above question."

Section 13116, R. S. of Mo. 1929 provides for the inspection by chemical analysis of soda and mineral waters by the Food and Drug Commission.

Section 13118, R. S. of Mo. 1929 provides that every person, persons or corporations bottling soda and mineral waters shall submit samples for inspection.

"Every person, persons, or corporation who shall erect or maintain a plant, factory, or establishment, for the manufacture, preparation or bottling of any such non-intoxicating beverages or so-called "soft drinks", or of fountain or other syrups, flavors and extracts intended for use in the preparation or concoction of such beverages or "soft drinks", for the purpose of offering the same for sale to persons in the state, shall cause samples of same to be inspected by the food and drug commissioner of this state, and when so inspected as herein required the same may be sold in this state. Every such person, persons, or corporation shall furnish to such commissioner upon demand by him from time to time such samples for inspection as he may deem necessary".

Section 13120, R. S. of Mo. 1929 provides the fees of the Commissioner for inspection, thus:

"Fees entitled to for inspecting.- The commissioner shall be entitled to receive for inspecting three-fifths cent for each gallon of non-intoxicating liquid beverage manufactured or sold in this state; five cents per gallon for all fountain syrups, three-fourths of a cent per ounce for all flavors or extracts used in the manufacture or concoction of beverages not otherwise inspected. All fees received by the commissioner shall be paid into the state treasury."

You state that the plant bottling soda and mineral waters at Excelsior Springs, Missouri, refuses to pay the inspection tax of three-fifths of a cent a gallon on the grounds that they are a municipally owned plant.

Section 6 of Article X of the Missouri Constitution exempts the personal property of a municipal corporation and provides in part that

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation."

Exemption in almost the same words is provided by Section 9743, R. S. of 1929.

In the case of *State v. Wenneker*, 145 Mo. 230, 1.c.237, the Court declaring the reason for the exemption of property of the State and its municipalities from taxation, said:

"The reason for exempting from taxation property of the State and its municipalities is plain. Judge Cooley in his work on Taxation (2 Ed), p. 172, expresses it thus: 'All such property is taxable if the State shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself'."

In the case of *State ex rel. Missouri Portland Cement vs. Smith*, 90 S.W. (2d) 405, the Court held that the imposing of a tax upon every retail sale of tangible personal property was not violative of Section 6, Article 10 of the Missouri Constitution and Section 9743, supra, providing that property of state should be exempt from taxation since the tax was an 'excise' and not a 'property tax'.

April 19, 1937

The Court, on p.406, distinguishes between a property tax and an excise tax, as follows:

"It is elementary that the power of the Legislature in matters of taxation for public purposes is unlimited, except in so far as restrained by the State or Federal Constitution or inherent limitations on the power to tax. Cooley on Taxation (4th Ed.) vol. 1, sec. 69, p.171. It has been said that taxes fall naturally into three classes, capitation or poll taxes, taxes on property, and excises. 'Excises, in their original sense, were something cut off from the price paid on a sale of goods, as a contribution to the support of government. The word however has come to have a broader meaning and includes every form of taxation which is not a burden laid directly upon persons or property; in other words, excises include every form of charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation.' 26 R.C.L., Sec. 18, p.34. The same text, in pointing out the distinction to be drawn between property taxes and excise taxes, says 'If a tax is imposed directly by the legislature without assessment, and its sum is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer irrespective of the nature or value of the taxpayer's assets, it is regarded as an excise,' 26 R.C.L., Sec. 19, p.35. Cooley on Taxation (4th Ed.) vol. 1, sec. 42, p.127, defines excises as 'taxes laid upon the manufacturer's sale or consumption of commodities within the country, upon licenses to

pursue certain occupations, and upon corporate privileges.' Under these general definitions of the term, as well as upon the authority of the many adjudicated cases, we think it so clear as not to be open to question that the tax in controversy is an excise, and not a property, tax. See Independent School District v. Pfost, 51 Idaho, 240, 4 P. (2d) 893, 84 A.L.R. 820; Crockett v. Salt Lake County, 72 Utah, 337, 270 P. 142, 60 A.L.R. 867; Portland v. Kozier, 108 Or. 375, 217 P. 833; Standard Oil Company v. Brodie, 153 Ark. 114, 239 S.W. 753; Wiseman v. Phillips (Ark.) 84 S.W. (2d) 91; Pierce Oil Corporation v. Hopkins (C.C.A.) 282 F. 253; Monamotor Oil Co. v. Johnson, 292 U.S. 86, 54 S.Ct. 575, 78 L.Ed. 1141. It will be observed that the exemptions granted by the Constitution and the statute, supra, are limited by express terms to the real and personal property of the several bodies mentioned. Accordingly, article 10, section 6, of the Constitution, has been held to have no application to collateral inheritance taxes (State ex rel. v. Henderson, 160 Mo. 190, 60 S.W. 1093), nor to license fees (State v. Parker Distilling Co. 236 Mo. 219, 139 S.W. 453). And we think in this instance the statute does not impinge upon the constitutional provision pointed out nor violate the statute relied on and is valid."

In the instant case the burden is placed on the business as distinguished from a burden laid directly on persons or property and under the general definition as pointed out in the Portland case, supra, the inspection fee is an excise, and not a property, tax.

On p.407 of the same opinion the Court pointed out that the weight of authority as applied to political subdivisions included municipalities seems to be that exemption from property taxes does not ordinarily extend to excise taxes, but the rule is not absolute and is dependent upon the circumstances of each case, thus:

"We pass now to the question of the intent of the Legislature with respect to imposing a tax on sales or transactions wherein a subordinate branch of the executive department (which the highway department was held to be in *State ex rel. v. Hackmann*, 314 Mo.33, 282 S.W.1007) becomes the purchaser. Respondent invoked the rule that exemption from property taxes does not extend to excise taxes, and asserts the language of the act itself, together with the record of the General Assembly in considering this particular legislation, evinces a legislative intent to impose the tax upon such agencies. The weight of authority seems to be that, as applied to counties, municipalities, and other subdivisions, exemption from property taxes does not ordinarily extend to excise taxes. See *Independent School District v. Pfost*,

Hr. Garland Pendleton. -7- April 19, 1937.

the other cases cited, supra. But the rule is not absolute, and is dependent upon the circumstances of each case. 26 R. C. L., Sec. 276, p.315."

Examining the Section dealing with inspection of beverages, we find that the inspection fee is to be imposed upon "every person, persons, or corporation."

In the case of City of Webster Groves v. Forrest Smith, 102 S.W. (2d) 618, 1.c.619, the State Auditor sought to impose an excise tax upon the privilege of engaging in the business of selling water service. The defense was that the Act was not applicable to a municipal corporation.

The Act in question, Laws of Missouri, Extra Session 1933-34, p.155, 166, which was repealed by the 58th General Assembly Laws of Missouri, 1935, p. 411, provided that (Section 2A, p. 157) "for the privilege of a person engaging in the business * * *."

April 19, 1937.

"Person" as used in the Act is defined in Section 1 thereof (p.156) as follows:

" 'Person' includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate or any other group or combination acting as a unit, and the plural as well as the singular number."

Plaintiff-appellant contended that it would not come within this definition, that, within the meaning of the Act, it was not a person upon whom the tax is imposed and that the Act does not apply to a municipality. The State Auditor took the position that the word 'corporation' as used in the foregoing definition should be taken and construed to include a municipality, it being a municipal corporation. The Court in its opinion said:

"In definition and legal classification and terminology a well-settled distinction exists, and is recognized generally, between a 'corporation' and a municipal corporation'. Each term has a distinct and commonly accepted meaning. As illustrative, reference may be had to our statutes. The numerous statutory provisions relating to the organization, powers, etc. of municipalities are collected and classified under the designation 'municipal corporations'. See for example chapter 38, R. S. 1929, Sec. 6090 et seq. (Mo. St. Ann. Sec. 6090 et seq., p.5266 et seq.) Municipalities are variously referred to in our Constitution as cities or towns and municipal corporations. 'In common parlance, towns, cities and other municipal organizations are not known as corporations.' Linehan v. City of Cambridge, 109 Mass.212. Reverting to statutory language in this state, the term 'corporation' is used and refers to private and business corporations and the statutes relating to such corporations are assembled under the designation or classification of 'corporations.' See for example chapter 32, R.S.1929, Sec. 4526 et seq. (Mo. St. Ann. Sec. 4526 et seq., p.1983 et seq.) Likewise where the

term 'corporation' is used in our Constitution it uniformly refers to private or business organizations of individuals. Neither by the language of the Constitution nor statutes is the term 'corporation' so used as to apply to and include a municipality or municipal corporation and where a city or town is referred to, in the sense of being a corporate entity, the term 'municipal corporation' is used. Looking to the context of the act as a whole, we find no language or provisions therein from which an implication necessarily arises that it was the legislative intent to include a municipal corporation within the act. Indeed we find nothing in the other provisions of the act which so much as tends to show such an intent. The provision for verification of the return to be made to the state auditor requires that it 'be verified by the oath of the tax-payer, if made by an individual, or by the oath of the President, Vice-President, Secretary, or Treasurer of a corporation if made on behalf of a corporation.' While the persons thus specifically named are the usual officers of private corporations, they are not, except treasurer, officers of a municipality. Further the collocation of 'corporation' with the words 'individual', 'firm', 'copartnership', etc., indicates that a private corporation and not a municipality was meant. In view of the foregoing considerations, the meaning commonly ascribed to the word 'corporation' both in popular usage and legal nomenclature and absence of language indicating a legislative intent to use it in a

April 19, 1937.

different sense we must assume it was used in its ordinary and commonly understood meaning and the assumption legitimately follows that had the Legislature intended to include a municipality in the act it would have done so by specific language to that effect. It is our conclusion that the word 'corporation' as used does not include a municipality and therefore a municipality is not within the act. The decisions of this court in Public Service Commission v. City of Kirkwood, 319 Mo. 562, 4 S.W. (2d) 773, and the City of Columbia v. Public Service Commission, 329 Mo. 38, 43 S.W. (2d) 813, lend support to such conclusion."

As pointed out in the Missouri Portland Cement Company case, supra, whether municipalities are exempt from excise taxes, depends upon the circumstances of each case. Looking into the context of the Act as a whole, we find no language or provisions therein from which an implication necessarily arises that it was the legislative intent to include a municipal corporation within the Act. Further, we believe that the use of the words 'corporation' with the words 'person or persons' indicates that a private corporation and not a municipality was meant.

In view of the foregoing we are of the opinion that the municipal water system in Excelsior Springs, Missouri, which is a municipally owned plant, is not subject to the inspection fee, as provided in Sec.13120, supra.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

WM. ORR SAWYERS
Assistant Attorney-General

TOWNSHIPS: Township Clerks not entitled to receive a fee on account which may be filed in his office, which is to be laid before the township board for allowance.

April 29, 1937

5-10



Mr. Henry M. Phillips
Attorney At Law
Bloomfield, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date requesting an opinion from this department, which reads as follows:

"I am writing this letter for an opinion from your office relative to proper fees for a Township Clerk to charge in a county under township organization such as Stoddard county. Mr. Clyde Henson, a newly elected clerk for Castor township, this county, has asked my advice in construing Section 12310 R. S. Mo. 1929 which sets out the fees to be charged by a clerk. Because of the wording I am doubtful about the meaning of said section. Mr. Henson is conscientious and wants to charge the proper fees and does not want to charge fees he is not entitled to. I am writing as an accommodation to Mr. Henson and not as his attorney.

* * * * *

"Should the township clerk charge ten cents each for claim or account filed by creditors of the township? In other words are these claims or

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accounts which creditors must file in order to get warrants as provided by Section 12301 R. S. Mo. 1929 "instrument of writing" mentioned in Section 12310?"

We direct your attention to Section 12301, supra, which reads in part as follows:

"Any person having a claim or account against the township may file such claim or account in the office of the township clerk, to be kept by the said clerk, and laid before the township board at their next meeting: Provided, however, that any person having a claim against the township may present said claim to the township board himself, or by an agent, at any legally convened meeting of said board;"

You will notice from above quoted part of the Statute that it is discretionary with a person having a claim or account, as to whether such claim or account be filed in the office of the clerk, or be presented by the person or his agent before the township board. This Section contemplates that a person may pursue either course which, in his opinion, is best toward having his claim or account allowed.

Section 12310 provides in part:

"* * * the township clerk shall receive fees for the following, and not per diem. * * * For filing any instrument of writing, ten cents; * * *"

At first blush it would seem to appear that the above part of the statute would be broad enough to in-

clude any paper or memoranda with writing on it, but a perusal of a number of definitions cited in adjudicated cases reveals the contrary.

In the cases of State vs. Phillips 62 N. E. 12,14, and Patterson vs. Churchman 23 N. E. 1082, 1083, the Supreme Court of Indiana, has, in its opinions, undertook to collate the various definitions of an instrument and instruments of writing which we deem apropos. In the former case the Court construed a statute relating to recorders fees, for the indexing and recording of all other instruments there not specifically mentioned, for which a fee was charged, and in discussing the word instrument said:

"The word 'instrument', in a legal sense, is defined to be 'a writing, as the means of giving formal expression to some act; a writing expressive of some act, contract, process, or proceeding, as a deed, contract, writ, etc'. Webster's Int. Dict. 'A writing giving as the means of creating, a securing, modifying, or terminating a right, or affording evidence; as a writing containing the terms of contract, a deed of conveyance, a grant, a patent, an indenture, etc.' Cent. Dict. 'A formal legal writing, e. g. a record, charter, deed, or written agreement.' Rap. & L. Law Dict. 'Anything reduced to writing; a written instrument or instrument of writing; more particularly, a document of formal or solemn character.' And. Law Dict. 'The term 'instrument', in the broadest sense, comprises formal or legal documents in writing, including con-

tracts, deeds, wills, bonds, leases, mortgages, etc.' 16 Am. & Eng. Enc. Law (2d Ed.) p. 824. Abbott, in his Law Dictionary, defines the term 'instrument' as 'something reduced to writing as a means of evidence.' The word 'instrument' is frequently employed in our registry laws, and usually refers to some written document that is entitled to be recorded in a public record."

In the latter case above cited, the court had before it for consideration a statute which provided in substance that it was not necessary to copy a written instrument into a bill of exceptions. The question arose as to whether the stenographic report of the testimony was a written instrument within the meaning of this statute.

The Court in discussing definitions of an instrument, on page 1083 and 1084 said:

"* * * It is not every sheet of paper which has writing upon it that is a 'written instrument'; * * * We quote from Anderson's Dictionary of the Law: 'Instrument. * * * (3) Anything reduced to writing; a "written instrument," or "instrument of writing", more particularly, a document of a formal or solemn character. * * * "Instruments in writing," associated in a statute with "bonds", "laws", "deeds", and "records", has a restrictive connotation. * * * In Bouvier's Law Dictionary the word 'instrument' is defined as follows: 'The writing which

Mr. Henry M. Phillips

-5-

April 29, 1937

contains some agreement, and is so called because it has been prepared as a memorial of what has taken place, or been agreed upon. It includes bills, bonds, conveyances, leases, mortgages, promissory notes, and wills, but scarcely accounts, ordinary letters, or memoranda."

CONCLUSION

In view of the above, it is the opinion of this department that the claim or account mentioned in Section 12301, supra, that may be filed in the office of a Township Clerk, is not an instrument of writing, within the meaning of Section 12310, supra, for which the Township Clerk may receive a fee.

Very truly yours,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS:JMW

JURY COMMISSIONERS:) Jury commissioners entitled to have
in Counties from) salary restored under Senate Bill No. 12.
400,000 to 800,000)
inhabitants.)
SALARY & COMPENSATION:)

June 7, 1937.

6-10



Honorable John B. Pew
County Counselor
Jackson County
Kansas City, Missouri

Dear Mr. Pew:

This is to acknowledge your letter of May 17th in which you request the opinion of this Department on the questions therein submitted. Your letter is as follows:

"On March 5, 1937, the Governor approved Senate Bill #12, which provides for an increase in the salary of jury commissioners in Jackson County, from \$1500. to \$3000. per year. The 10 circuit judges of Jackson County are ex officio members of the jury commission. In fact, the creation of this commission in the first instance was probably a method of raising the salaries of circuit judges. The salary of a commissioner was fixed at one time at \$3000. and I think about 4 years ago was reduced to \$1500. but now Senate Bill #12 amends the law by merely increasing the pay and no added duties are assigned to the commission and no change in the law is made other than the increase in salary.

"Some of our judges have just been elected for 6 years. The terms of some will expire in less than 2 years and they will probably be re-elected. It is the desire of the county court to meet this increase in pay.

June 7, 1937.

"We are informed that the circuit judges, who constitute this board, insist that a membership on this board is not a public office as contemplated by the constitution. The members are not nominated and elected to this office and are not appointed. It is a position incident to the office of circuit judge. As a matter of precaution, the county court today requested me to ask you if, in your opinion, we could safely meet this payroll."

The question, as we understand it from your letter, is whether or not the members of the present Board of Jury Commissioners of Jackson County are entitled to an increase in compensation of \$1500.00 each per annum, as provided in Senate Bill No. 12 passed by the 59th General Assembly and signed by the Governor March 5, 1937.

The Legislature in 1905 created a Board of Jury Commissioners for all counties of the State having a population of 200,000 inhabitants and not more than 400,000 inhabitants and designated the circuit judges of such counties as a board of jury commissioners. In its original enactment each member of the Board of Jury Commissioners received \$1500.00 per annum for his services as jury commissioner. This law was carried through the different revisions of the Statutes of Missouri and was Section 8795, of the Revised Statutes of 1929.

The 1931 General Assembly repealed Section 8795 and created a Board of Jury Commissioners for each county in this State having not less than 400,000 nor more than 800,000 inhabitants and re-enacted a new section which increased the compensation of the jury commissioners in said counties to \$3000.00 per annum. In each of these acts the circuit judges of said counties, including the judges of the court having jurisdiction in felony cases, constitute the board of jury commissioners. Jackson County falls within the provided classifications. The 1930 United States Census shows that Jackson County had a population of 470,454 (1935-36, Blue Book, page 434) and falls within the classification of the

1931 Act by which act the salary of each member of the Board was fixed at \$3000.00 per annum.

Section 8795, R. S. Mo. 1929, as amended by Laws of Missouri, 1931, at page 257, was repealed and a new section enacted (Laws of Missouri, 1933, page 281) and the compensation of each member of said Board for his services as jury commissioner was reduced to \$1500.00 per annum.

Senate Bill No. 12, passed by the Legislature and approved by the Governor March 5, 1937, amends the 1933 law by striking out the words "fifteen hundred" and inserting in lieu thereof the words "Three thousand," thereby restoring the compensation to \$3000.00 per annum.

The creation of the additional duties and the fixing of the compensation of the jury commissioners did not affect the salaries of the judges of the Circuit Court of Jackson County for the reason that it was compensation solely as members of the Board of Jury Commissioners. The General Assembly has full power and authority to increase or decrease the compensation of public officials unless restricted in some way by the Constitution. There are two sections of our Constitution which should be considered in this opinion:

Section 8, Article XIV, which provides:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; * *"

and Section 33, Article VI, which provides:

"The judges of the Supreme, Appellate and Circuit Courts, and all other courts of record receiving a salary, shall, at stated times, receive such compensation for their services as is or may be prescribed by law; but it shall not be increased or diminished during the period for which they were elected."

Unless the increase of the compensation allowed each member of the Board of Jury Commissioners by Senate Bill No. 12 is prohibited by the above sections of the Constitution, each

June 7, 1937.

of the members of this board is entitled to the \$1500.00 increase provided by Senate Bill No. 12.

The judges of the Circuit Court of Jackson County are elected at the various general state and presidential elections, so that the personnel is constantly changing. We do not think that the jury commissioners hold their offices ex officio, but under the statute creating said board the judges are designated as "Board of Jury Commissioners." Since the members of the Board of Jury Commissioners do not receive their compensation as Judges of the Circuit Court of Jackson County, but for additional duties given them by the statutes, not incidental to their duties as judges, and thereby Section 33, Article VI of the Constitution, quoted above, does not affect in any way the compensation given the members of the Board for the reason that this section states that the salary of the judges, which means as judges, shall not be increased or diminished during the period for which they were elected, and therefore constitutes no inhibition against them as members of the Board of Jury Commissioners.

It is well settled in Missouri and elsewhere that where a public official is given additional duties to perform, for which a compensation is given for the performance of these additional duties, he is entitled to said increase, notwithstanding the constitutional provision may provide that his compensation or salary may not be increased during his term of office. State ex rel. v. Sheehan, 269 Mo., 1. c. 429, and cases cited; The State ex rel. McGrath v. Walker, 97 Mo. 162; Tayloe v. Davis, 212 Ala. 282, 102 So. 433, 40 A. L. R., 1. c. 1057.

There is nothing in Section 33, Article VI of the Constitution which prohibits the present members of the Board of Jury Commissioners from being entitled to the increased compensation as provided in Senate Bill No. 12, as jury commissioners.

We must then determine whether Section 8, Article XIV of the Constitution, constitutes a barrier to them accepting this additional compensation at this time by reason of the increase provided by Senate Bill No. 12. This section prohibits the increase of a state, county and municipal officer

during his term of office. Do the members of the Board of Jury Commissioners in Jackson County have a term of office within the meaning of the Constitution? If it is determined that they have no term of office within the meaning of the Constitution, then they are entitled to this increase in compensation immediately upon the signing of Senate Bill No. 12 by the Governor, namely, March 5, 1937.

Section 8795, R. S. Mo. 1929, provides in part:

"The circuit judges of said counties, including the judges of the court having jurisdiction in felony cases, shall be and constitute a board of jury commissioners for such counties, * *"

It will be noted that the members are not nominated, appointed or elected to any office, no term of office is created by the statute, but the Legislature has merely stated that the aforementioned judges shall be and constitute a Board of Jury Commissioners. The Legislature at all times may abolish at will the Board of Jury Commissioners or diminish or take away the salary at any time it sees fit, and the members thereof have no vested right whatsoever in the compensation allowed under the Act creating them. The members act on this Board solely at the pleasure of the Legislature. Missouri cases may be cited announcing the doctrine where an officer serves at the pleasure of another does not have a fixed term within the meaning of the Constitution. State ex rel. Rumbold v. Gordon, 238 Mo. 168; State ex inf. v. McKay, 249 Mo. 257.

If it were held that Section 8, Article XIV of the Constitution prohibits the members of the Board of Jury Commissioners from receiving the increase in compensation, and if it were considered as a term of office, we would have the anomalous situation of some members of the Board receiving \$3000.00 and others receiving \$1500.00 per annum. We do not think that there is anything in Section 8, Article XIV, supra, which constitutes a barrier or prohibits the members of the Board of Jury Commissioners from receiving the increase in compensation as provided in Senate Bill No. 12.

June 7, 1937.

By Section 8795, R. S. Mo. 1929, the Members of the Board of Jury Commissioners received \$1500.00 each; in 1931 the salary was increased to \$3000.00 each; in 1933 the salary was reduced to \$1500.00 each; then in 1937 under Senate Bill No. 12 the salary was increased to \$3000.00 each; so that for those judges who were elected in 1932 and whose terms do not expire until December 31, 1938, the increase of 1937 is but a restoration of the \$3000.00 salary received by them as jury commissioners under the 1931 law. It would not be reasonable to assume that some of the judges serving as jury commissioners are entitled to only \$1500.00 per annum and others \$3000.00 per annum for performing exactly the same services. As their salaries as jury commissioners have been changed at every regular session of the Legislature since 1929, with the exception of 1935, and as some of the Judges of the Circuit Court of Jackson County are elected every two years, we would have the peculiar situation of some of them receiving \$1500.00 and others \$3000.00 if Section 8, Article XIV constituted an inhibition against the jury commissioners, now serving, receiving the additional compensation.

We note further that Section 2 of Senate Bill No. 12 has an emergency clause. There would be no good reason for an emergency clause if it was not intended that the increase become effective for the benefit of the jury commissioners now serving.

Without extending this opinion further, and we think other cases and reasons might be assigned in support of our conclusions, from the above and foregoing we are of the opinion that the present members of the Board of Jury Commissioners of Jackson County, now serving, are entitled to the increase in compensation as provided by Senate Bill No. 12.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

CRH:EG

TAXATION: Collector can refund penalties paid by
taxpayers under House Bill No. 70
after effective date of said Bill

July 17, 1937
7/20



Mr. W. S. Pelts
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Sir:

This Department is in receipt of your recent letter wherein the substance of the question propounded, in essence, is as follows:

"House Bill No. 70 being approved by the Governor on June 8, 1937, remitting certain penalties on delinquent taxes, the collector received notice from the State that the Bill was approved, and as the same carried an emergency clause, went immediately into effect:

"Can penalties be refunded to taxpayers who paid said penalties after June 8 (June 9) and before receipt of the notice by the Collector on June 10."

Section 1 of House Bill No. 70 is as follows:

"In payment of the taxes assessed against any person whose name appears upon the personal delinquent lists of any year or years prior to January 1, 1937, and in payment of the taxes assessed against any real estate which

appears upon the lists of delinquent and back taxes of any year or years prior to January 1st, 1937, including delinquent taxes for the year 1936, the collectors of revenue of the counties and cities of this state are hereby empowered and directed to accept the original amount of said taxes as charged against any such person or real estate relieved of the penalties, interest and costs accrued upon the same except the commission of said collectors of revenue, as same are now provided by law for the collection of delinquent taxes; PROVIDED, however, that such remission of penalties, interest and costs shall be in full if said taxes are paid not later than June 30, 1937; if paid after June 30, 1937 and not later than August 31, 1937, then such remission shall be 75 per cent of such penalties, interest and costs; if paid after August 31, 1937, and not later than October 31, 1937, such remission shall be 50 per cent of such penalties, interest and cost; if paid after October 31, 1937 and not later than December 31, 1937, then such remission shall be 25 per cent of such penalties, interest and costs, PROVIDED, further, that after December 31, 1937, all penalties, interest and costs as aforesaid shall be restored and be in full force and effect for the full period of time since their accrual and as if this act had not been passed."

July 17, 1937

The digest of House and Senate Bills shows that House Bill No. 70 was signed by the Governor on June 8, 1937; Section 3 of House Bill No. 70 is an emergency section and the last sentence reads:

"And this act shall be in force and take effect from and after its passage and approval by the Governor."

Under our Constitution, laws which are passed by the Legislature without an emergency clause become effective ninety days after the adjournment of the Legislature. The emergency clause in a legislative enactment makes it become effective immediately upon the approval by the Governor. Therefore, the law remitting penalties, as set forth above, was effective on June 9 at the time the taxpayers in question paid their taxes and included the penalties. In other words, the taxpayer was entitled to the remission of the penalties, but, having voluntarily paid the same, can the collector refund the penalties.

The general rule with reference to paying taxes and the recovery of same is contained in *Kansas City ex rel. v. Holmes*, 127 Mo. App. 1. c. 624:

"We think the principle of that case should govern this also. And furthermore the taxes were just. When plaintiff paid the money to redeem his land he was paying that for which his land was liable. We assert the proposition that, whereas a taxpayer cannot be compelled to pay taxes irregularly assessed against him property, yet if he does pay them under such a condition and the sum paid represents the amount for which his property is justly liable he cannot recover it. It has even been

held that where a taxpayer pays taxes that are illegal he cannot recover them back unless he paid them under duress. (Robins v. Latham, 134 Mo. 466; Wolfe v. Marshall, 52 Mo. 167; State ex rel. v. Railroad, 165 Mo. 597.)"

But we think that although the rule differs in the several states that in Missouri interest and penalties on delinquent taxes are not a part of the tax. Section 2220, 61 Corpus Juris, page 1516, is as follows:

"When interest is charged on a delinquent tax by statute, it is not regarded as interest in the sense that it is a consideration for the forbearance of money, but is deemed to be a penalty; and the statutes imposing interest do not make interest a part of the tax but pertain to the remedy employed to compel payment of the tax."

Most of the states contain statutory provisions relating to the refunding of taxes illegally paid, or the refund of taxes under certain conditions. Missouri apparently has no such statute as a guide. The only decision which has been before our Supreme Court relating to the remission of penalties is that of State ex rel. McKittrick v. Bair, 63 S. W. (2d) 64. This decision mainly dealt with the constitutionality of such an enactment by the Legislature. Speaking of the remission of penalties, Judge Hays, page 66 said:

"It having been determined that the respondent and the interveners have no vested interest or property right in the penalties remitted by Senate

Bill No. 80, the act does not offend against the due process clauses of the Fourteenth Amendment nor section 10 of Article 1 of the Constitution of the United States nor our Section 30 of Article 2."

And again states:

"In this situation, the legislative power to remit the penalties involved here is well settled in principle. In *Maryland v. B. & O. R. R. Co.*, 3 How. 534, 11 L. Ed. 714, it is held that the Legislature has a right to remit penalties imposed by law. 'In this aspect of the case,' the court said at page 552 of 3 How. ,11. L.Ed.714, 'and upon this construction of the act of Assembly, we do not understand that the right of the state to release it is disputed. Certainly the power to do so is too well settled to admit of controversy. The repeal of the law imposing the penalty, is of itself a remission, (U. S. v. The Peggy) 1 Cranch, 104, (2 L.Ed.49); (*Yeaton v. United States*), 5 Cranch 281, 3 L.Ed. 101); (U. S. v. *Ship Helen*), 6 Cranch, 203 (3 L. Ed. 199); (*The Rachel v. U. S.* 6 Cranch) 329 (3 L.Ed. 239). And in the case of the *United States v. Morris*, 10 Wheat. 287 (6 L.Ed. 314), this court held that Congress had clearly the power to authorize the secretary of the Treasury to remit any penalty or forfeiture incurred by the breach of the revenue laws, either before or after the judgment; and if remitted before the money was actually paid, it embraced the shares given by law in such cases to the officers of the customs, as well as the share of the United States.'

See, also, 23 Am. & Eng. Ency.
of Law, pp.506-508 and 510
(1st Ed.) and cases cited."

And again, in discussing the effect of suits pending and the remission of penalties thereon, at l. c. 67 said:

"All questions necessary to be discussed having been determined, it seems advisable, before closing this opinion, to observe briefly the effect of the change in the law upon the back tax suits that have been filed, or may be filed, subsequently to the date, April 13 of the current year, when this new law became effective. Owing to the alternative options granted the taxpayer, with periodically and increasingly reduced advantage to him in the avoidance of penalties, a question of some difficulty is presented pertinent to the effect upon suits pending during any part or all of the entire period covered by the act. Concerning this matter, it is our view (1) that none can proceed to final judgment before the expiration of the act on January 1 next; (2) a taxpayer exercising the first option may pay the original tax without more, and all penalties are thereby discharged, and his pending tax suit, if any, will be abated; (3) exercising the second option, the taxpayer, if suit be pending against him, must, in addition to the original tax, pay one-fourth of all penalties formerly chargeable, in full discharge of the whole, and the suit will likewise abate; (4) the same process and result will apply

July 17, 1937

in a general way to the remaining options. We think this mode of procedure seems practical and just, and accomplishes the legislative purpose, as we have determined it."

None of the above quoted decisions have a direct bearing on our question at hand. However, having concluded that in Missouri penalties and interest are not a part of the tax, it would appear in equity and in justice that both the collector and the taxpayer, not being informed of the effective time of House Bill No. 70, a refund of penalties in the amount that the taxpayers would have been entitled to forego under House Bill No. 70 should be returned to them. If the amount of the penalties have not been turned into the county treasury we think the same can be held aside and returned to the taxpayers by the collector. If the penalties have been turned into the county treasury then the redress of the taxpayers should be in the county court and the collector should be privileged to take credit for same.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

ASSISTANT COUNTY HIGHWAY ENGINEER: Should be paid out of
Class 4 of the county
budget.

August 26, 1937



Honorable Tom Phelps
Presiding Judge, County Court
Jasper County
Joplin, Missouri

Dear Sir:

This will acknowledge your request for an opinion,
which reads as follows:

"Will you please give us an opinion
in regard to what fund the assistant
county highway engineer should be paid
out of?"

Under provisions of Section 8011, R. S. Mo. 1929, the
county court has the authority to appoint the county sur-
veyor to the office of county highway engineer which, we
are informed, your court has done. Said section also author-
izes the county highway engineer, when he is unable to pro-
perly perform all the duties of his office, to appoint one
or more assistants, with the approval of the court, who
shall receive such compensation as may be fixed by the court.
We are informed that an assistant has been appointed whose
compensation has been fixed by the court. The question to
be determined is out of what fund the assistant so appointed
is to be paid.

There is no question but what such assistant highway
engineer is a county officer and that his services should be
paid by the county court out of the general revenue of the
county.

Section 2 of the County Budget Law, Laws of Missouri
1933, page 341, provides in part in regard to the classifi-
cation of expenditures:

August 26, 1937

"Class 4: The county court shall next set aside the amount to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county * * * * "

Section 5 of said Act also provides:

"Class 4: Pay or salaries of officers and office expense * * * * * "

It is therefore the opinion of this department that the assistant county highway engineer's salary should be paid out of the ordinary revenue of a county under Class 4 of the county budget.

Very truly yours,

J. E. TAYLOR
Acting Attorney General

JET:RT

TAXATION: Section 9951 Laws of Missouri 1933, page 428, relating to sale of property for delinquent taxes is applicable to Jackson County, Missouri.

September 1, 1937

9-3



Mr. John B. Pew
County Counselor
624 Rialto Building
Kansas City, Missouri

Dear Sir:

This department is in receipt of your request for an opinion as to the following:

"In conformity with Sec. 9960-D of the chapter pertaining to taxation and revenue in the Session Acts of 1933, at page 443, we are writing you for your decision on a question arising as to the interpretation of Sec. 9951 of said act found on page 428, Session Acts of 1933.

"Jackson County has not to date offered any property for sale under the provisions of this revenue act but to prevent the 5-year limitation from running it will be necessary this November for the county to offer for sale property on which the 1932 taxes have not been paid.

"Nearly all of these unpaid taxes are small in amount. The last time the city limits of this city were extended we did a big job of it. The territorial area of Kansas City is about equal to that of St. Louis. In this extension we took in many dairy farms and a tremendous lot of property very rough in typography.

Unfortunately a great deal of this property has been improvidently platted. I may add that the large area taken in was mainly for the purpose of getting within the city limits property with drainage toward the Missouri River so that the city might formulate a plan of a gravity sewer sufficient for all time. However, this large extension has required the Assessor and Collector to carry on their books thousands of lots that are now abandoned. Subsequently some one may become interested in these lots.

"One or two additions are in the Missouri River and yet for years there are pages of records in these two offices assessing and keeping track of the back taxes on these additions in the river.

"As Counselor to the County Court, I would like to advise, under authority of Sec. 9951, that our County Auditor, Collector and Assessor may, acting as a commission as provided in this section, recommend that vast numbers of these tracts of land are not worth the taxes or that the taxes are too small to justify the expense of sale and that for that reason taxes for the year 1932 may be abated and left out of the sale. Such would save a tremendous lot of cost in clerk hire and in advertising expense. No bids would be received on any of this property.

"The substantive part of this section which sets out the law, makes it apply specifically to a county having therein a city of 300,000 inhabitants. That provision includes Jackson County, but

near the end of the section it says that the 'tax bills shall be cancelled by the comptroller of such city.'

"By reason of this provision, our local authorities are inclined to feel that this entire section relates to St. Louis only. But the concluding sentence in the section is as follows:

'In the City of St. Louis such commission shall be composed of the Comptroller, Mayor and the President of a Board of Assessors.'

"Thus not only does the section in the substantive part thereof provide specifically that it shall include Jackson County, but the closing sentence likewise discloses that it is intended to cover St. Louis as well as other counties and could not therefore have been intended exclusively for St. Louis.

"It is my view that wherein it provides that the tax bills shall be cancelled by the comptroller means where there is a comptroller. If in a county like ours, where the city comptroller has nothing to do with the county books; it is my view that the County Court, in whom is vested by the constitution the power and authority to transact all county business, this court would undoubtedly have the right, upon the recommendation of this commission to enter an order for the reasons set out, abating the taxes for the year 1932 and directing the County Collector to abate such taxes and satisfy the

record for that year.

"If you will kindly confer with the Attorney-General and if he feels that these views I express are correct or upon any other interpretation and direction from your commission, under the advice of the Attorney-General, we can cancel some of these taxes, it will be highly profitable for us to do so.

"We are working daily upon plans for our sale and would like to have your views upon this matter as early as convenient."

Section 9951, Laws of Missouri 1933, page 428, provides:

"Sec. 9951. Commission to examine back taxes. - At every annual settlement made by a collector of the revenue after this article shall take effect, in each city in this state which now has or which may hereafter have three hundred thousand (300,000) inhabitants or more, and in each county having therein or which may hereafter have therein a city having three hundred thousand (300,000) inhabitants or more, all delinquent real estate and delinquent personal tax lists and back tax bills for taxes on real estate and personal property shall be carefully examined by a commission to be composed of the auditor, collector and assessor, and if there appear thereon any back tax bills which have appeared thereon for a period of five years or more which, in the opinion of a majority of said commission, are too small to justify the expense of suit or foreclosure, or which are

against exempt property, or which are against property which is not worth the taxes, interest and cost, and cannot be compromised as provided by law, the same shall, upon order of such commission or a majority thereof, be stricken from such delinquent real estate or back tax books and the tax bills therefor cancelled by the comptroller of such city. In the City of St. Louis said commission shall be composed of the comptroller, mayor and the president of the board of assessors."

If the above statute be considered as applicable to the city of St. Louis only, the statute would be unconstitutional by reason of being in violation of Article 4, Section 53, of the Constitution of the State of Missouri. However, as we view the situation, there is no question but that this statute not only applies to St. Louis and St. Louis County, but also to Kansas City and Jackson County and to any other city or county that may hereafter have a population of 300,000 inhabitants.

In the first place, section 9951, Laws of Missouri 1933, page 428, is a new section passed by the General Assembly in 1933. The former section 9951, R. S. Mo. 1929, was repealed by section 1 of the present act. The present section 9951 enacted in 1933 specifically provides that it shall be applicable "in every city in this state which now has or which may hereafter have 300,000 inhabitants or more, and in every county having therein or which may hereafter have therein a city having 300,000 inhabitants or more." The express language of the statute itself, therefore, leaves no doubt but that the Legislature intended that it should apply to Jackson County and it is the use of this general language that gives validity to the Act and prevents it being purely local legislation.

"In other words, the class is fixed, but the counties that fall within it may change as their population fluctuates. That such legislation is not local is established by numerous decisions of

this court." Thomas v. Buchanan Co., 51 S. W. (2d) 95.

The only words in the section which might cast some doubt upon this construction of the intention of the Legislature in passing the act is to be found in the last two lines of the first sentence of said section, wherein it is said:

"and the tax bills therefor cancelled by the comptroller of such city."

Obviously this language cannot refer to Jackson County. However, we believe this to be merely a clerical omission on the part of the General Assembly, and it is our opinion that the words "collector of such County" may be read into section 9951 in place of the words "comptroller of such city" wherever necessary or applicable. In the case of State v. Koeln, 211 S. W. 31, l. c. 33, Judge Williams said:

"The correct rule here applicable is stated in 36 Cyc. 1126, as follows: 'Mere verbal inaccuracies or clerical errors in statutes in the use of words or numbers, or in grammar, spelling, or punctuation, will be corrected by the court whenever necessary to carry out the intention of the Legislature as gathered from the entire act.'"

This clerical error of omission is easily understandable when the history of the section is traced to its origin. Section 9951 undoubtedly has its origin in Laws of Missouri, 1913, page 741, which provides:

"Section 1. Certain bills to be cancelled by commission in certain counties and cities. At the first annual settlement made by a collector of the revenue after this act shall take effect, in each city in this state which now has or which may hereafter have three hundred

thousand inhabitants (300,000), or more, and in each county having therein or which may hereafter have therein a city having three hundred thousand (300,000) inhabitants or more, all delinquent real estate and delinquent personal tax lists and back tax bills for taxes on real estate and personal property shall be carefully examined by a commission to be composed of the auditor, collector and assessor, and if there appear thereon any back tax bills prior to the year 1908 which, in the opinion of a majority of said commission are too small to justify the expense of suit, or which are against exempt property, or which are against property which is not worth the taxes, interest and costs, and cannot be compromised as provided by law, the same shall, upon order or such commission or a majority thereof, be stricken from such delinquent real estate or back tax books and the tax bill therefor canceled by the comptroller of such city. In the city of St. Louis said commission shall be composed of the comptroller, mayor and president of the board of assessors."

At the time this section was passed, in 1913,

there was only one city to which the law could possibly apply, namely St. Louis, for it was the only city at that time having a population of 300,000 inhabitants or more. Nor was there a county at that time having a population of 300,000 inhabitants or more. Consequently, while the Legislature undoubtedly passed a law at that time for the benefit of St. Louis only, nevertheless in order that the law might be constitutional, they provided that the law should be applicable to any city or county which might have or might thereafter have 300,000 inhabitants or more. However, having in mind when the law was being formulated that there was only one city to which the law could possibly apply, it is quite natural that in providing the necessary procedure, the Legislature should provide that the tax bills should be cancelled by the comptroller of such city. This language can be traced from 1913 to 1933, though from the moment the population of Jackson County reached 300,000 inhabitants, these words became inapplicable. However, we do not feel that this clerical error of omission should prevent the operation of the statute in Jackson County. As Judge Lamm said in the case of Rutter v. Carothers, 223 Mo. 631, the recognized canons of construction "ordain that the naked letter of the law must gently and a little give way to its obvious intentment."

CONCLUSION

In view of the foregoing, it is the opinion of this department that the provisions of Section 9951, Laws of Missouri 1933, page 428, are applicable to Jackson County, Missouri.

Respectfully submitted,

JWH:EG

JOHN W. HOFFMAN, Jr.
Assistant Attorney General

APPROVED:

(Acting) Attorney General)

SPECIAL ROAD DISTRICTS: Funds of a special road district, when the district comprises territory in two or more counties, may be used in any part of the district regardless of mileage or amount of funds derived from any county

October 7, 1937

Honorable Tom Phelps
Presiding Judge
728 Virginia Avenue
Joplin, Missouri

10-8
FILED
70

Dear Sir:

This department acknowledges receipt of your request for an opinion based on the following facts:

"Jasper Special Road District is located in both Jasper County and Newton County. Most of the district is located in Jasper County and consequently most of the revenue is derived from Jasper County.

"Will you please give us your opinion as to whether this road district can use the revenue received from Jasper County in its roads located in Newton County."

In arriving at a conclusion in answer to your question it is necessary to review certain statutes as well as court decisions.

Section 8042, Revised Statutes Missouri 1929, refers to the funds to be used in the special road district, and, among other others, recites that the county court shall, upon written application by the commissioners of a special road district, or districts, draw warrants upon the county treasurer, payable to the commissioners of such special road district, or districts, for all the part or portion of taxes

October 7, 1937

collected upon property lying and being within the special road district, or districts.

In the decision of State ex rel. v. Barry County, 302 Mo. 280, it was held that a special road district is entitled, upon timely application therefor, to receive all moneys collected as taxes for road and bridge purposes upon property within its boundaries.

Section 8033, Revised Statutes Missouri 1929, places the sole, exclusive and entire control and jurisdiction over all public highways within the special road district in the board of commissioners, and the manner of appointment and term and qualifications of the board of commissioners is set forth in Section 8026.

Section 8059, Revised Statutes Missouri 1929, relates to the boundary of special road districts and how they may be extended, and contains the following provision:

"* * or if the proposed district shall include parts of more than one county, the county courts of all such counties, shall each make an order of record that the proposed extension of said road district under the provisions of this section, describing the same by its title and the date of its approval, and describing the boundaries of the district* * * *
* * . Each county court shall give notice of such election by publishing the same in some newspaper published in its county.
* * * * The said county court or county courts of each of said counties shall have the ballots for the election in their counties printed * * * * *."

Under Section 7961, relating to the issuance of bonds by special road districts, we call your

attention to the following provision,

"and if such special road district embraces territory in two or more counties, then such notice shall be published in a newspaper published in each of such counties.* * * It shall be the duty of the clerk of the board of commissioners on or before the first day of May in each year, or the state auditor immediately thereafter, in case the clerk of the board of commissioners should fail or neglect, on or before the first day of May of each year, so to do, to certify to the county court of the county, or counties, wherein such road district is situated, the amount of money that will be required during the next succeeding year to pay interest* * * * *. On receipt of such certificate it shall be the duty of the county court, or courts, at the time it makes the levy for state, county, school and other taxes, to, by order made, levy such a rate of taxation upon the taxable property in the road district in such county or counties, as will raise the sum of money required for the purposes aforesaid."

The above statutes have been quoted for the purpose of showing the intention of the Legislature not to limit the boundaries of a special road district to the confines of any county, but to show that the boundaries of the district may be extended into two or more counties, and, likewise, that the funds derived from taxation may be expended within the district. The only provision in any statute which we find in conflict therewith is Section 8034, which is as follows:

"Said board shall have authority to expend not more than one-fourth of the revenue which may now or which may hereafter be paid into its treasury for the purpose of grading and repairing any roads or streets within the corporate limits of any city, within said special road district, in conformity with the established grade of said roads and streets in said cities and for the purpose of constructing and maintaining macadam, gravel, rock or paved roads or streets within the corporate limits of any city within the said special road district in conformity with the established grade of said roads and streets in said city; provided that no part of the revenue of any special road district in this state be expended outside of the county in which such special road district is situated."

We explain the apparent conflict on the ground that the section refers to the expending of funds within the corporate limits of a city within a special road district, and refers to a district the boundaries of which are not extended into another or other counties.

In the decision of *Harris v. Compton Bond and Mortgage Company*, 244 Mo. 664, it was held:

"The Legislature in the creation of municipal and public corporations of any description, is absolute and unlimited, in the absence of some specific provision in the State or Federal Constitution restricting and inhibiting such power. In the absence of

some constitutional limitation, the Legislature is vested with the whole power of the State, and may establish any public, political or municipal corporation it deems necessary or expedient to the public interest."

In a controversy arising as to the levy for the purpose of taxation by a special road district which was partly in one county and partly in another, the court, in the case of State ex rel. Road District v. Hackmann, 278 Mo. 602, disposes of the questions in the following language:

"A tax of fifty cents upon each one-hundred-dollar valuation levied by a road district partly in one county and partly in another, does not violate the constitutional rule that all taxes 'shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.' It is not to be presumed that inequality will arise because of the fact that property in one portion of the district is to be assessed by the assessor of one county and that in another portion by the assessor of the other county.

"Whether a portion of a road district lying in one county may at some future time have to pay a larger road tax than the portion lying in the other county, owing to the fact that by the Act of 1917 county courts may levy a road tax of not more than twenty nor less than ten cents on the

hundred-dollar valuation, is a question not germane to the question of the validity of a uniform tax levied upon all taxable property in the district."

In the decision of State ex rel. Attorney General v. Special Road District, 319 Mo. 1. c. 1251, the court declares the status of a special road district as follows:

"The special road district contemplated by Article 8, Chapter 98, Revised Statutes 1919, is 'a political subdivision of the State for governmental purposes' - a municipal corporation. (Sec. 10834.) It is brought into existence through the exercise of legislative power. (State ex rel. v. Thompson, 315 Mo. 56, 285 S. W. 57.) The proceedings prescribed by statute for its organization must be scrupulously followed. (State ex inf. v. Colbert, 273 Mo. 198, 201 S. W. 52.) With these general principles in mind we proceed to a consideration of the question presented by the record, namely, whether the notice given by the county clerk did not 'set out the boundaries of said proposed district,' as required by the statute, and was therefore a nullity."

CONCLUSION

Applying the terms of the statutes as hereinbefore quoted and mentioned and the decisions cited with reference to special road districts, we find that

October 7, 1937

the control, management and expending of the funds is entirely within the discretion of the commissioners as long as the discretion of the commissioners is exercised within the limits of the statutes; that boundaries of special road districts may be located in more than one county; that a special road district is a political subdivision, for governmental purposes, of the State of Missouri.

Bearing in mind these conclusions, we are of the opinion that the funds of the Jasper Special Road District may be expended by the commissioners of said district in any part of the district, irrespective of counties, and the funds, when received by the commissioners, are to be expended any place in the district irrespective of the amounts paid in taxes by each of the counties. In other words, the commissioners do not have to expend the funds in proportion to the taxes derived from each county or in proportion to the number of miles of road in each county, but may expend it on any road or roads which, in their discretion and judgment, the same should be expended on.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

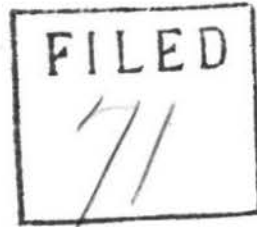
J. E. TAYLOR
(Acting) Attorney General

OWN LC

SCHOOLS: School house may not be sold until another house is provided.

April 26, 1937.

4-28



Honorable Leo A. Politte
Prosecuting Attorney
Franklin County
Union, Missouri

Dear Mr. Politte:

This is to acknowledge your letter dated April 24, 1937, as follows:

"During the past year School District No. 44, of Franklin County, has occupied and had control of a portion of the parochial school building at Krakow, and used the same for conducting the public school of that district, and the old district school building has been and still is unoccupied.

"The district has now acquired a new school site, by warranty deed, which has no building thereon, and the district has a permission and intends to use the portion of the parochial school which it has been using until the district grows to such an extent that will justify the construction of a new school building on the site acquired.

"Under these circumstances, has the district the right to sell and dispose of the old school building and site which is now owned, but not used, by the district?"

We understand the facts to be that School District No. 44 has a schoolhouse but that such is unoccupied and we assume for a valid reason. School District No. 44 does not at the present time have a schoolhouse other than the one it contemplates selling.

The answer to your question is found in Section 9269, R. S. Mo. 1929, and reads as follows:

"The title of all school house sites and other school property shall be vested in the district in which the same may be located; and all property leased or rented for school purposes shall be wholly under the control of the board of directors during such time; but no board shall lease or rent any building for school purposes while the district schoolhouse is unoccupied, and no schoolhouse or school site shall be abandoned or sold until another site and house are provided for such school district."

We invite your attention to the underscored portion of Section 9269, supra. Said section specifically provides that no schoolhouse shall be sold until another house is provided for such district. The statute uses the words "schoolhouse or school site" and will not permit the sale of either the schoolhouse or school site until a new site and house are provided. School District No. 44 would have a new site but would not have a new school house. Consequently, if it sold the old schoolhouse (even though such is of no value or use or cannot be used as a school house) the statute is very plain and mandatory that such cannot be sold until a new house is provided. School District No. 44 is not providing a new school house.

In Consolidated School District No. 6 v. Shawhan et al., 273 S. W. 182, the Kansas City Court of Appeals said (l. c. 184):

"Under our state law the government of a school district * * * is vested in a board of directors duly elected by vote. Their powers and duties are prescribed by statute. A trust is reposed in them, the execution of which is frequently attended with difficulty and embarrassment. By accepting such trust each director obligates himself to perform the duties as the law directs. * * * *"

As Section 9269, supra, directs that no school house shall be sold until another house is provided, it is our opinion

Hon. Leo A. Politte

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Apr. 26, 1937

that school district No. 44 will have no right to sell or dispose of the old school building and site until a new building and site are provided for by the district.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

JLH:EG

SHERIFF: Is entitled only to ten cents a mile as mileage when he takes two patients to a State Hospital.

October 11, 1937

10-13
FILED
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Mr. Leo A. Politte
Prosecuting Attorney, Franklin County
Union, Missouri

Dear Sir:

This department is in receipt of your request for an opinion which reads as follows:

"The sheriff of Franklin County has asked me to obtain from you an opinion as to the amount of mileage he is entitled to collect under Section 8662, Laws of Missouri, 1933, for taking insane persons to a State Hospital.

Recently he took two insane persons in the same automobile and at the same time to the State Hospital under commitments issued by the County Court, and presented a bill to the County Court for mileage on both persons committed, and the County Court allowed him no extra compensation for mileage.

The sheriff believes that he is entitled to mileage for each person."

Laws of Missouri, 1933, page 408, provide as follows:

"To the sheriff or other person, for taking a patient to a state hospital or removing one therefrom, upon warrant of the Clerk, mileage going and returning, at the rate of ten cents per mile, and \$1.00 per day for the support of each patient on his way to or from the hospital shall be allowed: to each assistant allowed by the clerk and accompanying the Sheriff, or other person acting

under the warrant of the clerk, \$4.00 per day for the time actually consumed in making said trip said sum, to include all expenses of such assistant. The computation of mileage in each case is to be made from the place of arrest to hospital by the nearest route usually traveled. Provided, that the said Sheriff shall furnish all necessary means of transportation without charge other than as above allowed. The cost specified in this Section shall be paid out of the County Treasury of the proper county."

Mileage is defined in Bouvier's Law Dictionary as "a compensation allowed by law to officers for their trouble and expenses in traveling for public business." This definition has been used and approved in *Howe vs. Abbott*, 78 Cal. 270, 20 Pac. 572; *Weston County vs. Blakely*, 20 Wyo. 259, 123 Pac. 72; *Reed vs. Gallet*, 50 Idaho 638, 299 Pac. 337. It will be noted in the above definitions that mileage is allowed to officers in order to pay him for his trouble and for his expenses and is personal to him. This fact is recognized in *Richardson vs. State*, 63 N.E. 593, in which the Supreme Court of Ohio said:

"And the 'mileage' allowed him is intended to compensate him for expenses of his travel on official business. That is the legal meaning and import of the term. It is defined in the Century Dictionary as 'payment allowed to a public functionary for the expenses of travel in the discharge of his duties, according to the number of miles passed over'. The same definition substantially is found in Bouvier's and other law dictionaries. The commissioner is at liberty, under our statute, to adopt and pursue his own method and means of travel. He may, if he chooses, travel by railway when accessible, or by vehicle hired by him, or use his own conveyance. But, whatever the mode adopted, he must pay all the expenses incurred, and his only source of reimbursement is the amount of the mileage allowed him."

Therefore, the mileage given him by the statute is to compensate him for the trip and if he took more than one patient, the expenses incurred by him would probably be the same. The intentions of the Legislature may be gleaned from the wording of the statute itself. Because it allows \$1.00 per day "to the support of each patient", the Legislature must have taken into consideration those instances when the sheriff would take more than one patient, and while they allowed him only ten cents per mile for mileage, still they allow a dollar per day for each patient.

CONCLUSION

It is, therefore, the opinion of this department that when a sheriff takes two patients to a State Hospital, he is entitled only to ten cents a mile as mileage.

Respectfully submitted,

OOLLIVER W. NOLEN
Assistant Attorney-General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney-General

AO'K:VAL

COUNTY CLERK: Under the statutes is entitled to retain only \$1700.00 per annum for himself. On failure to pay maximum amount deputies or assistants may receive under the statute, Clerk cannot retain difference for himself.

December 14, 1937.

Honorable John C. Pope
Prosecuting Attorney
Webster County
Marshfield, Missouri



Dear Sir:

This Department acknowledges receipt of your letter of November 20th, wherein you make the following inquiry:

"Under Section 11811 R. S. 1929 and Laws 1933, page 369, the county clerk of our county is entitled to retain the sum of \$1,700.00 for himself and pay to his deputies and assistants the further sum of \$1,600.00.

"In our county the Clerk has been drawing the sum of \$166.66 and paying his deputy the sum of \$108.00, thereby using the total amount of \$3,300.00, the total yearly allowance to both.

"In your opinion, can the clerk legally draw more than \$1,700.00 for himself by reducing the amount of his deputy and assistant hire."

Section 11811, referred to in your letter, page 370, Laws of Missouri, 1933, from which the pertinent part is as follows:

"The aggregate amount of fees that any clerk of the County Court under Articles 2 and 3 of this Chapter shall

be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. * * * * * in counties having a population of 15,000 and less than 17,500 persons, the clerks shall be allowed to retain \$1700.00 for themselves, and shall be allowed to pay for deputies and assistants \$1600.00; * * *

The above section was repealed and reenacted by the 59th General Assembly, Laws of Missouri, 1937, page 441, but makes no material change in the salaries or does not affect the question which you present, and hence we merely refer to it without quoting any of its provisions.

Under Section 11810, R. S. Mo. 1929, the clerk of the county court has certain duties with respect to making quarterly returns. Said section reads in part as follows:

"Every clerk of a court of record in every county in this state shall make return quarterly to the county court of all fees by him received to date of return, from whom received and for what services, giving the amount of each fee received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail and verifying the same by his affidavit. Such statement shall include all fees for all services of whatever character done in his official capacity, giving the name of each deputy or assistant, the length of time each was employed, and the amount of money paid to each. The county court shall at each regular session examine such statement, and may examine any person as to the truth of the same, and allow all necessary clerk or deputy hire, not exceeding the amount allowed in the next succeeding section of this chapter for deputies or assistants, and deduct the same from the

aggregate amount received by the clerk, and if there be an amount still in the hands of the clerk exceeding the sums specified in the next section succeeding, the court shall ascertain the amount of such excess over and above the amounts allowed to be retained by the clerk and paid to deputies and assistants, and make an order directing such clerk to pay the amount so ascertained into the county treasury: * * * * *

We call your attention to the fact that the statute uses the words, "and of the salaries by him actually paid to his deputies or assistants." We think, clearly, that Section 11811, supra, is a limitation of the maximum amount that a county clerk can retain and that the said section contains also the maximum amount which can be paid to deputies.

In the decision of *Holman v. City of Macon*, 155 Mo. 398, 1. c. 402, the court follows the legal principal to the effect:

" A recognized rule of statutory construction is that a public officer cannot demand any compensation for his services not specifically allowed by statutes and that statutes fixing such compensation must be strictly construed."

There are many other decisions to like effect.

Conclusion.

The compensation of an officer is a matter of statute, not a contract, and is incidental to the office. An officer assumes an office, accepts the terms of the

Dec. 14, 1937.

statute governing the salary or remuneration he is to receive, and if the statutes fix the maximum salary that is all the salary that he is legally entitled to receive, and merely because the statute gives to him the right to pay the deputies or assistants \$1600.00 it does not give him the legal right to thwart the purpose of the statute and receive more compensation than is provided by said statute.

Therefore, the Clerk is entitled to retain only \$1700.00 per annum for himself personally, under the facts and statutes which you present to us. If he does not pay the deputies or assistants the maximum amount which said deputies or assistants may receive under the statute, the difference should be paid into the county treasury instead of being retained by the Clerk himself.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

WATERS: BOUNDARIES: STATES: State lines, as well as other lines bounded by a river change with the gradual changing of the course of the river, but do not change if the change is sudden and by avulsion.

February 17, 1937

Senator William M. Quinn,
Jefferson City, Missouri.



Dear Senator:

We understand the following to be the situation about which you inquire:

The center of the Des Moines River, as the State of Missouri was originally laid out, is the north line of Missouri, but the channel of the Des Moines River has changed in the not distant past so that now there is quite a considerable tract of land on the south side of the Des Moines River as it now flows that was prior to the change of said river on the north side thereof, and you desire to know the law with reference to determining the present true line between the State of Missouri and the State of Iowa.

The Act of Admission of Missouri into the Union, found on page 54 of the Revised Statutes of Missouri, 1929, establishes the northern line of Missouri in the following language:

" * * * thence east from the point of intersection last aforesaid, along the said parallel of latitude, to the middle of the channel of the main fork of the said river Des Moines; thence down and along the middle of the main channel of the said river Des Moines, to the mouth of the same, where it empties into the Mississippi river; thence due east to the middle of the main channel of the Mississippi river."

This Act of Congress was approved March 6, 1820, and on June 27, 1821, the Missouri Legislature accepted the conditions in the Act of Admission prescribed by the Congress, and on August 10, 1821, the President of the United States issued his proclamation announcing the acceptance by this state of that condition.

The Act of Admission into the Union of the State of Iowa was dated December 28, 1846 (9 Stat. L. 117), and was accepted by the State of Iowa on January 15, 1849.

In United States Statutes at Large, Vol. 5, p. 742, entitled "An Act for the Admission of the States of Iowa and Florida into the Union" and so admitting them, is defined the boundary of the State of Iowa as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the States of Iowa and Florida be, and the same are hereby, declared to be States of the United States of America, and are hereby admitted into the Union on equal footing with the original States, in all respects whatsoever.

"Sec. 2. And be it further enacted, That the following shall be the boundaries of the said State of Iowa, to-wit: Beginning at the mouth of the Des Moines river, at the middle of the Mississippi, thence by the middle of the channel of that river to a parallel of latitude passing through the mouth of the Mankato, or Blue-Earth river, thence west along the said parallel of latitude to a point where it is intersected by a meridian line, seventeen degrees and thirty minutes west of the meridian of Washington city, thence due south to the northern boundary line of the State of Missouri, thence eastwardly following that boundary to the point at which the same intersects the Des Moines river, thence by the middle of the channel of that river to the place of beginning.

"Sec. 3. And be it further enacted, That the said State of Iowa shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said State of Iowa, so far as the said rivers

shall form a common boundary to said State, and any other State or States now or hereafter to be formed or bounded by the same: Such rivers to be common to both: And that the said river Mississippi, and the navigable waters leading into the same, shall be common highways, and forever free as well to the inhabitants of said State, as to all other citizens of the United States, without any tax, duty, impost, or toll therefor, imposed by the said State of Iowa."

Said Act shows the south line of the State of Iowa with reference to the matters here under consideration to be as follows:

" * * * thence eastwardly following that boundary to the point at which the same intersects the Des Moines river, thence by the middle of the channel of that river to the place of beginning", the place of beginning being, "Beginning at the mouth of the Des Moines river, at the middle of the Mississippi, thence by the middle of the channel of that river to a parallel of latitude passing through the mouth of the Mankato, or Blue-Earth River, thence west," etc.

United States Statutes at Large, Vol. 9, page 52, approved August 4, 1846, repealed so much of the above Act of Admission of the State of Iowa into the Union as relates to the boundary lines, and prescribes the following as the boundary of the State of Iowa:

"Beginning in the middle of the main channel of the Mississippi River, at a point due east of the middle of the mouth of the main channel of the Des Moines River; thence up the middle of the main channel of the said Des Moines River, to a point on said river where the northern boundary line of the State of Missouri, as established by the constitution of that State, adopted June twelfth, eighteen hundred and twenty, crosses the said middle of the main channel of the said Des Moines River; thence, westwardly, along the said northern boundary line of the State of

Missouri, as established at the time aforesaid, until an extension of said line intersect the middle of the main channel of the Missouri River; thence, up the middle of the main channel of the said Missouri River, to a point opposite the middle of the main channel of the Big Sioux River, according to Nicollet's map; thence, up the main channel of the said Big Sioux River, according to said map, until it is intersected by the parallel of forty-three degrees and thirty minutes north latitude; thence east, along said parallel of forty-three degrees and thirty minutes, until said parallel intersect the middle of the main channel of the Mississippi River; thence, down the middle of the main channel of said Mississippi River, to the place of beginning."

Section 2 of said Act mentions the dispute between the two states respecting the northern line of Missouri, and refers the question to the Supreme Court of the United States, said Section 2 being as follows:

"And be it further enacted, That the question which has heretofore been the subject-matter of controversy and dispute between the State of Missouri and the Territory of Iowa, respecting the precise location of the northern boundary line of the State of Missouri, shall be, and the same is hereby, referred to the Supreme Court of the United States for adjudication and settlement, in accordance with the act of the Legislature of Missouri, approved March twenty-five, eighteen hundred and forty-five, and the memorial of the Council and House of Representatives of the Territory of the Iowa, approved January seventeenth, eighteen hundred and forty-six, by which both parties have agreed to 'the commencement and speedy determination of such suit as may be necessary to procure a final decision by the Supreme Court of the United States upon the true location of the northern boundary of that State;'

and the said Supreme Court is hereby invested with all the power and authority necessary to the performance of the duty imposed by this section."

Pursuant to the directions in said Act, the case of Missouri v. Iowa, 7 Howard 1. c. 679, 48 U. S. Rep. 1. c. 679, was decided by the United States Supreme Court at the January Term, 1849, in which decree is recited

"that the true and proper northern boundary line of the State of Missouri, and the true southern boundary of the State of Iowa is the line run and marked in 1816 by John C. Sullivan as the Indian boundary, from the northwest corner made by said Sullivan, extending eastwardly, as he run and marked the said line, to the middle of the Des Moines river; and that a line due west from said northwest corner to the middle of the Missouri river is the proper dividing line between said states west of the aforesaid corner; and that the states of Missouri and Iowa are bound to conform their jurisdictions up to said line on their respective sides thereof from the river Des Moines to the river Missouri."

In 1850 the Supreme Court of the United States, in the case of State of Missouri v. State of Iowa, 51 U. S. Rep. 1, 10 Howard. 1, adopted the report of the commissioners, and said, 1. c. 48:

"From said reports, it appears that the old northwest corner of the Indian boundary line, made by John C. Sullivan in the year 1816 (and referred to in our former decree), is found to be at forty degrees thirty-four minutes and forty seconds of north latitude, and at about ninety-four degrees thirty minutes of west longitude from Greenwich; that at said 'northwest corner' was planted a large cast-iron monument, weighing between fifteen and sixteen hundred pounds, four feet six inches long, squaring twelve inches at its base,

and eight inches at its top. This monument is deeply and legibly marked with the words (strongly cast into the iron) 'Missouri' on its south side, and 'Iowa' on its north side, and 'State Line' on the east.

"And this court doth adjudge and decree, that said monument doth mark and witness the true northwest corner of the Indian boundary lines, as run by John C. Sullivan, in 1816. And the precise corner is hereby established and declared to be in the centre of the top of said monument."

And further, l. c. 49:

"Sullivan's line, as run and marked in 1816, from said corner east, to the Des Moines River, was found not to be a due east line; but that more or less northing should have been made in the old line. Nor is it a straight line, as sudden deviations amounting to from one to three degrees frequently occur; and it rarely happens that any two consecutive miles pursue the same direction. It also appears, that, if the whole line was reduced throughout to a straight line, its southing would be about two degrees from a due east line."

And further, l. c. 50:

"It is therefore adjudged and decreed, that Sullivan's line is established to run through the wooden mile posts and the cast-iron pillars planted ten miles apart on said line; and that the true and proper dividing line between the States of Missouri and Iowa, east of the monument erected at the 'old northwest corner,' begins at the centre of said monument, and runs eastwardly, (southing about two degrees of a true east line,) through the centre of each wooden post and iron pillar, to the centre of the monument erected on the bank of the Des Moines River. And it is further

adjudged and decreed, that a straight line from one mile post to another, and from a mile post to a pillar; and from the last mile post to the monument on the bank of the Des Moines River, is the true and proper line, and that such straight line shall conclude all other marks. And it is further adjudged and decreed, that a line extended north eighty-seven degrees thirty-eight minutes east, from the centre of the monument erected on the bank of the Des Moines River to the middle of said river, is the true and proper boundary line between the States of Missouri and Iowa west of said monument."

In 1895 the States of Missouri and Iowa had another suit, State of Missouri v. State of Iowa, 160 U. S. 688, in which the true boundary of the states was involved as to a portion about twenty miles long along the north side of Mercer County. The State of Missouri there brought suit alleging that the State of Iowa was encroaching on the former state's sovereignty and usurping the functions of government on certain lands. The opinion (l. c. 691) adjudges

"that the true and proper northern boundary line of the State of Missouri, and the true and proper southern boundary line of the State of Iowa is the line run, located, marked and defined by Hendershott and Miner, commissioners of this court, under the order and decree of this court, as set forth in their report annexed to said decree of January 5, 1851,"

and the Supreme Court appointed commissioners to find and remark said line with proper and durable monuments.

In 1896 the Supreme Court of the United States in the case of State of Missouri v. State of Iowa, 165 U. S. 118, adopted the report of the commissioners in the last case above noted, but as these two cases last mentioned do not immediately affect the matter here under consideration, but concern a portion of the state line west thereof, we do not refer to them more extensively.

The question before us is, where is the state line between the two states immediately north of the town of Alexandria, bearing in mind that originally the line was the center of the Des Moines River, and that the center of the Des Moines River in the past was at a different place than where the center of the Des Moines River now is, there having been a change which affects a considerable quantity of land, and it being uncertain whether said affected land is in the State of Missouri or in the State of Iowa?

The determination of that question involves the law of accretion, reliction and avulsion. At common law, land formed by accretion belongs to the riparian owner against whose bank it is deposited and is governed by the same rights of ownership that pertain to the mainland of such riparian owner.

Benne v. Miller, 149 Mo. 228;
Widdecombe v. Chiles, 173 Mo. 195;
McCormack v. Miller, 239 Mo. 463.

The latter case was in ejectment involving fifteen acres of land on Salt River which formed the northern boundary. The channel of the river moved to the south, forming land on the other side of the river. The fifteen acres were formed over a period of seventeen years. The court said:

"A running stream, forming the boundary line between contiguous lands, continues to be such boundary line, although the channel may change, provided the change is by the gradual erosion and cutting away of its banks and not by a sudden change leaving the old channel and forming an entirely new and different channel. (Cases cited.) In determining whether a riparian owner has title to land in controversy by accretion, the length of time in which it is in course of formation is of no importance. If it is formed by a gradual, imperceptible deposit of alluvion, it is accretion; but if the stream changes its course suddenly and in such manner as not to destroy the integrity of the land in controversy and so that the land can be identified, it is not accretion and the boundary line remains the same as before the change of the channel."

In the case of State of Missouri v. State of Nebraska, and State of Nebraska v. State of Missouri, 196 U. S. 23, the question before the court was the true boundary line between the states of Missouri and Nebraska, the Missouri River, on July 5, 1867, within twenty-four hours and during a time of very high water, having changed its course so that a new channel was made which placed a portion of land on the Missouri side of the thereafter flowing Missouri River. The Supreme Court of the United States held that that, being a sudden change, known in the law as avulsion, did not change the line between the two states, saying 1. c. 34:

"In New Orleans v. United States, 10 Pet. 662, 717, 9 L. ed. 573, 594, argued elaborately by eminent lawyers, Mr. Webster among the number, this court said: 'The question is well settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain.' It was added-- what is pertinent to the present case-- that 'this rule is no less just when applied to public than to private rights.' The subject was under consideration in Missouri v. Kentucky, 11 Wall. 395, 20 L. ed. 116, and Indiana v. Kentucky, 136 U. S. 479, 34 L. ed. 329, 10 Sup. Ct. Rep. 1051. But it again came under consideration in Nebraska v. Iowa, 143 U. S. 359, 361, 367, 370, 36 L. ed. 186, 187, 190, 191, 12 Sup. Ct. Rep. 396, 398, 400. In the latter case, the court, after referring to the rule announced in New Orleans v. United States, and citing prior cases in which that rule had been recognized, said: 'It is equally well settled that where a stream which is a boundary, from any cause suddenly

abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In Gould, Waters, sec. 159, it is said: "But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates." 2 Bl. Com. 262; Angell, Watercourses, sec. 60; Hopkins Academy v. Dickinson, 9 Cush. 544; Bittenuth v. St. Louis Bridge Co., 123 Ill. 535, 5 Am. St. Rep. 545, 17 N. E. 439; Hagan v. Campbell, 8 Port. (Ala.) 9, 33 Am. Dec. 267; Den ex dem. Murry v. Sermon, 8 N. C. (1 Hawks) 56. These propositions, which are universally recognized as correct where the boundaries of private property touch on streams, are in like manner recognized where the boundaries between states or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel. Avulsion has no effect on boundary, but leaves it in the center of the old channel.' Again, in the same case, the court, referring to the very full examination of the authorities to be found in one of the opinions of Attorney General Cushing (8 Ops. Atty. Gen. 175), said: 'The result of these authorities puts it beyond doubt that accretion on an ordinary river would leave the boundary between two states the varying center of the channel, and that avulsion would establish a fixed boundary; to wit, the center of the abandoned channel. It is contended, however, that the doctrine of accretion has no application to the Missouri river, on account of the rapid and great changes constantly going on in respect to its banks; but the contrary has already been decided by this

court in *Jeffries v. East Omaha Land Co.*, 134 U. S. 178, 189, 33 L. ed. 872, 876, 10 Sup. Ct. Rep. 518.' In *Nebraska v. Iowa*, it appeared that the Missouri river near the land there in dispute had pursued a course in the nature of an ox-bow, but it suddenly cut through the neck of the bow and made for itself a new channel. The court said: 'This does not come within the law of accretion, but that of avulsion. By this selection of a new channel the boundary was not changed, and it remained as it was prior to the avulsion,-- the center line of the old channel; and that, unless the waters of the river returned to their former bed, became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel.'

59 C. J., Sec. 30, subdivision a, page 63, sets out the proceedings to be followed in a suit between two states to determine the boundary line, thus:

"A question of boundary arising between the United States and one of the states, or between two states is not of a political nature and is susceptible of judicial determination. The United States Supreme Court has original jurisdiction of suits between two states, or between the United States and a state, to determine a state boundary.

"Nature and conduct of suit. Such suit may be brought by a bill in equity and is to be conducted, as a general rule, according to the rules of pleading and practice of the court of chancery, the court acting, ordinarily, in such disputes in the same manner as in the determination of like matters between private individuals. By reason, however, of the dignity of the parties and the importance of the interests involved, such controversies are not to be decided upon mere technicalities, but the chancery rules should be so molded and applied as to bring the cause to a hearing on its real merits, in the absence of

legislation particularly prescribing the procedure to be followed; and thus the court will not be obliged to apply the same rules as to parties, or the time of answering, or the effect of laches or the lapse of time.

"Award or decree fixing boundary. As a mode of settling the respective rights of the parties an issue at law may be directed, or a commission awarded, or, if the court is satisfied without either, it may itself determine the boundary."

You do not define in the facts before us the method by which the change in the center of the Des Moines River occurred. If the change from the original line of the river was brought about gradually, that is, by the gradual process of imperceptibly depositing particles of sediment on one side of the river and washing them away from the other side, then the lands are accretions and belong to the riparian owner to whose mainland they attach by this gradual process. If the change occurred by reason of sudden high waters or by the cutting of a ditch which caused the current of the water to run in the new location and the old river bed to be abandoned, and in which change of the river there was a part of the land that had never been washed away and that was located between the old and the new location of the river, then such a change as that would not change the boundary line, but the old location (which was thereupon abandoned) would continue to be, for the purposes of defining the rights of private property owners with reference to the river, the true criterion and boundary line.

By the decision in the case last referred to of *Missouri v. Nebraska*, the Supreme Court of the United States held that these same rules which apply with reference to private property likewise apply with reference to determining whether the line between states or nations has changed on account of the changed water course.

CONCLUSION

It is our opinion that if the change in the center of the Des Moines River was gradual, that is by the deposit gradually, little by little and bit by bit, of particles of sand, gravel or sediment, by which there has been added to

2/17/37

the lands that originally constituted the Clark County lands, additional lands, the same would be accretion, and the line between Missouri and Iowa would change and follow the gradual change in the course or center of the river. If the land in controversy was cut off from the mainland to which it formerly attached by sudden high water which left a portion of the disputed land intact, that is not broken up into small particles and washed away, then the true line between the two states would be the line as it was prior to such sudden change.

If this course by which the change occurred is disputed, the one contending that it was a gradual and imperceptible change, and the other contending that it was a sudden and violent change, a question of fact is presented, which may be determined by the trier of the facts.

The Supreme Court of the United States has original jurisdiction of a suit between two states and involving their territorial boundaries. They frequently are memorialized by the Legislature, and, if the facts justify, that court may find and adjudge the true line, or may appoint a commission to assist them in the same.

It occurs to us that the preferable course, in order to eliminate uncertainties and to finally adjudicate and determine controversies such as you speak of, is to file suit in the Supreme Court of the United States between the two states and have a judgment of that court determining finally and authoritatively the controverted question.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

DW:HR



LOTTERIES--Hollywood and similar theatre schemes.

March 23, 1937

3-29

Hon. E. L. Redman
Prosecuting Attorney
Gentry County
Albany, Missouri



Dear Sir:

We have your request of March 19, 1937, for an opinion, which request in part is as follows:

"I desire an opinion from your office concerning the legality of the use of a game called Hollywood, in connection with a moving picture business. Enclosed find a pamphlet which the promoters of this game have prepared, explaining its operation.

The game is played by the audience at the picture show, who have paid a regular theatre admission and received a ticket of admittance to a moving picture program, and the audience compete for prizes offered for successful players. Each person, when he enters the theater, is given a card with the names of three movie stars, and during the course of the theater program the game is played on the screen by an electric wheel with an arrow pointing to letters of the alphabet on the dial, which electric wheel itself is operated successively by means of an extension cord with a button, placed in the hands of different persons in the audience. Some member presses the button and the electric mechanism causes the arrow to point to some letter on the dial, which is shown on the screen. Each person then holding a card watches the letters indicated on the screen, and if it is a letter embodied within the three names

March 23, 1937

on his card, he checks his card by means of punching below the letter. This operation is repeated until some person in the audience has succeeded in getting the complete names of two of the stars on his card punched out. He then calls "Hollywood," and is a candidate for a money prize which he draws by number. The game is continued in operation until eleven other persons have also completed a Hollywood, and twelve prizes are given, totalling \$15.00 in money. Should some player in the audience score a Hollywood score within the first twelve spins he gets a grand prize of a larger sum of money. If it is not won in one night, it is doubled and is played for at the next theater attendance."

The principle underlying all lottery laws and particularly Section 4314 R. S. Missouri 1929, is that a lottery is a scheme or device wherein anything of value is, for a consideration, allotted by chance. State vs. Emerson, 1 S. W. (2) 109. Brooklyn Daily Eagle vs. Voorhies, 181 Fed. 579; 38 C. J. 289.

We notice in the pamphlet furnished with your letter describing the play "Hollywood" that prizes are awarded by spinning a wheel. The arrow or wheel is required to stop on certain letters contained in names on cards distributed to patrons as they enter the theatre. Patrons have no way of knowing and cannot find out when and where the arrow of the wheel will stop on each spin. The Supreme Court of the United States in Dillingham vs. McLaughlin, 68 L. Ed. 742, 1. c. 747 said:

"What a man does not know and cannot find out is chance as to him, and is recognized as chance by the law."

The selection of these letters by spinning a wheel is sufficient to constitute the element of chance in a lottery scheme.

March 23, 1937

The third and last element "consideration" is present in the game "Hollywood". Featherstone vs. Independent Service Station (Tex.) 10 S. W. (2) 124; City of Wink vs. Griffith Amusement Company (Tex.) 100 S. W. (2) 695. There is little or no distinction between the game "Hollywood" and other similar games such as "Screeno", all of which are plain lotteries, operated in violation of state law.

I am enclosing herewith a copy of an opinion declaring schemes similar to "Bank Night" to be lotteries.

It is therefore the opinion of this Department that the scheme "Hollywood" is a lottery prohibited by the Constitution and statutes of Missouri.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM
Enclosure.

AMENDMENT NUMBER FOUR:

CONSERVATION COMMISSION: Has power both by Amendment Number Four and Section 8211, R. S. 1929, to confer honorary commissions on persons and require such persons to enter into a reasonable bond

September 7, 1937

Honorable J. F. Ramsey
Acting Director
Conservation Commission
Jefferson City, Missouri



Dear Sir:

This Department is in receipt of your recent letter wherein you make the following inquiry:

"I am quoting below an excerpt from the minutes of the last meeting of the Conservation Commission which was held in Jefferson City on August 9:

" 'Mr. Greensfelder moved that the Acting Director confer with the Attorney General relative to the power of the Commission to issue special commissions to other than employees of the Conservation Commission, and what form of bond could be required and the amount."

"I would greatly appreciate it if you would let me have a letter giving me your opinion in this matter, and your suggestion of the form of bond that should be required."

On November 3, 1936, at the general election of 1936, Amendment Number Four became a law, a part of the Constitution, by initiative. The effect of the Amendment was to transfer the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wild life resources of the State from the Commissioner of Game and Fish to a Commission to be known as the Conservation Commission. Prior to the effective

date of Amendment Number Four, which was July 1, 1937, the Commissioner of Game and Fish was empowered to appoint deputy Game and Fish Commissioners, under Section 8211, Revised Statutes Missouri 1929, which is as follows:

"The state game and fish commissioner shall have power to appoint at any time one or more deputies, from each congressional district, who shall assist him in the discharge of his duties, and such deputies shall have like power and authority as is herein provided for the game and fish commissioner; but such deputies shall be subject to the supervision and control of the game and fish commissioner and subject to removal by him. Such deputies shall each receive a per diem of four dollars per day, for each day while under the direction of the state game and fish commissioner, to perform services in the enforcement of fish, game and birds laws, and their actual necessary expenses incurred while working under the direction of the state game and fish commissioner, which expenses shall be paid monthly upon vouchers verified under oath and approved by the state game and fish commissioner, and paid out of the game protection fund."

Amendment Number Four contains the expression

"and the administration of the laws now or hereafter pertaining thereto."

In the fourth paragraph a similar expression is used

"and for the administration of the laws pertaining thereto and for no other purpose."

This Department has ruled heretofore that the laws pertaining to the Game and Fish Department of the State of Missouri remained in full force and effect after the commissioner of game and fish has been superseded by the Conservation Commission. Of course, it must be borne in mind that Amendment Number Four repeals all the laws or sections which were inconsistent with the amendment itself.

The Amendment, in the third paragraph, contains the following provision;

"A Director of Conservation shall be appointed by the Commission and such director shall, with the approval of the Commission, appoint such assistants and other employees as the Commission may deem necessary. The Commission shall determine the qualifications of the director, all assistants and employees and shall fix all salaries, except that no commissioner shall be eligible for such appointment or employment."

Bearing in mind the provisions of Section 8211 and the provisions of Amendment Number Four which we have herein referred to and quoted, we are of the opinion special commissions may be issued by the Director, acting under the direction and with the approval of the Conservation Commission; that the Conservation Commission has such power both by the statute and by the Amendment itself.

We think it is discretionary with the Conservation Commission as to the title and limitation of the duties of such persons who are given commissions, and it would appear that the title of Deputy State Game and Fish Commissioner could no longer be conferred upon any person as the Game and Fish Commissioner no longer exists, and that title would be in conflict or inconsistent with Amendment Number Four.

September 7, 1937

With reference to requiring a bond of any person seeking an honorary position we likewise think it is discretionary with the Conservation Commission. Section 8206, Revised Statutes Missouri 1929, required the Game and Fish Commissioner to enter into a bond with the State of Missouri in the sum of Five Thousand Dollars (\$5,000). There is no other statute relating to any other employee or person being compelled to execute a bond for entering upon active or honorary duties. Amendment Number Four has placed the control and management of the fish and game life in the hands of the Conservation Commission, and, having the exclusive power to name all employees and officers of the Commission, if the commission desires as one of the qualifications to name a person that such person execute a bond in a reasonable amount for faithful performance of duties, we think it entirely within the power of said Commission to demand such a bond, the form of the bond to be the usual form which is executed by officers and employees in the State of Missouri, which shall demand of the principal that he "shall well, truly and faithfully discharge and perform, according to law, all and singular the official duties" conferred upon him.

The oath of office and the form of bond attached to your inquiry are sufficient in form and substance and may be changed, where necessary, to meet the requirements of the title when the title is designated by the Conservation Commission.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

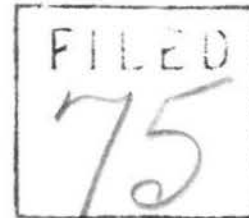
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN LC

DENTISTS: Contents of window and door plate notices.

July 23, 1937



Doctor R. R. Rhoades
Secretary Missouri Dental Board
Jefferson City, Missouri

Dear Doctor Rhoades:

This office is in receipt of your request for an opinion reading as follows:

"At the meeting of the Missouri Dental Board held in Kansas City, Saturday April 3rd, the question was discussed whether under the terms of our new law, a dentist would be allowed to have the words X-Ray or gas upon their window or door plate, also the use of a neon sign with the word dentist or X-Ray on such signs.

We have also had an inquiry whether it was legal for a dentist to have printed upon his receipts he gives to his patients after payment of their account, the word X-Ray and gas.

We have had many inquiries about this after sending a copy of the new law to each dentist throughout the State, therefore we are very anxious to get a written opinion from you, so we might advise them on these matters."

We shall answer your questions in the order in which they have been asked.

I.

Dentists may not use words
"X-Ray" or "Gas" upon their
window or door plate.

The Dental Practice Act is very specific in respect to this question. Section 13566 authorizes the revocation of a dentist's certificate of registration or his license, or both, upon the grounds therein set out. In the last part of this section it is specifically stated that:

"any dentist licensed under this act may announce by way of professional card containing only the name, title, degree, office, location, office hours, phone number and resident address and phone number if desired, and if he limits his practice to a specialty he may announce it but such cards shall be not greater in size than three and a half inches by two inches* * *or he or she may* * *display the name of the licensee on the premises where engaged in the profession upon the windows thereof and by a door plate or a name or office directory when the information is limited to that of the professional card.
* * * *Provided, that the name and title of the registrant shall not be displayed in lettering larger than seven inches in height.* * *"

These specific and plainly chosen words indicate with brevity and clarity the information which a dentist may lawfully and legally place upon his door plate or upon the window of his establishment. The maxim "expressio unius est exclusio alterius" is never more applicable than in construing statutes. Keane vs. Strodtman, 18 S. W. (2) 896. Clearly this is a proper place for the application of this maxim. The legislature has expressly stated what may be permitted to be placed on the window or door

July 23, 1937

plate of the premises wherein the licensee is operating, and by so doing have excluded the use of any other words or information upon the window or upon the door plate.

CONCLUSION.

It is therefore the opinion of this office that under the provisions of the Dental Practice Act the words "X-Ray" or "Gas" may not be used upon the window or door plate of a registered and licensed dentist of this state, as such would violate the terms and spirit of Section 13566 as contained in that act.

II.

Dentist may not advertise by means of a neon sign.

You next inquire as to the use of a neon sign in connection with the words "Dentist" or "X-Ray". Section 13566 is also specific in respect to advertising by means of light signs and after providing that a dentist's certificate of registration or license, or both, may be revoked or suspended for any of the following causes, provides:

"for unprofessional or dishonorable conduct or for gross ignorance or inefficiency in his or her profession. Unprofessional conduct shall include, but not by way of limitation, * * * advertising, directly or indirectly, by means of large display, glaring light signs, or containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head; * * *"

A proper interpretation of this phrase is essential to the correct solution of your request. In the first place, it must be remembered that each word or term used in the statute is presumed to be used by the legislature in its ordinary and usual sense and should be accorded its ordinary meaning. *O'Malley vs. Continental Life Insurance Company*, 95 S. W. (2) 837, 335 Mo. 1115. Giving the afore quoted phrase further consideration it

appears that there are three kinds of advertising which are prohibited thereby. First, advertising by means of large display signs. Second, advertising by means of glaring light signs. Third, advertising containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head.

It is quite apparent that the use of the comma after the word display, is used to indicate omitted words, the words omitted being "by means of". As heretofore stated words or terms used in statutes are to be given their meaning. The comma, as defined in Webster's International Dictionary is referred to as follows:

"Punctuation. A point (now,) used to mark the smallest structural divisions of a sentence. In present usage it primarily makes clear the grammatical grouping, rather than indicates rhetorical pauses, and is generally employed; (1) to set off words, phrases, and clauses that are independent, parenthetical, or appositional; as 'Hail, Caesar!'; (2) to indicate omitted words; as, 'Mishap might divide them; Mistrust, never.'; (3) to separate words and phrases of like construction used in a series; as, 'the virtues of faith, hope, and charity.' (4) To mark off phrases and clauses of a complex or compound sentence."

The comma in this phrase clearly takes the place of omitted words for otherwise it could be entirely eliminated.

The word "glaring" as defined in Webster's Dictionary is in part as follows:

"Glaring, p.a. * * *Emitting or reflecting a bright or dazzling light; dazzling, vivid; brilliant."

"Glaring" as used in its ordinary sense and recognized by the courts is as Webster has defined it. It means "bright, dazzling". Connolly vs. Cincinnati, No. & T.P. Company, 224 S.W. 670, 189 Ky. 123.

There cannot be any doubt but what Neon Signs are bright and dazzling. In fact the universal adoption by business and merchandizing establishments for the purpose of catching the eye of prospective customers proves beyond a question of a doubt that that type of sign is bright, vivid, dazzling and instantaneously catches the eye of all who pass by.

CONCLUSION.

The conclusion is inescapable that neon signs constitute "glaring light signs", and therefore advertising by registered and licensed dentists by such means is specifically prohibited by Section 13566 of the new Dental Practice Act.

III.

Use of the words "X-Ray"
and "Gas" upon receipts
not specifically prohibited,
but may constitute unpro-
fessional or dishonorable
conduct.

As heretofore stated, Section 13566 of the new Dental Practice Act authorizes the revocation of the certificate of registration or license "for unprofessional or dishonorable conduct". While a number of acts are specifically determined to be unprofessional conduct, the specification there made is general and not to be construed as a limitation upon the use of the term. By the second paragraph of part three of this section the act specifically designates what may be placed upon the professional card of a licensed and registered dentist, what may be placed in "public print", what may be placed on a card announcing change of place of business, absence from or return to business, what may be placed on "appointment cards", what may be displayed on the premises where the dentist is engaged in the practice, what may be displayed upon the windows of such premises, on the door plate, and what may be placed in the name or office directory. Each and every one of these means of announcement and display, is limited to the information contained on the professional card, to-wit, the name, title, degree, office location, office hours, phone number, residence address and phone number and the speciality practice, if such is the case. In each and every one, the use of the term

July 23, 1937.

"X-Ray" and "Gas" is excluded. It is therefore difficult to believe that the spirit or purpose of these provisions would permit the use of these words "X-Ray" and "Gas" upon the receipt issued by the practitioner. While the act does not in clear terms specifically forbid the use of these words on a receipt, yet the use of a receipt with these words upon it would not be consistent with the spirit of the act. Whether or not the use of such words would constitute dishonorable and unprofessional conduct is a decision which must be first made by the Dental Board. The statute places that duty upon the Board, which responsibility must be met.

The foregoing is based upon the assumption that the terms "X-Ray" and "Gas" do not constitute the identification of a "specialty". It must be remembered that Section 13566 authorizes a dentist, if he limits his practice to a specialty, to designate or announce such specialty. If a dentist limited his practice to the taking of "X-Ray" pictures or to the administering of "Gas" a different situation might be presented.

CONCLUSION.

It is the opinion of this office that the new Dental Practice Act, passed by the Fifty-Ninth General Assembly and approved by the Governor March 15, 1937, does not in specific terms forbid the use of the words "X-Ray" and "Gas" on receipts issued by practitioners of dentistry, but that the use of such words in such manner may constitute unprofessional or dishonorable conduct which in turn constitutes the ground for the revocation of a dentist's certificate of registration or license, or both, under the provisions of Section 13566 as enacted at the 1937 session of the Missouri Legislature, unless such practitioner limits his practice to the taking of "X-Rays" or to the administration of "Gas", in which case such specialty might be indicated on his receipt just as it is permissible to indicate it on his professional card or the window of the premises at which he operates.

Respectfully submitted,


HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FICTITIOUS NAME Use of fictitious name as a violation of criminal law.



January 13, 1937.

Hon. James S. Rooney,
Prosecuting Attorney,
Clay County,
Liberty, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of November 28, 1936, such request being in the following terms:

"Some time ago Mr. John Butler of Excelsior Springs was operating a cafe known as the Butler Cafe. He sold his business to a man by the name of Cowling. Cowling is now in partnership with Mrs. Lou Richner. At the time of the sale Mr. Butler told him that he could use a sign which he had on which was printed 'Butler's Cafe', but that if he ever went into business again he would expect him to stop using this name. Mr. Butler has this name registered in Jefferson City. Butler is now in the cafe business again and these people have changed the name to 'New Butler Cafe'.

I am inclined to think that this is criminal under the statute and would appreciate an expression of your opinion in the matter.

Thanking you in advance, I am"

R. S. Mo. 1929, Section 14342 provides as follows:

"That every name under which any person shall do or transact any business in this state, other than the true name of such person, is hereby declared to be a fictitious name, and it shall be unlawful for any person to engage in or transact any business in this state under a fictitious name without first registering same with the secretary of state as hereinafter required. (R.S.1919, Sec.13276.)"

Section 14343 provides for the method of registration, Section 14344 for the registration fee and Section 14345 makes the engaging in or transacting of any business under a fictitious name without registration a misdemeanor.

These sections have been identified as penal statutes, and their constitutionality upheld in the case of *Bassen v. Monckton*, 308 Mo. 641, 274 S. W. 404 (1925).

An interesting exposition of the purpose of these statutes is contained in the case of *Ditzell v. Shoecraft*, 219 Mo.App. 436, 274 S. W. 880 (1925) in which the court said:

"The purpose of the act is clearly defined in the legislative declaration relative thereto, which is found in Session Laws of 1919, p. 622 Sec. 7, as follows:

'Whereas there is no adequate law in this state governing the transaction of business under a fictitious name, and whereas hundreds of thousands of dollars are annually lost to honest business by the use of fictitious names, and whereas the use of a fictitious name affords a convenient vehicle for the perpetration of fraud an emergency is declared to exist within the meaning of the Constitution; therefore this act shall take effect and be in force from and after its approval.'

Nothing could be more clear than this plain declaration as to the purpose and scope of the act. Its history may be stated briefly as follows: It was introduced into the House of Representatives as House bill No. 675, and, as introduced, contained sections 1 to 7. Section 3 made failure to register, as required by the statute, a complete defense for the recovery of money by persons using fictitious name. This section, in its entirety, was stricken out by the House, and the bill was passed with its original sections intact save section 3. The original bill also, in section 5 thereof, made the violation of the act a misdemeanor punishable by a fine of \$10 to \$50; this section, however, was

Hon. James S. Rooney

- 3 -

January 13, 1937.

amended by striking out the fine, thus leaving a violation of the act a misdemeanor, which under the general statute carries a maximum fine of \$1,000, or a year's imprisonment, or both. Section 3701 R. S. 1919." 274 S. W. 883.

The foregoing makes it unnecessary to consider the validity or consequences of the contractual relationship between the parties described in your letter.

In conclusion it is our opinion that any person engaging in or transacting any business in this state under a name other than the true name of such person, without registering as required by R. S. Mo. 1929, Section 14342 - 14346, is guilty of a misdemeanor, and as such subject to prosecution and fine or imprisonment.

Very truly yours,

EDWARD H. MILLER,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

EMS:

COUNTY CLERK: Compensation of County Clerk and Deputies
in Osage County and how paid.

January 25, 1937.



Honorable L. L. Robinson
Presiding Judge of the County Court
Chambers, Missouri

Dear Sir:

We acknowledge your request for an opinion dated
January 15, 1937, which reads as follows:

"May I have an interpretation or
opinion of the law relating to the
fees of County Clerks.

"The last previous decennial census
of the United States gives Osage
County a population of 12,432 and
under the 1933 Session Acts, Sec.
11811. Fees of county clerks in
certain counties.- which reads as
follows:- In counties having more
than 11,500 persons and less than
12,500 persons, the clerks shall be
allowed to retain \$1300.00 for them-
selves, and shall be allowed to pay
for deputies and assistants \$1100.00;

"Now the point on which I am asking
your opinion is this, is it right
and proper for the County Court to
issue a warrant to the county clerk,
drawn on the general revenue of the
county, warrant to be drawn the first
of each month for twelfth of the
\$1100.00 which he is allowed to pay
his deputies, and if allowed, should
the county clerk enter it in his fee
bill as an accountable fee.

"Under Sec. 11781 R. S. 1929. The
fees which are allowed a county clerk
for his services are set forth but
no mention is made of this fee or
salary allowed for his deputies.

Section 11811, Laws of 1933, p. 370 provides in part:

"The aggregate amount of fees that any clerk of the County Court under Articles 2 and 3 of this Chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. * * * * in counties having more than 11,500 persons and less than 12,500 persons, the clerks shall be allowed to retain \$1300.00 for themselves, and shall be allowed to pay for deputies and assistants \$1100.00; * * * *."

Statutory authority for appointing deputy county clerks in Osage County is found in Section 11680, R. S. Mo. 1929, which provides:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

As to the statutory construction of legislative acts, the Legislature has provided in Section 655, R. S. Mo. 1929, the following:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appro-

January 25, 1937.

priate meaning in law shall be understood according to their technical import; * * * *."

CONCLUSION.

The words used in Sections 11811 and 11680, supra, should be given their ordinary and usual meaning.

In Section 11811, supra, the Legislature in providing the compensation of deputy clerks spoke of "the aggregate amount of fees that any clerk* * * shall be allowed to retain for any one year's service." The only plausible construction of such language is that out of the fees collected by the county clerk, in his official capacity, he shall be allowed to withhold or retain from the money in his custody and possession enough to take care of his salary and the compensation of his deputies. The Legislature used the word "retain" and hence there is no indication that the county court is empowered to create an obligation against the county by issuing county warrants for deputy clerk's service. The use of the word "retain" eliminates the county as a possible debtor for deputy hire and precludes any right of a deputy to receive and enforce compensation for services from the county.

We are of the opinion that in Osage County, the county clerk is allowed to retain \$1300.00 of collected fees for himself and \$1100.00 of collected fees for his deputy. It is true that under Section 11680, supra, the county court must approve the appointment of deputy county clerks. As to the payment of compensation to deputy county clerks, there is not one word in the Statutes that would authorize the county court to issue county warrants against the county's general revenue fund in payment of compensation of any deputy county clerk's service. To draw valid warrants on the county treasury, the county court must find some authority of law, or the county will not be bound. *Wolcott v. Lawrence County* 26, Mo. 272.

Respectfully submitted,

APPROVED:

WM. ORR SAWYERS
Assistant Attorney General.

J. E. TAYLOR
(Acting) Attorney General.

COLLECTORS: **BONDS:** Drainage district bonds are payable in the order of their presentation, a receipt showing that the taxing power has been exhausted.

January 29, 1937



Hon. J. K. Robbins,
Collector of Revenue,
New Madrid County,
New Madrid, Missouri.

Dear Sir:

We acknowledge receipt from you of the following inquiry:

"Since taking over the Treasurer's Office of New Madrid County a situation has developed that I do not know how to handle.

"We have here in our county a county court drainage dist. number 31. This district is in default and has tried to get a R.F.C. Loan but due to the other overlaps and the large amount of unimproved land has been unable to do so.

"At the present we have some funds on hand in the above mentioned district and several people have presented bonds for payment.

"It is not just quite clear in my mind as to how these bonds that are past due should be retired. Should I pay off the first past due bond that is presented or should the monies be pro-rated to the various past due bonds?

"A reply by return mail would be greatly appreciated as some of the boys holding these bonds are demanding their money."

Replying thereto, we do not find any statutory direction covering your question, but resorting to the case law we refer you to the case of McCune's Estate v. Daniel, 76 S. W. (2d) 403, where the Supreme Court of this state in 1934 had before it this same question of a series of notes or debts secured by the same deed of trust, the security in the deed of trust being of insufficient value to pay in full all of the notes secured thereby. The guardian of the estate, on behalf of his ward, had purchased four \$500 notes, said notes, along with a \$4000 note, being secured by a deed of trust on certain lands. The \$500 notes were payable in one, two, three and four years respectively, and the \$4000 note was payable in five years. On exceptions to the final report of the guardian the exceptors contended that the guardian should be held personally liable for these four \$500 notes because the land was not worth the full \$6000 secured. The court in passing on this question, said (l. c. 408):

" * * * the law is that, if a loss accrues on a foreclosure of this deed of trust, the loss must be charged in the first instance to the note held by Mary L. McCune, the last one due. When a deed of trust is given to secure several notes due at different times, then on a foreclosure the proceeds of the land must be applied in payment of the notes in the order in which they became due. *McPike v. Hufty* (Mo. App.) 227 S. W. 916; *Stewart v. Trust Co.*, 283 Mo. 364, 222 S. W. 808. There can, therefore, be no question but that the four \$500 notes which defendant took over for his wards, being the first ones payable, are amply secured."

However, in the case of *State ex rel. v. Grand River Drainage District*, 49 S. W. (2d) 121, decided in 1932 by the Supreme Court of Missouri in Banc, the facts were that the Grand River Drainage District had a bond issue of \$582,000, with interest thereon, payable semi-annually on the first days of March and September of each year. The first maturing bonds matured on March 1, 1927, and the last ones maturing in 1942, and the semi-annual interest on each of said bonds, as evidenced by coupons, fell due on the first of September and first of March in each year until maturity. The district had \$25,988.33 cash on hand at the time the mandamus suit was filed, and thereupon certain of the bondholders presented for payment the following bonds of said issue:

"36 coupons, No. 15, due Sept. 1, 1929, at \$13.75 each	\$ 495.00
240 coupons, No. 15, due Sept. 1, 1929, at \$27.50 each	6,600.00
14 bonds, due March 1, 1930, at \$500.00 each	7,000.00
14 interest coupons, No. 16, due March 1, 1930, attached to said \$500.00 bonds, at \$13.75 each	192.00
5 bonds, due March 1, 1930, at \$1,000.00	5,000.00
5 interest coupons, No. 16, due March 1, 1930, attached to said \$1,000.00 bonds, at \$27.50 each	137.50

\$19,425.00 "

being payment in full of relators' bonds. The district declined to pay them the full amount on the ground that by so doing there would be \$93,345.00 worth of other bonds due and interest due that should, "in justice and equity, share equally and in proportion with the amount claimed to be owned by the relators." There was no showing that the taxing power of the district had been exhausted. The court awarded a peremptory writ of mandamus and required the payment in full of the \$19,425.00 of bonds, saying, (l. c. 124):

" * * * relators have a clear and undoubted right to have their coupons and bonds paid in full out of the fund in the hands of respondents, unless past due and unpaid coupons and bonds of unknown owners 'should in justice and equity share equally and in proportion with the amount claimed to be owned by the relators.' If relators are entitled to only such proportion of the fund as the amount of their coupons and bonds bear to the whole amount of all past due and unpaid coupons and bonds, they must fail in this action. * * * If the respondent drainage district were a private corporation, with definite ascertainable assets, and those assets insufficient when liquidated to meet its obligations to creditors, principles of equitable adjustment could properly be invoked. But the district is

a municipal corporation; its general assets, if any, are not liable for its bonded indebtedness; such indebtedness is payable solely from a special fund to be derived from the taxation of the lands lying within its boundaries."

Then the court quotes extensively from Section 10759, R. S. Mo. 1929, and states:

"This statute clearly contemplates that the taxing power with which a drainage district is vested shall be so exercised as to make provision for the payment in full of all bonds which it authorizes. It does not appear from the record here that the power with which respondent drainage district is armed to assess, levy, and collect taxes for the purpose of paying its bonds and the interest thereon has been exhausted, nor that the future exercise of that power will not be fruitful in obtaining the necessary funds. On the contrary, it is admitted 'that the proper officers of said district and of said Livingston and Linn Counties are now engaged in collecting said taxes levied and assessed as aforesaid.' In these circumstances the equitable doctrine of equality as applied in the apportionment among creditors of the funds and assets of an insolvent debtor is without application."

It does not appear from your inquiry that the taxing power of your drainage district has been exhausted, and on the assumption that such taxing power has not been exhausted, it would seem that the case last quoted from is authority, the highest in this state, that it is the duty of the district to pay in full the bonds which are past due and are presented to you in the order of their presentation. It will be noted that in the above case the coupons matured September 1, 1929, and the bonds and other coupons matured March 1, 1930.

If the facts were that your district had exhausted its taxing power and had on hand a given amount of money, and the same was not sufficient to pay in full the bonds which were outstanding, we think the equitable principle of apportionment might apply according to the principle announced in the case of McCune's Estate v. Daniel, 76 S. W. (2d) 403.

1/29/37

CONCLUSION

It is our opinion that if your drainage district has bonds outstanding that have matured and has collected cash on hand sufficient to pay in full one or more of said bonds, and not enough to pay all of the bonds, and your drainage district has not exhausted its power of taxation for the payment of such bonds, that it is the duty of the district to pay in full each of said bonds in the order of their presentation insofar as the cash on hand will pay them. We write this opinion on the assumption that your district still has authority to levy and collect taxes for the purpose of paying the bonds here considered. If the taxing power therefor were exhausted, another conclusion might be reached.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

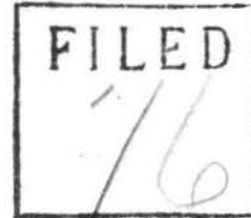
APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

DW:HR

SCHOOLS: School fund provided for by Sections 6 and 7 of Article XI of the Constitution, cannot be used for any purpose other than support of free public schools and the State University.

February 16, 1937. 2-24



Honorable James S. Rollins
Senator, Tenth District
Missouri Senate
Jefferson City, Missouri

Dear Senator Rollins:

This is to acknowledge your letter dated February 12, 1937, as follows:

"Kindly give the Appropriation Committee the opinion of your department on the following:

- "1. Can the Legislature go back to the Constitutional 25% on school monies without legislative action other than that in an appropriation act.
- "2. What use can be made of the school monies other than for use by the Elementary Schools.

"The Committee will greatly appreciate this information at your earliest convenience."

I.

Can the Legislature go back to the Constitutional 25% on school monies without legislative action other than that in an appropriation act?

We assume that you desire to know if there is any statute which must be amended in order to give to the schools only twenty-five per cent as provided for in Section 7, Article XI, Constitution of Missouri. There is no statute that will have to be amended if the Legislature desires to revert to the twenty-five per cent of the state revenue provided for in the Constitution. The Legislature biennially ever since 1877 by an act and an appropriation provided for the moneys to the public school fund. State ex rel. v. Gordon, 266 Mo. 394, 409, 410.

In 1935 the 58th General Assembly enacted the following law, found at page 9, Section 1:

"The State Auditor is hereby authorized and directed to set aside one third (1/3) of the ordinary state revenue paid into the State Treasury for the period beginning March 1st, 1935, and ending March 1st, 1937, into a fund to be known as the public school moneys fund; same to be used for the support of free public schools."

Section 2,

"There is hereby appropriated out of the public school moneys fund created by the preceding section, any and all sums placed in said fund for the support of the free public schools from March 1st, 1935; said sums to be apportioned and distributed for the support of the free public schools as provided by law."

The above act carried an emergency clause and was approved February 28, 1935.

It is thus seen that the Legislature biennially enacts a law directing the State Auditor to set aside a portion of the ordinary state revenue and creates a fund known as the public school moneys fund, and then appropriates said moneys for the support of the free public schools. Thus, the act of the 1935 Legislature relating to the duty of the State Auditor

to set aside so much of the ordinary state revenue for the public schools, expires as a matter of law. Consequently, the Legislature must enact a new statute placing the same duty upon the State Auditor, relating to the setting aside of so much of the ordinary state revenue for free public schools. If the Legislature desires it may direct the State Auditor to set aside only twenty-five per cent, or any other per cent greater than twenty-five per cent, of the ordinary state revenue for the support of free public schools. In other words, the General Assembly now in session must direct what per cent of the ordinary state revenue the State Auditor must set aside and it is not necessary to amend or repeal any statute, but requires the enacting of a new statute.

II.

What use can be made of the school monies other than for use by the Elementary Schools?

Preparatory to answering your question we invite your attention to the use to which the public school fund (moneys) is now being devoted.

The Supreme Court of Missouri, en banc, in State ex rel. School District of Kansas City v. Lee, State Superintendent of Public Schools, 66 S.W. (2d) 521, said:

"In 1931 the Legislature made quite a change in the method of distributing the state school funds.**The change may be indicated by summarizing the old law and the new law as follows:

New Law Act of 1931.

1. Equalization Aid--section 13, Laws 1931 (Mo. St. Ann. Sec. 9270n, p. 7121).
2. Teacher and Attendance--section 13, Laws 1931, and section 9257.
3. Defectives--section 13, Laws 1931, and section 9220.

4. Opportunity Rooms--section 13, Laws 1931, and section 9223.
5. Orphans--section 13, Laws 1931, and section 9431.
6. Tuition--section 16, Laws 1931 (Mo. St. Ann. Sec. 9270q, p. 7125).
7. Transportation--section 16, Laws 1931.
8. Buildings--section 19, Laws 1931 (Mo. St. Ann. Sec. 9270u, p. 7128).
9. Consolidated--section 13, Laws 1931 and section 9358."

The above shows the use now made of the public school moneys fund. None of the fund at the present time is used other than for elementary and high schools. The fund is given to elementary and high schools in the form of special aids and is apportioned to the county treasurers by the State Superintendent of Schools by virtue of Section 9257, R. S. Mo. 1929. The public school moneys fund cannot be devoted to any other use other than for the support of free public schools and the State University.

The Supreme Court of Missouri, en banc, in *Lincoln University v. Hackmann*, State Auditor, 243 S. W. 320, very forcibly defined the power of the Legislature as to what it could do with the public school moneys fund, held (p. 322):

"It results that the Legislature was without power to make the appropriation in question, and its action in the premises is in contravention of the express mandatory provisions of our Constitution."

In the *Lincoln University* case the Legislature sought to appropriate moneys for the Lincoln University from the public school fund. The court reviewed the constitutional provisions relating to the public school moneys fund, and held:

"It is thus seen that the income from the public school fund and the money required to be set apart from the ordinary revenue of the state must be devoted exclusively to the support of the public schools. To this there is only one exception, the State University. So that when the Legislature set apart one-third of the ordinary revenue of the state for the support of the public schools, that fund, together with the annual income from the public school fund, was devoted to the purpose designated by the Constitution, and the Legislature was without power to divert or appropriate any portion thereof to any use or purpose other than establishing and maintaining the free public schools and the State University. It must be apportioned and paid solely to the several county treasurers, except so much thereof as may be apportioned to the State University. It is apparent that the Legislature could not apportion any of this fund to the support of the State University were it not for the exception incorporated into the Constitution, for the obvious reason that it is not a part of the free public school system of the state ordained by our organic law."

The court in said case invited attention to the fact that Lincoln University was a separate "independent institution for the education of the negro race" and was "no part of the free public school system of our state for the education of persons between the ages of 6 and 20 years." The court further said that the Legislature could have established Lincoln University as a department of the State University and if such was done then Lincoln University could share in the appropriations out of the public school fund, because such would then be a department of the State University. But as Lincoln University was separate and distinct from the State University no moneys could be used from the public school fund for its support. For the Biennial 1935-1936 the University of Missouri received its moneys from the state revenue fund and not out of the one-third set apart by the State Auditor for the public schools.

Hon. James S. Rollins

-6-

Feb. 16, 1937.

From the above it is our opinion that the school moneys provided for by Sections 6 and 7, of Article XI, of the Constitution, cannot be used for any purpose other than for the support of free public schools and the State University.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

JLH:EG

ANIMALS: Under Section 12862, R. S. Mo. 1929, a person has the authority to kill dogs in the act of maiming or seizing hogs. He does not have authority to kill the dogs on the premises of the owner of the dogs

March 31, 1937

Mr. John W. Robertson
Steward
Missouri State Sanatorium
Mount Vernon, Missouri



Dear Sir:

This Department is in receipt of your letter of March 29 requesting an opinion based on the following facts:

"We are feeding approximately one hundred hogs here at this institution at all times and have been bothered considerably with dogs coming in the feed lot and killing them.

"I will appreciate the favor if you will give me a legal opinion as to whether or not we have the right to shoot these dogs when they attack our stock. I would like to put a man out in the feed lot to shoot the dogs when they come in but certainly don't want to get in trouble over it.

"Thanking you in advance for your assistance in the above matter, I remain."

Section 12862, Revised Statutes Missouri 1929, relates to the killing of sheep or other domestic animals and is pertinent to the question which you present. This section was interpreted and the scope of the same, in the case of Reed v. Goldneck 112 Mo. App. 310, l. c. 313. As the section is quoted in the decision we merely refer to the same:

"In 1899, the Legislature furnished us a new section on the subject of dogs in this State. It is as follows:

" 'If any person shall discover any dog or dogs in the act of killing, wounding or chasing sheep in any portion of this State, or shall discover any dog or dogs under such circumstances as to satisfactorily show that such dog or dogs has or have been recently engaged in killing or chasing sheep or other domestic animal or animals, such person is authorized immediately to pursue and kill such dog or dogs; provided, however, that such dog or dogs shall not be killed in any enclosure belonging to or being in lawful possession of the owner of such dog or dogs'. (Sec. 6976, R. S. 1899.)

"This section has come into our law since any of the above cases on this subject have been decided. The statute went into effect a few months only after the decision of the case of Fenton v. Bissell, 80 Mo. App. 185, by the Kansas City Court of Appeals, and, therefore, was not noticed in the opinion in that case. Under the rule of the common law which obtained prior to the statute as announced in the cases supra, one was not justified in killing a dog even though it was on his premises, unless the dog was actually doing injury or attempting to do injury to his domestic animals, and in the latter case, the danger from the dog must have been so apparent as to threaten imminent peril. (Gillum v. Sisson, 53 Mo. App. 516; Fenton v. Bissell, 80 Mo. App. 135; Woolsey v. Haas, 65 Mo. App. 198.) This being the settled law at the time the statute was enacted, we must presume that the Legislature knew the law as it existed, and sought to make some change

therein by statutory innovation. We are to understand then, that the Legislature intended to change the rules. In interpreting the statute with this in mind, we must be guided by the intent of the law-makers as it appears from the language employed. With this before us, it is apparent from the very terms of the statute that it was not the purpose of the Legislature to make the rule more stringent in favor of the dog and against the person charged with the killing thereof, while in a threatening attitude. The old statute authorizing the killing of the dog which had killed or maimed sheep, was said by our Supreme Court in the case of *Carpenter v. Lippitt*, 77 Mo. 246, to be an act of outlawry against sheep-killing dogs. To hold the new statute above quoted did no more than reassert the common law on the subject, would be equivalent to holding that its provisions accomplished no purpose whatever. It seems clear, when viewed from this standpoint, that we must construe it to mean that it is in part a further act of outlawry against the dog and that it not only outlaws a sheep-killing dog but outlaws as well the dog discovered under suspicious circumstances or under circumstances reasonably suspicious, by its provisions 'or shall discover any dog or dogs under such circumstances as to satisfactorily show that the dog or dogs has or have been recently engaged in killing or chasing sheep or other domestic animal or animals, such person is authorized,' etc., to kill such dog. It appears that the first clause of the section is declaratory of the common law on the subject. The second clause is a new act of outlawry against the dog, and one who kills a dog and undertakes to justify his act under it,

must show to the reasonable satisfaction of the jury, by the facts and circumstances surrounding the killing, that the dog had recently been engaged in killing or chasing sheep or other domestic animals, and hence one who kills a dog under the suspicious circumstances mentioned in the second clause, does so at the risk of paying the owner the value of the dog, or of satisfying the court or jury, as the case may be, the trier of the facts, that he was outlawed under the second clause of the statute, and if the dog be found either killing or chasing the animal or under such circumstances as would make it appear satisfactorily to the jury that the dog had been engaged either in killing or chasing the animals, then the killing of the dog is justifiable. Then, too, this statute authorizes any person to kill the dog under the circumstances mentioned; it is immaterial whether he be the person owning the animals or not. The evidence shows that respondent and his neighbor as well had recently lost animals by the ravages of dogs. This dog was discovered by him in the very midst of his goats and rabbits in the night, under very suspicious circumstances indeed. It seems to us that there is substantial evidence to support the judgment of the trial court to the effect that the dog was either then or had recently been engaged in chasing the animals and this is sufficient in law, if it was sufficient to satisfy the court who tried the facts."

CONCLUSION

We are of the opinion that if the dogs in question are maiming or killing the hogs which you are feeding you are within your rights in killing the same. However, bearing in mind the proviso contained in said section to the effect 'that such dog or dogs shall not be killed in

Mr. John W. Robertson

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March 31, 1937

any enclosure belonging to or in the lawful possession of
the owner of such dog or dogs.†

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

CWN:LC

The 59th General Assembly made certain changes as to the character of security to be given by selected depositories to secure public funds. At page 502, et seq., Laws of Missouri, 1937, it is provided in part as follows:

"Notwithstanding any provisions of law of this state or of any political sub-division thereof, the public funds of every county * * * * * which shall now or hereafter be deposited in any banking institution acting as a legal depository of such funds under the provisions of the Statutes of Missouri requiring the letting and deposit of same and the furnishing of security therefor, shall be secured by the said legal depository making deposit, as hereinafter provided, of securities of the same character as are required by Section 11469 and all amendments thereto for the security of funds deposited by the State Treasurer under the provisions of Article 1 and 2 of Chapter 72 of the Revised Statutes 1929, and all amendments thereto. * * * * *" (underscoring ours.)

At the same session of the General Assembly, page 521 et seq., Laws of Missouri, 1937, Section 11469 was amended, and the securities, the character of which is proper and sufficient, were designated as follows:

"* * *(1) bonds or other obligations of the United States, or (2) bonds or other obligations of the State of Missouri, or (3) bonds of any city in this state having a population of not less than two thousand, or (4) the bonds of any county in this state, or (5) the approved registered bonds of any school district situated in any city, town or village in this state, or (6) the approved registered bonds of any special road district in this

state, or (7) the state bonds of any state, or (8) the bonds of any Federal Land Bank, or (9) the bonds of any Federal Intermediate Credit Bank, or (10) the bonds of the Federal Farm Mortgage Corporations, or (11) the bonds of the Home Owners Loan Corporation, or (12) the bonds or other obligations of the Reconstruction Finance Corporation, or (13) the bonds of the Federal Home Loan Banks, or (14) securities issued under the provisions of the Tennessee Valley Authority Act and guaranteed by the government of the United States, or (15) securities issued under the provisions of the Federal Housing Act and guaranteed by the government of the United States, or (16) any bonds or other obligations guaranteed as to payment of principal and interest by the government of the United States to an amount at least equal in value to one hundred per centum of the amount of the deposits with said banks or banking institutions, less \$5000.00 where the depository is insured by the Federal Deposit Insurance Corporation; * * * * *

It is, therefore, our opinion that only the securities as set forth in Section 11469, as amended, Laws of Missouri 1937, at page 521, may be accepted by the County Court as security for the safekeeping and payment of said deposits.

Answering the second question propounded in your letter:

Since first mortgages on farm land are not set forth in the above as requisite security for the safekeeping

Hon. L. L. Robinson

-4-

Oct. 19, 1937.

and payment of said deposits, they cannot be accepted as collateral by the county court to secure the county funds.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

PROSECUTING ATTORNEY:)
RECORDS ALL DESTROYED)
IN CRIMINAL CASE:)
WHAT ACTION TAKEN:)

Where all records of conviction and sentence destroyed, prosecuting attorney should renew prosecution.

October 19, 1937.

Honorable G. W. Rogers
Prosecuting Attorney
Ozark County
Gainesville, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of recent date in which you request the opinion of this Department. Your letter of request is as follows:

"At the May term of court in 1934, _____ was convicted on a charge of felonious assault and his punishment fixed at two years imprisonment in the State Penitentiary. At that same term of Court a motion for a new trial was filed and overruled and an appeal granted to the Supreme Court. He was given until the first day of the next term of court to file a Bill of Exceptions. The Bill of Exceptions was filed at the November term of Court in 1934. The appeal was not perfected and it was never sent to the Clerk of the Supreme Court.

"After the Bill of Exceptions was filed, the Courthouse of Ozark County was destroyed by fire and all files and records, including the judgment and sentence, were burned so there are no files, no papers, no records, nor anything else on file to show that he was ever arrested or in court. The only thing in existence at this time is the reporter's notes and his copy of the evidence which he transcribed in preparing the Bill of Exceptions.

Oct. 19, 1937.

At a recent term of our Circuit Court the Circuit Judge requested that steps be taken to restore the files and records in this case. As the matter is out of the ordinary, and as any steps taken by the State will likely be contested, I would like to have your opinion concerning the steps necessary to be taken."

Your request for an opinion presents a novel situation and we have made considerable research to ascertain what steps should be taken by you in this matter. We note that so far as the records are concerned there is nothing to show that the defendant was ever arrested or convicted of the offense of which he is alleged to be guilty. Every official step taken looking toward defendant's prosecution was destroyed in the burning of the Courthouse of Ozark County, according to your letter, and the only record of same is the Reporter's notes of evidence and the memory of man.

We have found cases where indictments or informations have been supplied where lost or destroyed but we do not seem to be able to find a similar case as yours which has reached the appellate courts and become a matter of record and precedent. We note in your letter that the Reporter's notes and his copy of the evidence which he transcribed in preparing the bill of exceptions, are preserved. We take it from your statement that no part of the record proper which was entered upon the court's records is in existence. It seems to be one of those unfortunate cases which by the destruction of the records and the passage of time has rendered it difficult to bring one charged with a crime to the bar of justice.

We do not find that any action may be taken by the appellate court for the reason that no sufficient record outlining the steps taken in the prosecution and conviction may be certified to by the Clerk of the Circuit Court of your County and filed in the appellate court. Neither do we find that any action may be taken by the Circuit Court of Ozark County for the reason that there is no sufficient record of the conviction or sentence.

Oct. 19, 1937

It is, therefore, our opinion that under the circumstances, as outlined in your letter, the prosecuting officers desiring to prosecute, may file an information or secure an indictment and renew the prosecution theretofore commenced in that county. We realize that certain difficulties and perhaps insurmountable obstacles might be encountered by the prosecuting officers in a matter of this kind. However, we deem it unnecessary for us to enumerate same in this opinion.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

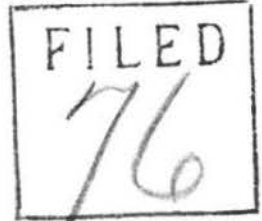
J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

SUPERINTENDENT OF INSURANCE - APPROVAL: Articles of incorporation of National Protective Insurance Company under Sections 5759-5760, R. S. Mo. 1929.

October 30, 1937.

Honorable George A. S. Robertson
Superintendent of Insurance
Jefferson City, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of October 28, 1937, in which you enclose Articles of Agreement for incorporation of the National Provident Insurance Company, and, in which letter you request our approval or disapproval of same.

This company is proposed to be organized under the provisions of Article IV, Chapter 37, R. S. Mo. 1929, and amendments thereto. We have examined said Articles submitted by you and find that same are proper in form, and they have our approval as provided in Section 5760, R. S. Mo. 1929, and are not inconsistent with the laws of the State of Missouri.

Yours very truly

COVELL R. HEWITT
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

CHR:H

INSURANCE: Stipulated premium plan companies must comply with Senate Bill No. 126.

December 1, 1937

Hon. George A. S. Robertson
Superintendent of Insurance
Insurance Department
Jefferson City, Missouri

Attention Mr. J. F. Allebach,
Deputy Superintendent.

Dear Sir:

This Department wishes to acknowledge your request for an opinion under date of November 26, 1937, wherein you state as follows:

"A Missouri insurance company which writes accident and health contracts and which company is incorporated and authorized to do business under Article 4, Chapter 37, Revised Statutes of Missouri, 1929, as a stipulated premium company, asserts that it is not subject to the terms of Senate Bill No. 126.

The reason that it gives for not being subject to the law is that Section 5762 of Article 4 states that any corporation 'which shall comply with all the provisions of this article, shall be deemed to be engaged in the business of life insurance upon the stipulated premium plan and shall be subject only to the provisions of this article, except that the provisions of Sections 5684 and 5685 of the Revised Statutes of Missouri, 1929, shall be applicable.' Sections 5684 and 5686 have to do with the examination of insurance companies by this Department. This company takes the



position that since Senate Bill No. 126 is a statute which will be contained in Article 10, Chapter 37, which article contains the general provisions, that the same can have no application whatsoever to stipulated premium companies because of the exclusion given in Section 5762.

I would like to call your attention particularly to the case of Schott vs. Continental Auto Insurance Underwriters, 31 S. W. (2) 7. This case had to do with a similar provision in Article 11 in connection with reciprocal exchanges. Section 5977 in Article 11 provides as follows:

'Except as herein provided no law of this state relating to insurance shall apply to the exchange of such indemnity contracts*****.'

The Supreme Court of Missouri in this case determined that a law in the general provisions which authorized an injured party to proceed against the insurer of the party causing the injury for satisfaction of the judgment was applicable to reciprocal exchanges regardless of the provision contained in Section 5977. The Court held that the passage of the law really ingrafted an exception to Section 5977 and was applicable to reciprocal exchanges.

Senate Bill No. 126 provides that 'no policy of insurance against loss or damage from sickness or the bodily injury or death of the insured by accident, and no riders, endorsements, supplementary or additional terms and provisions shall be issued or delivered to any person in this state by any company doing business in this state****.'

It seems to me that it was the intention of the Legislature to make the law applicable to all types of companies issuing accident and health

contracts whether the same were casualty companies under Articles 6 and 7, stipulated premium companies under Article 4 or old line life insurance companies under Article 2. Article 7 contains a provision similar to that quoted above from Article 4, that the general provisions do not apply to such companies.

The company says that the case of Key vs. Cosmopolitan Life, Health and Accident Insurance Company, 102 S. W. (2d) 797, decided by the St. Louis Court of Appeals on March 2, 1937, definitely eliminates stipulated premium companies from the terms and provisions of Article 10. This case holds in effect that Section 5929 which provides for allowance of damages and reasonable attorneys fees in case of vexatious refusal to pay is inapplicable to such companies.

We would appreciate it if you would advise us whether or not in your opinion the stipulated premium companies should be required to issue accident and health contracts which comply with the provisions of Senate Bill No. 126."

Article IV, Chapter 37, Section 5762 R. S. Missouri 1929, declares what statutory provisions are applicable to companies engaged in the business of life insurance upon the stipulated premium plan, in part as follows:

"Any corporation, company or association issuing policies or certificates promising money or other benefits to a member or policyholder, or upon his decease, to his legal representatives, or to beneficiaries designated by him, which money or benefit is derived from stipulated premiums collected in advance from its members or policyholders, and from

interest and other accumulations and wherein the money or other benefits so realized is applied to or accumulated solely for the use and purposes of the corporation as herein specified, and for the necessary expenses of the corporation, and the prosecution and enlargement of its business, and which shall comply with all the provisions of this article, shall be deemed to be engaged in the business of life insurance upon the stipulated premium plan and shall be subject only to the provisions of this article, except that the provisions of sections 5684 and 5685, Revised Statutes 1929, shall be applicable."

In the case of Key vs. Cosmopolitan Life, Health and Accident Insurance Company, 102 S. W. (2) (Mo.App.) 797, 1. c. 800, the Court in holding that a statute providing for allowance of damages and reasonable attorney fees in case of vexatious refusal to pay insurance was inapplicable to an insurer organized and doing business on the stipulated premium plan, said:

"It is finally suggested that the allowance of an attorney's fee was erroneous upon the theory that section 5929 R.S.Mo. 1929 (Mo. St. Ann. Sec. 5929, p. 4515), which provides for the allowance of damages and a reasonable attorney's fee in the case of vexatious refusal to pay, has no application to a company such as defendant which is organized and does business upon the stipulated premium plan. It is indeed provided by section 5762, R.S. 1929 (Mo. St. Ann. Sec. 5762, p. 4414), that any corporation, company, or association engaged in the business of life insurance upon the stipulated premium plan 'shall be subject only to the provisions of this article (article 4, chapter 37, R.S. Mo. 1929, Mo. St. Ann. art. 4, c. 37, Secs. 5759-5783, pp. 4412-4424), except that the provisions of sections 5684 and 5685, Revised Statutes 1929, shall be applicable.' The particular sections designated have to do only with

the matter of the examination of companies by the insurance department and the payment of the expenses of such examinations. The language used in section 5762 would seem to disclose a clear legislative intent that no part of the Insurance Code shall apply to a company doing business upon the stipulated premium plan except the two sections specifically mentioned therein, and it necessarily follows, therefore, that section 5929 is inapplicable to the case."

Section 5929 supra, relating to allowance of damages and a reasonable attorney's fee in case of vexatious refusal to pay, appears in the General Statutes of 1865, page 402, Section 1, and passed into the revision of 1879, Article IV, Chapter 11, Section 6029, and into the revision of 1899, Article L, Chapter 89, Section 5227. The provision relative to attorneys fees was added by the Laws of Missouri 1899, page 254.

Section 5762 supra, relating to companies engaged in the business of life insurance on the stipulated premium plan first appears in the Laws of Missouri 1899, page 262.

The article relating to companies engaged in the business of life insurance on the stipulated premium plan having been adopted at a date subsequent to Section 5929 supra (although that portion relating to attorneys fees was adopted at the same session) it is evident that the Legislature in accordance with the views of the Court in the Key case could not have intended that Section 5929 be applicable to stipulated premium companies.

You state that a Missouri insurance company incorporated under Article IV, Chapter 37, R. S. Mo. 1929, and writing health and accident contracts takes the position that it is not subject to the terms of Senate Bill No. 126, found in the Laws of Missouri 1937, Section 5965a, page 360, in that the statute is "contained in Article X, Chapter 37, which article contains the general provision that the same can have no application whatsoever to stipulated premium companies because of the exclusion given in Section 5762."

Section 5965a, supra, provides as follows:

"No policy of insurance against loss or damage from sickness or the bodily injury or death of the insured by accident, and no riders, endorsements, supplementary or additional terms and provisions shall be issued or delivered to any person in this state by any company doing business in this state under the provisions of the insurance laws of the State of Missouri until a copy of the form thereof has been filed with the Superintendent of the Insurance Department for at least a period of thirty days (30) unless before the expiration of said thirty (30) days the Superintendent of the Insurance Department and the Attorney General of the State of Missouri shall have approved of the same in writing. If during such period of thirty (30) days or at any time thereafter, as provided in this section, the Superintendent of the Insurance Department or Attorney-General, in writing, disapprove of the form of such policy, it shall be unlawful for such policy to be issued or delivered in this State by the company filing same. If the Superintendent of the Insurance Department or the Attorney General are unable, by virtue of their other duties, to determine whether or not they shall approve or disapprove the form of such policies within the thirty-day period herein provided, the Superintendent of the Insurance Department may extend the time within which they may approve or disapprove to a period not to exceed ninety (90) days from the date of filing such forms, and the company filing such form or forms shall be notified by the Superintendent, in writing, of such extension of time. The Superintendent of the Insurance Department and the Attorney-General shall not approve such forms of policies unless every part is plainly printed in type not smaller than long primer or ten point type nor unless there is printed on the first page thereof and on its filing back in type not smaller than eighteen point or great primer a brief description of the policy; nor unless the exceptions be printed with the same prominence as the benefits to which such exceptions apply. If the Superintendent fails, within the thirty-day period of time or within the extended period, as herein provided, to notify the company

in writing of his disapproval, then the company may issue such form of policy, but nothing herein contained shall permit an insurance company to issue policies in violation of other provisions of the insurance laws of this State, and nothing herein shall bar the Superintendent and Attorney-General from, at any time thereafter, disapproving such form after giving the company notice thereof and a hearing thereon. Whenever the Superintendent or Attorney-General disapprove a policy form, as herein provided, the Superintendent shall notify the company filing same, in writing, giving the reasons therefor. The Superintendent and Attorney-General are hereby directed to approve for use in this State only policies conforming to the express provisions of the insurance laws of Missouri, and only such words, phrases, figures, terms and conditions of policy forms, riders, endorsements, supplementary or additional terms and provisions affecting policies or agreements for insurance which are specific, certain and unambiguous, to meet needed requirements for the protection of lives and property of assureds. Any policy filed with the Superintendent pursuant to this section, not conforming to the requirements herein, shall be, by the Superintendent and Attorney-General, disapproved. Nothing in this section contained shall be held to apply to life insurance, endowment or annuity contracts, or contracts supplementary thereto."

The case of Schott vs. Continental Auto Insurance Underwriters, 31 S. W. (2) (Mo. Sup.) 7, 1. c. 11, presents a situation analogous to the one in the instant case. The appellant's contention was that the Act of 1925 was not applicable to reciprocal or inter-insurance exchanges operating under Article XIII, Chapter 50, R. S. Mo. 1919 (Now Article XI, Chapter 37, R. S. Mo. 1929). Section 6385 (now section 5977 R. S. Mo. 1929), relating to reciprocal or inter-insurance contracts provided in part as follows:

"Except as herein provided no law of this state relating to insurance shall apply to the exchange of such indemnity contracts*****"

The Court in holding that the 1925 law was applicable to reciprocal insurance companies, said:

"Appellant's argument in support of its contention under this head seems to run as follows: The act of 1925 (hereinafter called the act) is a general law; said article 13 relating to reciprocal and interinsurance contracts, including said section 6385, is a special law; section 6385 provides that no law of this state relating to insurance shall apply to the contracts of companies operating as reciprocals; the act does not in express terms repeal or amend section 6385; and a general law does not repeal a prior special law by implication. 'It is* * *true that the presumption against implied repeals has peculiar and special force when the conflicting provisions which are thought to work a repeal are contained in a local or special act and a later general act. The presumption is that the special is intended to remain in force as an exception to the general act.' 25 R.C.L. 927, Sec. 177. But there is no rule which prohibits the repeal of a special act by a general one, the question being always one of intention. And there can be no doubt but that it was the legislative intention that the act should apply to contracts of reciprocal companies; by its express terms they are made subject to its provisions. The effect of the act in that respect, therefore, is to ingraft upon said section 6385 another exception."

The Act of 1937 is a general law, whereas Article IV relating to stipulated premium plan contracts, including Section 5762, is a special law. The question of the repeal of a special act being one of intention, we need only examine the following underlined portions of the 1937 act, supra, to remove any doubt but that it was the intention of the legislature that the act shall apply to contracts of stipulated premium plan companies:

"No policy of insurance against loss or damage from sickness or the bodily injury or death of the insured by accident, and no riders, endorsements, supplementary or additional terms and provisions shall be issued or delivered to any person in this state by any company doing business in this state under the provisions of the insurance laws of the State of Missouri* * * *"

And in the case of *State vs. Koeln*, 61 S. W. (2) (Mo. Sup. En Banc) 750, 1. c. 756, the Court cites the *Schott* case and points out that:

"* * * a special act may be impliedly repealed by a general one and the question whether it has been so repealed is always one of legislative intention; *Schott vs. Continental Auto Ins. Underwriters*, 326 Mo. 92, 31 S. W. (2d) 7; 59 C.J. Sec. 536. 'The special act is not repealed unless a different intent is plainly manifested, or where the two acts are irreconcilably inconsistent or repugnant, or where the general act covers the whole subject matter of the special one* * * or is clearly intended to establish a uniform rule or system for the whole state.' 59 C.J. Sec. 536; and cases cited in footnotes 85 and 89. (*Italics ours.*)

In applying the foregoing rule we are at liberty to take judicial notice of matters of common knowledge, of matter of current history as related to affairs of public interest and concern,* * * *

Taking judicial notice of matters of common knowledge, and from an examination of the 1937 Act, it is at once apparent that the Legislature was striking at the practice of certain insurance companies to avoid payment of honest claims by resorting to such trickery as printing the benefits of the policies in bold print, whereas the exceptions were printed in small print cleverly hidden away in the body of the policy. There can be no question of the legislative intention to ingraft upon Section 5762 another exception.

Hon. Geo. A. S. Robertson

-10-

December 1, 1937.

It is the opinion of this Department that stipulated premium plan companies are required to issue health and accident contracts which comply with the provisions of Senate Bill No. 126, found in the Laws of Missouri 1937, Section 5965a, page 360.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:MM

TAXATION: Property purchased with funds received under World War Compensation Act subject to State and County Taxation.

4-19
April 15, 1937.



Mr. V. C. Rose, Jr.,
Prosecuting Attorney,
Putnam County,
Unionville, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of April 10, 1937, in which you request an opinion as to the following facts:

"One William H. Scott, a disabled world war veteran, received certain compensation under the U. S. Veteran Act of 1924, which subsequently came into the hands of his guardian Lucy Scott of Powersville, Missouri. She evidently loaned a portion of this money taking as security a mortgage on forty acres of land in this county. The mortgagor did not pay, and the mortgage was foreclosed, title resting in William H. Scott.

William H. Scott died about four years ago and over a year ago his brother Harry T. Scott took this forty acres of land as his distributive share of the deceased veteran's estate.

The guardian of William H. Scott paid taxes on his estate for sometime, but discovered a few years ago that it was exempted from taxes by the veterans act and ceased to pay taxes. The assessor and county court raised the question of taxation as the veteran died and the land is now owned by Harry T. Scott, who of course received no veterans compensation. I gave it as my opinion that the land is now subject to taxes, but I would like to have your opinion also.

It does seem to me that if a veteran dies his estate, even in the hands of a distributee, would not be perpetually exempt from taxes.

Mrs. Scott asked if she could recover the taxes erroneously paid before she found out of the exemption. I told her I did not think she could. Is this correct? "

April 15, 1937.

There is no question but that Congress intended to so surround the fund received under the World War Compensation Act with protection that creditors cannot take it away from the dependents. In other words, the thought became developed among states and nations that for the good of mankind there are instances when it is best that creditors go unpaid in order that certain individuals in society may have a particular source of income dedicated to personal or family sustenance, maintenance and enjoyment. *Andrews v. Bank*, 219 N. W. 62.

However, this exemption, at least as to taxation, ceases if other property be purchased for the World War Veteran's use with money received under the Act. A case precisely in point is that of *State v. Wright (Ala.)* 140 So. 584. In that case certain land was purchased by the guardian of a disabled soldier with money received by the guardian under the World War Compensation Act for the use and maintenance of said soldier. The guardian refused to pay any taxes on this property and the question was finally presented to the Supreme Court of Alabama, wherein it was held:

" ***** it is clear that the exemption ***** does not extend to privately owned property purchased with money arising from such sources and which was at the time of the purchase within the jurisdiction of the state and subject to its powers of taxation. *****

The judgment here is that the lands in question were not exempt from taxation by the state and County of Marshall *****.

CONCLUSION

In view of the foregoing, it is the opinion of this department that the property now owned by Harry T. Scott and originally owned by William H. Scott, a disabled World War Veteran, is subject to taxation by the state and county regardless of the fact that the property was acquired by William H. Scott by means of certain compensation received by him under the United States Veteran's Act of 1924.

Respectfully submitted,

JOHN W. HOFFMAN, JR., Assistant
Attorney General.

APPROVED:

J. E. Taylor
Acting Attorney General

TOWNSHIPS: May not issue bonds for road purposes when there is a special road district organized which includes the whole or any part of said township within its boundaries, and has road bonds outstanding and unpaid.

July 1, 1937

7-2

Hon. V. C. Rose, Jr.
Prosecuting Attorney
Putnam County
Unionville, Missouri



Dear Sir:

This Department is in receipt of your letter of June 2, 1937, requesting an opinion as follows:

"The officials of a township in Putnam county have consulted with me about trying to issue some bonds for road and bridge purposes.

"Within the township in question are two special road districts which already have issued bonds that are now outstanding.

"I note that Section 7964 R. S. Mo. 1929, provides that a township cannot issue bonds when included within its territory is a special road district which has issued bonds that are outstanding, or vice versa. In checking up on this section I find nothing to the contrary, but before advising the township board that the section presented an insuperable obstacle, I should like to have your opinion if there is any way around it."

Section 7960, R. S. Missouri, 1929, is as follows:

"The board of commissioners of any special road district organized and incorporated under the laws of this state, for and on behalf of such district, and the county courts of the several counties, on behalf of any township in their respective counties, are hereby authorized to issue road bonds to an amount, including existing indebtedness, not exceeding five per centum of the assessed valuation of such special road district or township, as the case may be, to be ascertained by the assessment next before the last assessment for state and county purposes. Such bonds shall be issued in denominations of one hundred dollars or some multiple thereof, to bear interest at not exceeding six per centum per annum, payable semi-annually, and to become due and payable at such times as the board of commissioners or county courts shall determine by order of record, not exceeding twenty (20) years from date of issue."

Section 7964, R. S. Missouri, 1929, is as follows:

"The four next preceeding sections, to-wit: sections 7960, 7961, 7962 and 7963, R. S. Missouri, 1929, shall not apply to any township, the whole or any part of which is included in a special road district that has issued bonds, the whole or any part of which are outstanding and unpaid; nor shall said sections apply to any special road district which includes the whole or any part of any township which has issued bonds for road purposes, the whole or any part of which bonds are

outstanding and unpaid, nor shall said sections apply to any special road district which includes the whole or any part of the territory of any other special road district which has incurred an indebtedness evidenced by an issue of bonds, the whole or any part of which are outstanding and unpaid."

We call your attention particularly to that part of Section 7964, R. S. Missouri, 1929, which we have underlined. This section is very clear and plain in its meaning as such is not open to construction. *Cummings v. Kansas City Public Service Commission*, 66 S. W. (2d) 920.

In *State ex rel Jackson v. Hackman*, 249 S. W. 71, the court had before it the interpretation of Section 10751, R. S. Missouri, 1919, which is in substance the same as Section 7964, R. S. Missouri, 1929, except that Section 7964, R. S. Missouri, 1929, is more explicit in its prohibition of the issuance of bonds for road purposes by townships, when other bonds of an overlapping special road district were outstanding and unpaid. In this case the court said at l. c. 73:

"It * * * seems apparent that while the Legislature intended to give townships, no part of which were contained in special road districts, the full right to vote bonds for road purposes, yet, whenever a special road district is organized and has taken in such township or part thereof, it tended to transfer to such special road district the management and control of road matters and the sole power thereafter to issue bonds for such purposes. The township is a political subdivision organized for various governmental functions, while the special road district is

July 1, 1937

a political subdivision created solely for the purpose of taking care of road maintenance and road construction problems within its boundaries. It is more fitting that all matters of voting bonds for road purposes should be committed to the special road district where it exists, and such, apparently, was the theory of the Legislature in enacting section 10751."

The act of 1919 provided that the next preceeding four sections "shall not apply to any township where the whole township or any part thereof is included in a special road district which has heretofore issued bonds for road purposes which remain unpaid." This act was amended in Laws 1923, p. 356, in its present form, and as we understand it, the amendment made the exception of Section 7967, R. S. Missouri, 1929, apply both ways, but did not change its former application to a township overlapped by a special road district. That is, when a special road district overlaps into a township that has road bonds outstanding the special road district is prohibited from issuing bonds for road purposes, or that when one special road district overlaps another, the same prohibition applies.

Therefore, it is the opinion of the Department that a township is prohibited by Section 7964, R. S. Missouri, 1929, from issuing bonds for road and bridge purposes when there is a special road district, which includes the whole or any part of said township within its boundaries, that has road bonds outstanding and unpaid.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB:MR

PENAL INSTITUTIONS: Sentences are to run concurrently from the date rendered unless the sentencing court directs sentence to commence at a future time.

August 28, 1937.

Honorable J. M. Sanders, Warden
Missouri State Penitentiary
Jefferson City, Missouri

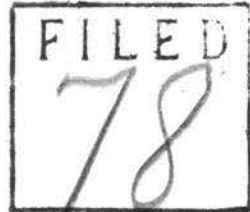
Dear Sir:

We acknowledge your request for an opinion dated August 20, 1937, which reads as follows:

"Walter Wall #46638, is serving here four years from Cape Girardeau County, Missouri, from June 24, 1935, for Burglary and Larceny, having plead guilty there to the charges at the April, 1935 term, and was received here on June 26, 1935, as shown by his commitment now in file in this office.

"Prior to this, on May 31, 1935, at the same term of the Circuit Court in said county, he was tried and convicted by a jury of similar offence as stated above, and his sentence was fixed at four years from June 8, 1935, as will be shown by the certified copy of the sentence and judgment of court herewith submitted. He appealed this conviction to the Supreme Court of Missouri, but was transported to prison and began service on the first sentence named above at the time stated, which sentence he is now serving.

"On June 30, 1936, the Supreme Court affirmed his conviction on the appealed sentence, setting forth in its mandate that sentence was to



be for "A period of two years for burglary and two years for larceny, the same being the sentence passed by the said Circuit Court of Cape Girardeau County aforesaid." This said mandate was received here August 19, 1937.

"This office would appreciate an opinion from you as to when service in the appealed sentence should begin."

The record of facts of this case, as stated in your request for an opinion, does not bring the above prisoner within the provisions of Section 4456 or 12969 R. S. Mo. 1929, which are mandatory statutes directing cumulative sentences under certain circumstances where one is convicted of more than one crime.

The power of the Trial Court to render judgment and sentence, after conviction of the crime, is provided in Section 3715 R. S. Mo. 1929, which reads:

"Whenever a judgment upon a conviction shall be rendered in any court, the clerk of such court shall enter such judgment fully on the minutes, stating briefly the offense for which such conviction shall have been had, and the court shall inspect such entries and conform them to the facts; but the omission of this duty, either by the clerk or judge, shall in nowise affect or impair the validity of the judgment."

By the above section we see that the Trial Court has the power to, and is not prohibited from, rendering a cumulative sentence upon one, convicted of a crime, while restrained under a judgment and sentence of conviction for a prior crime.

Section 3742 R. S. Mo. 1929, provides when an appeal to the Supreme Court operates as a stay of execution on the trial court's judgment and sentence and reads:

"No such appeal or writ shall stay or delay the execution of such judgment or sentence, except in capital cases, unless the supreme court, or a judge thereof, or the court in which the judgment was rendered, or the judge of such court, on inspection of the record, shall be of opinion that there is probable cause for such an appeal or writ of error, or so much doubt as to render it expedient to take the judgment of the supreme court thereon, and shall make an order expressly directing that such appeal or writ of error shall operate as a stay of proceedings on the judgment; but in capital cases the order granting the appeal shall operate as such stay absolutely."

When an appeal be granted the defendant may be committed without a stay of execution as was done in the above case, or he may be recognized (admitted to bail while on appeal), for Section 3754 R. S. Mo. 1929 provides:

"If an appeal be granted, the court below shall order the defendant to be committed or recognized, and the recognizance shall be to the same effect as the recognizance required when the defendant himself is appellant; and the party, if committed, shall be held in custody until the judgment of the supreme court shall have been passed on the case, to abide such judgment."

The mandate of the Supreme Court, in this case, follows the provisions of Section 3763 R. S. Mo. 1929, which reads:

"When the appeal is taken, or the writ of error is sued out by the party indicted, if the supreme

court affirm the judgment of the court below it shall direct the sentence pronounced to be executed, and the same shall be executed accordingly; if the judgment be reversed, the supreme court shall direct a new trial, or that defendant be absolutely discharged, according to the circumstances of the case."

The Supreme Court in its mandate could have changed the time of imprisonment pursuant to Section 3765 R. S. Mo. 1929, which reads:

"No judgment shall be reversed or set aside by the appellate court, for the reason that the judgment by virtue of which such person is confined, or from which he has prosecuted an appeal or writ of error, was erroneous as to time or place of imprisonment, but in such case it shall be the duty of the court or officer hearing the case to sentence such person to the proper place of confinement, and for the correct length of time, from and after the date of the original sentence, and to cause the officer or other person having such prisoner in charge to convey him forthwith to such designated place of imprisonment."

Section 648 R. S. Mo. 1929 states the limitations upon the warden for imprisoning one convicted of crime, and reads:

"No person's body shall be imprisoned or restrained unless by authority of law."

In *Meininger v. Breuer*, 304 Mo. 381, 1. c. 391, 264 S. W. 1, the Supreme Court said:

August 28, 1937.

"The law then, as now, was settled beyond dispute that, in the absence of a statute to the contrary, sentences were not cumulative, even where they might be made so, unless the sentencing court expressly made them so by directing that the subsequent one should commence at a future time determined or determinable with certainty. In the Meyers sentences no sort of effort was made by the trial court to render the sentences cumulative."

CONCLUSION.

This department is of the opinion that the mandate of the Supreme Court in the hands of the warden, by its very terms, affirms the judgment of the trial court and thereby gives force to the judgment of the trial court which had been rendered before appeal.

The form and substance of said judgment shows it to be in conformity with statutory requirements, even though the trial court did not render cumulative sentences for the second conviction. A cumulative sentence was not mandatory for the second conviction under the Missouri code.

The trial court, in plain language, fixed the sentence at four years incarceration to run from June 8, 1935, which sentence was legal, because it is intended to run from the same date that judgment and sentence was passed, and the Supreme Court, on appeal, did not change that judgment and sentence as to time, as was its power, in the mandate dismissing the appeal.

Since the judgment and sentence of the trial court was rendered within the trial court's jurisdiction; since it is certain as to time and place of imprisonment; since the punishment conforms to the statutory punishment for the particular crimes, and since the Supreme Court has unconditionally sanctioned the judg-

August 28, 1937.

ment and sentence in its mandate, now the duty falls on the warden to imprison according to the original judgment and sentence, as ordered in the mandate. Imprisonment in the appealed case should be computed from June 8, 1935, the date that the original judgment was rendered and sentence was passed.

When the appeal was granted to the Supreme Court the defendant was not admitted to liberty on appeal bond, nor does the record show a stay of execution on the judgment and sentence, pending appeal, or an escape. In such cases the present opinion would not apply. At all times, since the original judgment and sentence on the second charge, the record shows that the prisoner was being incarcerated in the penitentiary without recognizance on either charge.

It is our further opinion that insofar as the two judgments and sentences overlap, as to time of incarceration, they should run concurrently with each other on the prisoner's records. Such a confinement is by "authority of law".

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

WOS:H

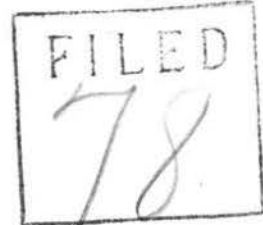
HABEAS CORPUS -

PENAL INSTITUTIONS -

Writ served on person in custody must deliver the body and may be reimbursed by Legislative appropriation for necessary expenses.

December 28, 1937

Honorable J. M. Sanders, Warden
Missouri State Penitentiary
Jefferson City, Missouri



Dear Warden:

We acknowledge receipt of your request for an opinion dated November 9, 1937, which reads as follows:

"A writ of habeas corpus ad testificandum was issued by Hon. Robert L. Gideon, Judge of the Circuit Court of Ozark County, Missouri, directed to the undersigned as Warden of the Missouri State Penitentiary, and commanding that Ernestine Howell, an inmate of this institution, be brought before the said judge of the said circuit court on November 8, 1937, there to testify in the case of the State of Missouri vs. Ralph Taylor and Floyd Taylor, defendants in said Court, on the part of the defendants.

"No fees or expenses incident to the transportation, safekeeping and return of the prisoner was offered. In this instance, as well as all other instances of like character, a written opinion from your office as to whether necessary fees or expenses can be required before complying with the order of the Court. Would the rule laid down by you in this instance apply in cases where the witness is required by the State? If compliance with the order of the Court is to be carried out under any circumstance, from what source should the necessary fees and expenses come?"

As to the jurisdiction over one convicted of a crime and admitted to the Penitentiary, Section 8316, Laws of Mo. 1933, page 327, provides:

"There is hereby created and established a department to be known as the Department of Penal Institutions, by which name it shall have perpetual succession, with the right to complain and defend in all courts; and to adopt and use a common seal and alter the same at pleasure. The Department of Penal Institutions shall be under the control and management of a Commission composed of three members, not more than two of whom shall belong to the same political party, who shall be known as Commissioners of the Department of Penal Institutions, and who shall have and exercise the powers, and perform the duties and functions in this article provided, and as otherwise authorized by law. The commissioners of the department of penal institutions shall reside in Jefferson City and devote their entire time to the duties of their respective offices. Said department of penal institutions shall have and exercise control and jurisdiction over all penal institutions in this state supported in whole or in part by the direct appropriation of money out of the state treasury, and more particularly over the Missouri reformatory at Boonville, the state industrial home for girls at Chillicothe, the state industrial home for negro girls at Tipton, the intermediate reformatory at Jefferson City and the state penitentiary and prison at Jefferson City, together with all real estate, buildings, machinery and personal property belonging to or used by, or in connection with, said penal institutions, or any thereof."

Section 8319, Laws of Mo. 1933, page 328, provides:

"The director of penal institutions shall receive an annual salary of not more than thirty-six hundred dollars, and such railroad fare and other traveling expenses as may be incurred while traveling in the discharge of official duty. Each member of the commission of the department of penal institutions, other than the chairman thereof,

shall have and receive an annual salary of not more than thirty-two hundred dollars, and in addition thereto shall be reimbursed for all railroad fare and other expenses incurred while traveling in the discharge of official duty."

Section 8338, R. S. Mo. 1929, relating to custody of prisoners, provides:

"The State prison board shall, subject to law, have the exclusive government, regulation and control of the Missouri state penitentiary, the Missouri reformatory, the industrial home for girls, the industrial home for negro girls and of all other penal or reformatory institutions hereafter created and of all persons who now are or who hereafter shall be legally sentenced to either of the institutions hereinabove mentioned or referred to and who shall be committed to the custody of said board, and said board shall make and enforce such by-laws, rules and regulations as they from time to time deem necessary and proper in the management of all institutions or persons now or hereafter legally committed to said board, and shall be vested with and possessed of all other powers and duties necessary and proper to enable it to carry out fully and effectually all the purposes of this article. Said board shall employ and at all times control a warden, deputy warden, superintendent of industries, superintendents, matrons, physicians, chaplains, trade foremen, turnkeys and guards, and all other officers and employes as the board may, under law, from time to time deem necessary and proper for the efficient administration of said board."

Section 655, R. S. Mo. 1929 provides in part:

" ** eighth, when a statute requires an act to be done, which by law, an agent or deputy as well may do as the principal, such requisition shall be satisfied by the performance of such act by an authorized agent or deputy; ** "

As to the right of a defendant charged with a crime to have legal process for a witness, Article II, Section 22, Missouri Constitution, provides:

"In criminal prosecutions the accused shall have the right *** to have process to compel the attendance of witnesses in his behalf ***."

Section 1752, R. S. Mo. 1929, provides:

"Any person who has been convicted of a criminal offense is, notwithstanding, a competent witness, but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer."

Section 3618, R. S. Mo. 1929, provides in part:

"Every person indicted or prosecuted for a criminal offense shall be entitled to subpoenas and compulsory process for witnesses in his behalf; *** "

In *Ex parte Marmaduke*, 91 Mo. 228, 1.c. 238; 4 S. W. 91, the Supreme Court said, construing the above constitutional provision:

"Compulsory process, for a witness, signifies and means the process that will compel the attendance of such witness."

In the same case but in the dissenting opinion, the purpose of habeas corpus ad testificandum, is discussed at page 250, and Judge Sherwood said:

"The writ of habeas corpus ad testificandum is a very ancient one, and was grantable at the discretion of the courts at common law. It was a process whereby the attendance of witnesses was compelled, and it was employed to bring the witness before the court, whether in custody awaiting trial, or when undergoing sentence. *** And there are instances where

the state courts have issued the writ in question, where the witness was in custody or undergoing sentence. The instances of the issuance of such a writ are not frequent in the state courts, but whenever they occur, or are referred to, they distinctly recognize the principle, and the undoubted right of a defendant in a criminal case to have it enforced."

46 C. J. page 1018, Section 246, reads:

"The right of an officer to compensation for expenses incurred by him in the performance of an official duty must be found in a provision of the constitution or a statute conferring it either directly or by necessary implication, *** "

46 C. J. page 1035, Section 301, reads:

"The duties of a public office include those lying fairly within its scope, those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principal purposes. Public officials take their offices cum onere with all responsibilities attached, and in accepting office impliedly contract to perform the duties thereof. ** "

CONCLUSION

From the above quoted statutes, we see that custody of inmates in penal institutions is primarily in the department of penal institutions, subject to the rules and regulations of the Commissioners as they deem necessary and proper in the management of said penal institutions, and persons legally committed therein. We also see that the Commissioners are entitled to reimbursement for rail-

road fare and other expenses incurred while traveling in the discharge of official duty. We see also that the Commissioners have power to employ and control a Warden and other persons whom they deem necessary, under the law, to assist in administering as their agents some of the legal duties imposed on the Missouri penal institutions.

Where the duty has been delegated to the Warden of the Penitentiary, by the Commissioners, to assume general custody over the prisoners confined in the Penitentiary, then the inconvenience of answering a writ of habeas corpus directed to said Warden is apparent. The writ of habeas corpus ad testificandum is no exception. Pursuant to the Missouri statutes and the Marmaduke case, above set out, one committed to the Penitentiary is yet a competent witness, and one charged with a crime has the constitutional right to compulsory process for his witnesses, even where they be convicts. By statute the state has this same right to compel attendance of a convict as a witness. (See Section 3618, R. S. Mo. 1929). The available remedy in such cases is habeas corpus ad testificandum, and where the Warden be served with a copy of such a writ, it is his duty, under the law, to see that the body be produced in court as commanded whenever the prisoner be in his custody. There is no alternative available to avoid said writ.

We have searched the statutes to discover if the Legislature has provided any advance fees or expenses incident to the transportation, safekeeping and return of a prisoner delivered pursuant to a writ of habeas corpus and we find none. On the other hand, Section 1389, supra, provides reimbursement to the penal commissioners for expenses incurred in the discharge of official duties, and we believe that the Legislature intended by this section the same reimbursement to extend to any subordinate penal employee who is delegated to perform as their agent any legal duty that necessitates traveling expenses in delivering prisoners in response to habeas corpus ad testificandum. This expense of reimbursement would be properly charged against money appropriated by the Legislature for costs in criminal cases.

On the other hand, there is no law prohibiting the Warden from asking and receiving reimbursement in lieu

Hon. J. M. Sanders

-7-

December 28, 1937

of a claim against the state, from persons expecting the benefit of said convict's testimony pursuant to habeas corpus ad testificandum..

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

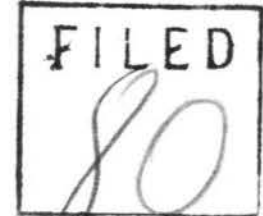
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WOS:FE

Motor Vehicles---- : A private person who transports school
Drivers License Law: children to and from school without
compensation does not "operate" school
bus.

June 12, 1937



Father T. Schoen
New Haven, Missouri

Reverend and dear Father:

This Department is in receipt of your request
for an opinion, which reads as follows:

"May I request an official opinion
from your office relative to the
following matter:

'Is it permissible under the new
drivers license law to use a driver
under 21 years of age--if I use a
privately owned automobile, such as
a limousine, in the transporting of
school children to school; or does the
very fact that I transport school
children make my vehicle of transpor-
tation a school bus--thereby necessi-
tating a driver over 21 years of age.'

This is a serious problem to all
parochial schools who transport children
to school. Our burden is already plenty
burdensome. I do hope for a favorable
reply, for the necessity of a driver
over 21 years of age means quite an
additional expense. May I expect an
early reply, so I can arrange accordingly."

The law which is commonly known as "Drivers License Law", was passed at the last session of the legislature and approved by the governor. Section 5 of the act provides in part, as follows:

"No person who is under the age of twenty-one (21) years shall drive any motor vehicle while in use as a school bus for the transportation of pupils to or from school* * *."

Section 1 (c) reads as follows:

"School bus. Every motor vehicle owned by a public or governmental agency and operated for the transportation of children to or from school or privately owned and operated for compensation for the transportation of children to or from school."

In applying the above sections to your set of facts, it will be seen that the question turns upon the interpretation of the word "operated" as used in Section 1 (c). The question is whether "operated" as used in the act means actual physical control of a vehicle, or whether it means the direction or supervision of the vehicle. Funk and Wagnall's Dictionary defines "operate" as:

- "1. To put in action and supervise the working of.
2. To conduct or manage the affairs; superintend."

Webster's Dictionary gives as synonyms of the word "operate"; "to manage, conduct, to carry out, or through."

In an interpretation of a law, the court should endeavor to arrive at the true intent of the lawmakers as determined from the text in which they have expressed it. St. Louis vs. Lane,

19 S.W. 533; 110 Mo. 254. We believe that the reasonable construction of Section 1 (c), wherein a school bus is defined, is that the strict definition of "operate", which means to put in action or to work, should not be taken, but rather the broader meaning of managing or superintending. A reading of the provision in this light seems to carry out the intent of the Legislature. In other words, the statute should read so that "operated" refers to the control or direction of the governmental agency or the private person, rather than the steering or driving by the chauffeur. This view is borne out by the construction of the statute. As was said in *Dyer vs. Sutherland*, 13 S.W. (2d) 1056:

"In construing the statute, effect must be given, if possible, to every word thereof."

It will be noted that when "operated" appears in the first clause of the paragraph, it is used by itself. However, in the second clause, it is followed by the phrase "for compensation". This phrase must be included in the statute for some reason. In both instances whether the vehicle belongs to a public agency, or to a private person, it is driven by a person for which act he receives compensation. Therefore when the phrase "for compensation" is used in the second clause, it must refer to something other than the compensation of the driver, otherwise, it would have been used in the first clause also. Therefore, when the act says "operated for compensation", if it does not refer to the actual physical control exercised by the driver, then it must mean operating in the sense of management or superintendence or the direction of the conduct. A reading of the section as a whole bears out this interpretation. The "public or governmental agency" provides a bus for the convenience of the pupils and receives no compensation for it, it therefore, only "operates" a bus. However, a private person when paid by a school or by the parents of the pupils to provide means whereby the pupils are transported to and from school, then he "operates for compensation".

June 12, 1937

It will, therefore, be seen that a school bus as defined by Section 1 (c) of the Drivers License Law is a motor vehicle operated by a public or governmental agency or one operated by a private person for compensation. If no compensation, directly, or indirectly, is received by the private person, then the vehicle is not a school bus.

However, if such a vehicle as described in your letter is not a school bus, still if you pay compensation to a person for driving the same, he would be a chauffeur and under Section 7765 R. S. Missouri 1929, he must be eighteen years of age and have a chauffeur's license. However, if said person does not receive compensation, the only requirements would be that he be sixteen years of age and have a driver's license.

CONCLUSION

It is, therefore, the opinion of this Department that where a private person has a driver transport children to and from school in that person's car and for which the person receives no compensation, then the vehicle used is not a school bus and the driver does not come within the provision of Section 5 of the Drivers License Law, which requires him to be twenty-one years of age.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

AO:MR

RE: INHERITANCE TAX: Consideration affecting transfer in contemplation of death.

April 30, 1937.

5-7
FILED
81

Honorable Robert F. Sevier,
Judge of the Probate Court of Clay County,
Liberty, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion of April 19th, relative to the following:

"Under Sec. 570 R. S. 1929, referring specifically to that part of the section reading as follows:

'or in the nature of a final disposition or distribution thereof without an adequate, valuable consideration shall be construed to have been made in contemplation of death within the meaning of this section.'

Now with regard to those above lines, this situation is presented. A certain party dies leaving a will in which all of his property was conveyed to an entire stranger; however, the executors of the estate upon investigation find and so return in the inventory that this man had conveyed all of his property within two years prior to his death to this entire stranger. It was alleged by this stranger that he had kept the testator for eighteen years and that his fee for those services was the adequate valuable consideration for this transfer so that same should not now be subject to any tax, seeking thereby to exempt this amount under the section above referred to.

The case seems a little peculiar to me in that it attempts a double standard; in other words, the testator has nothing because he has previously conveyed all of his property and at the same time, the beneficiary, who is this stranger, states that the reason he had no property at the time of his death was because owing him, he had paid his debt by transferring all of this property to the amount of which is approximately \$7,000.00.

I was wondering whether or not you had ever had

April 30, 1937.

an incident of this kind before and further that if this court should find that actually the stranger had performed certain services which were reasonably of the value of \$7,000.00 and that therefor he was paid and that because he was paid, the mere fact that the man had died within two years after this payment would not make the estate subject to any tax.

I would appreciate a reply on this as speedily as is possible as, of course, the executors of the will and this stranger are anxious that same be disposed of."

There is no question but that under Section 570, R. S. Mo. 1929 as amended by the Laws of 1931, page 130, a gift, or rather a transfer of property within two years of death for an adequate and valuable consideration is not taxable under the inheritance tax law of the State of Missouri. It is rather difficult to point to a case decisive of the problem submitted by you for the reason that the whole question turns upon the proposition of fact, that is to say, whether the consideration was adequate and valuable. We specifically call your attention to the fact that the consideration must be not only valuable, but adequate.

As to what constitutes consideration, as we have said, is a question of fact for the Probate Court, in the first instance, to determine. A moral obligation to the transferee is certainly not sufficient to relieve a transfer made in contemplation of death from this tax. *People v. Porter*, 287 Ill. 401. Not every consideration presents a transfer, some being voluntary or some being a gift. The rule has been stated that it is intended that "Property shall be treated as taken under a gift, although such gift may have been made under a contract by which the donee takes a benefit. The fact that something was given in exchange for the donee does not prevent the transaction from being a gift, if one can see from the nature of it that it was intended as a gift." *Attorney General v. Johnson*, 1 K. B. 617.

In conclusion, we reiterate that the problem is one of fact rather than one of law. There are, however, three rules that may be looked to for guidance, namely, (1) The consideration must be valuable; (2) The consideration must be adequate; and (3) The contract (implied in this case) must be legally enforceable.

JWH:EG

Respectfully submitted,

APPROVED:

(Acting) ATTORNEY GENERAL

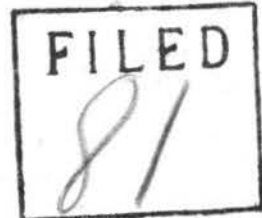
JOHN W. HOFFMAN, JR., Assistant
Attorney General.

ESCHEAT FUNDS:

All funds remaining unpaid and unclaimed in the hands of executor or administrator shall, upon order of the court in which a final settlement is made, be paid into the treasury within one year.

July 16, 1937.

7-17



Hon. J. B. Selby,
Judge of Probate,
Harrison County,
Bethany, Missouri.

Dear Sir:

This is to acknowledge receipt of your request for an opinion, which reads as follows:

"We write for your interpretation on the length of time required from time of final settlement in an estate in probate court before these funds, refused or not receipted for can be paid into the Escheat Fund and receipt secured from that office, which will authorize the court to discharge an administrator or executor.

"It has been the practice of this court, to wait until one year has elapsed from time of final settlement and distribution before paying this money into the State escheat fund, Sections 620 and 621 Rev. Sta. 1929. And that is the interpretation of most of our attorneys, and the practice of the court, after following up the court decisions on these sections of the statute. Now this practice is questioned by a layman, and we would appreciate very much your interpretation on this question."

Section 621 R. S. Mo. 1929, provides:

"Within one year after the final settlement of any executor or administrator, assignee, sheriff or receiver, all moneys in his hands unpaid or unclaimed, as provided in section 620, shall, upon the order of the court in which such settlement is made, be paid into the state treasury. And the state treasurer shall issue to him a duplicate receipt therefor, one of which shall be filed with the state auditor, who shall credit him with the amount thereof and charge the state treasurer therewith. All such moneys so received into the state treasury shall be credited into a fund, to be known and designated as 'escheats'".

As you will note, the above section is plain, unambiguous and clearly contemplates that within one year after the final settlement of any executor or administrator all moneys remaining in their hands, which have been unpaid or unclaimed, shall, upon the order of the court in which such settlement is made, be paid into the state treasury.

Where the statute is plain, as here, there is no room for construction of the same. (State ex rel. Jacobs-meyer v. Thatcher, 92 S.W. (2d) 640).

Your attention is further directed to Section 622, which provides in substance and effect that if moneys, as above set out in Sec. 621, supra, are not paid into the state treasury, the prosecuting attorney of the county in which such executor or administrator resides shall, upon giving ten days' previous notice of his intention to do so, move the court to enter judgment against such executor or administrator for the amount of moneys in their possession.

Hon. J. B. Selby,

-3-

7/16/37.

CONCLUSION

It is the opinion of this department that all funds remaining in possession of any executor or administrator, which have been unpaid or unclaimed, shall, upon the order of the court in which a final settlement has been made, be paid into the state treasury at any time within one year after a final settlement.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

RSC/LD

GENERAL ASSEMBLY:

Power of Legislature to employ additional employees to assist Investigating Committee under House Resolution No. 60

February 27, 1937.



Honorable T. A. Shockley
Member of House of Representatives
Chairman, Insurance Committee
Jefferson City, Missouri.

Dear Mr. Shockley:

This is to acknowledge receipt of your letter of February 25, 1937, in which you request the opinion of this Department on the question therein submitted. Your letter is as follows:

"The House Committee on Insurance by resolution was made the Investigating Committee on certain fire insurance funds that have been impounded for a number of years, seeking to ascertain the disposition of same.

"The resolution states that said Investigating Committee may employ clerks, stenographers, sergeant-at-arms, and other assistants. Since the House of Representatives now has the seventy-five employees provided for by the Constitution, I would like to have your opinion if the Investigating Committee may employ additional clerks, stenographers, sergeant-at-arms, and other assistants.

"I am attaching hereto printed copy of said resolution for your information, and would be glad to have your opinion at the very earliest moment."

In your letter of submittal you enclosed a copy of House Resolution No. 60 with interlineations showing the amendments thereto. Your question is, as we understand from your letter, does the Investigating Committee provided for in said resolution have the authority to employ additional clerks, stenographers, sergeant-at-arms and other assistants as it may require to make the investigation called for by the resolution? We note, also, that you state in your letter that "the House of Representatives now has the seventy-five employees provided for by the Constitution." You refer, of course, to Section 16a, an Amendment to the Missouri Constitution adopted by the people at the General Election of November 8, 1932, Laws of Missouri, 1933, page 479, Vol. 15, Mo. Stat. Ann., Cumulative Pocket Addition, which is as follows:

"Neither House of the General Assembly shall employ to exceed in all 75 employees, elective, appointive, or any other, at any time during any session."

This amendment to our Constitution has not been before our courts for construction or interpretation since its adoption. One of the cardinal rules in the construction of a provision of a constitutional amendment is to find out and ascertain the intention of the framers and of the people who adopted same, and in such construction technical rules shall be disregarded, and, as a rule, a medium between a strict and a liberal construction should be followed.

Does this amendment to the Constitution mean that neither house of the General Assembly shall employ to exceed in all 75 employees at any time during any session and under any and all circumstances?

The Supreme Court of Oklahoma in the case of Shaw, State Auditor v. Grumbine, 278 Pac. 311, had a somewhat similar provision of the Oklahoma Constitution before it for construction, which provision of the Constitution of Oklahoma, Section 49, Article V, reads as follows (l. c. 313):

"The Legislature shall not increase the number or emolument of its employees, or the employees of either House, except by general law, which shall not take effect during the term at which such increase was made."

And the court held in that case (1. c. 316):

"that the Legislature, acting in an inquisitorial and investigating capacity, or either House in performing such duties, or the Senate sitting as a court of impeachment, is vested with authority to employ such clerks, stenographers, or other employees as may be necessary to discharge such duties, and that the inhibition of section 49, article 5, of the Constitution, was intended by the framers and the people in adopting the Constitution that it should apply to the Legislature as a lawmaking body, and does not prohibit the Legislature sitting in an inquisitorial and investigating capacity from employing additional employees to enable it to properly function and discharge its duties in such capacities." (Italics ours)

and that there was a distinction between its purely legislative functions and when the Legislature was acting in an investigating and inquisitorial capacity.

We assume that to perform the necessary legislative functions the House of Representatives deems it necessary to employ 75 employees to take care of and perform the general, usual, customary and ordinary matters coming before it in its law-making capacity. That being true, if the House of Representatives deemed it necessary to make an investigation, such as is called for under House Resolution No. 60, and extra employees were necessary to make such investigation, it could not do so because it had employed all the clerks, stenographers and other employees permitted under Constitutional Amendment, Section 16a aforesaid, wherein it is limited to 75 employees.

We do not agree to such a narrow construction of this Amendment to our Constitution for the reason that it would cripple the General Assembly in performing its investigating and inquisitorial functions and we do not believe that the people, by adopting this Amendment, intended to so limit the General Assembly.

Feb. 27, 1937.

In 59 C. J., p. 102, Section 89, it is said:

"When the legislature, or either house thereof, sits in an inquisitorial or investigating capacity, it may employ additional employees to enable it properly to function and discharge its duties in such capacity, but the legislature, or either house thereof, cannot delegate to a committee the power to fix the number of employees."

Conclusion.

From the above and foregoing we are of the opinion that the Investigating Committee, provided for in House Resolution No. 60, may, with the sanction and approval of the House of Representatives, employ additional clerks, stenographers, sergeant-at-arms and other assistants mentioned in your letter, to make the investigation called for in said Resolution and report the result of its investigation to the House of Representatives.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

DEPOSITORIES:) Bond must be given to secure the full
COUNTY DEPOSITORIES:) amount of the "total annual revenue" of the
county.
County treasurer liable for funds deposited
in an unlawful county depository.

March 5, 1937.

3-17



Honorable H. J. Simmons
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of February 20th, in which you request the opinion of this Department on the questions therein submitted. We set forth your letter in full:

"The Treasurer Elect who takes office April 1st is required to give bonds in the total penalty of about \$125,000.00. The bonding Company with whom he has made application refuses to write the bond until the County Court has selected the County Depository and the County Depository has executed a bond prescribed by Section 12187, the penalty of such bond to be not less than the total amount of County funds to be deposited with such depository.

"The County Court will advertise for proposals from banking institutions in this County in compliance with section 12184, but the banks have indicated that they will not submit proposals; in which case no proposals being made it then becomes the duty of the County Court, Section 12189, to select one or more banking corporations to act as County Depositories and to fix the rate of interest at not less than 1½%, to be

computed on the daily balances due the County as provided in Section 12186. The banks state that they will not pay interest on County deposits. The peak deposits at the present time are about \$127,000.00; the penalty on the bonds which have been deposited by the present depository is but \$50,000.00. The present depositories are not willing to increase deposit bonds in excess of \$50,000.00.

"If I understand the law the present banking institutions are County Depositories of funds up to the amount of the bonds deposited with the county. In case of a failure, assuming the County had more than \$50,000.00 on deposit in said depository the depository would become the Trustee of the County Treasurer who in turn would have a preferred claim for the amount of deposits in excess of the \$50,000.00. If the preferred creditors were not paid 100 cents on the dollar and a loss was sustained, then the County Treasurer and the Bonding Co. would become liable to the County for the deficiency.

"As stated in the beginning the bonding Co. at the present time is refusing to write a treasurers bond until the County Depository has complied with Section 12189.

"Assuming that the Banking Corporations of this County refuse to deposit bonds in excess of \$50,000.00 and the total funds in the hands of the County Treasurer amount to \$127,000.00 then what should the County Treasurer do with the excess of \$77,000.00.

"As a matter of second importance, Section 12187, Session Laws 1935, provides that in case a depository bids on County funds and the bid is approved by the County Court, then such depository shall file in the office of the clerk thereof a bond, the

penalty of which shall not be less than the total annual revenue of said county for the years for which the bond is given. The anticipated revenue of Vernon County is approximately \$300,000.00.

"Will you kindly advise whether the depository, proceeding under Section 12187, is required to deposit a bond of not less than \$300,000, when the average daily balances of the county are between twenty and forty thousand dollars?

"It may be that your office has already written an opinion on this matter for some other County. I would appreciate receiving an opinion from your office at your earliest convenience, as very little time remains until the County Treasurer must have a bond."

I.

Your first question is:

Assuming that the Banking Corporations of this County refuse to deposit bonds in excess of \$50,000.00 and the total funds in the hands of the County Treasurer amount to \$127,000.00 then what should the County Treasurer do with the excess of \$77,000.00?

Section 12187, R. S. Mo. 1929, as amended by Laws of Missouri, 1935, page 315, provides that the successful bidder for the county money shall within ten days execute a bond with not less than five solvent sureties, to be approved by the county court and filed in the office of the clerk thereof. And said section further provides that in lieu of a personal or surety bonds that the selected depository may pledge "bonds of such county, or of the State of Missouri, or of the United States, or bonds fully guaranteed by the United States, which such bonds shall be deposited as the court may direct, with a Trustee, Trust Company or fiduciary designated or approved

by it; the penalty of each depository's bond to be not less than such proportion of the total annual revenue of said county for the years for which such bond is given as the sum of the part or parts of the funds awarded to such bidder selected respectively bears to the whole number of said parts the amount of the bond to be fixed by the court," etc.

Section 12198, R. S. No. 1929, provides as follows:

"COUNTY TREASURER EXEMPT FROM LIABILITY, WHEN.--The county treasurer shall not be responsible for any loss of the county funds through the negligence or failure of any depository, but nothing in this article shall release said treasurer from any loss resulting from any official misconduct on his part, or from responsibility for the funds of the county, until a depository shall be selected and the funds deposited therein, or for any misappropriation of such funds in any manner by him."

In the case of Glaze v. Shumard, 54 S. W. (2d) 726, 1. c. 728, it is said:

"It is well settled that a public officer is an insurer of public funds which he has lawfully received, unless the legislature has provided otherwise."

As was said by the Supreme Court in the case of City of Fayette v. Silvey, 290 S. W. 1019, 1. c. 1021:

"* * * The general rule, which is the rule in this state, is that one of the duties of a public officer intrusted with public money is to keep such funds safely, and that duty must be performed at the peril of such officer. Thus, in effect, he is an insurer of public funds lawfully in his possession. Shelton v. State, 53 Ind. 331, 21 Am. Rep. 197; Thomssen v. County, 63 Neb. 777, 89 N. W. 389, 57 L. R. A. 303. He is therefore liable for losses which occur even without his

fault. *Shelton v. State*, supra. This standard of liability is bottomed on public policy. *University City v. Schall*, 275 Mo. 667, 205 S. W. 631.

"In the last case cited, our Supreme Court, speaking through Blair, P. J., applied this general rule to a city treasurer, into whose hands the general funds of the city had passed, finding that the mayor and aldermen had directed the funds placed to the credit of the city treasurer in a certain trust company, which later failed. The treasurer died, and the suit was instituted against the administrator of his estate. The estate was held liable under the general bond, notwithstanding the fact that the funds had been so deposited in the trust company at the direction of the board of aldermen."

In the case of *Bragg City Special Road District v. Johnson*, 20 S. W. (2d) 22, 1. c. 24, 66 A. L. R. 1053, the Missouri Supreme Court in this leading case said:

"The ruling in the *University City Case* was made in recognition of the rule followed in this State, and generally followed that the liability of the treasurer of a public corporation for its funds coming into his hands is absolute. *State ex rel. v. Powell*, 67 Mo. 395; 29 Am. Rep. 512; *State ex rel. v. Moore* 74 Mo. 413; 41 Am. Rep. 322; *County of Mecklenburg v. Beales*, 111 Va. 691, 69 S. E. 1032, L. R. A., (N. S.) 285. The rule is one founded upon considerations of public policy."

In the case of *Everton Special Road District v. Bank of Everton*, 55 S. W. 335, 1. c. 336, the Supreme Court stated:

"In selecting a county depository the steps may be all regular up to the execution of a bond by the depository and then if the bond given does not substantially comply with the requirements of the statute, the depository selected is not the legal depository."

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In the case of Huntsville Trust Company v. Noel, 12 S. W. (2d) 751, 1. c. 754, the Supreme Court said:

"As heretofore stated, all county funds are required by law to be deposited in a county depository. The officers of the county charged with duties relating to the deposit of such funds for safe keeping are agents of limited powers, and as such they have no authority to deposit these public moneys with any other than a county depository. Now a bank or trust company does not become a county depository merely by being designated as such in an order of the county court; it must qualify as a depository by giving the security prescribed by section 9585. If, therefore, the trust company had not so qualified on June 27, 1927, the deposit of the county funds with it was unlawful; and it, in receiving such funds under color of being a county depository, wrongfully obtained possession of them. The county moneys so obtained thereupon became, in the hands of the trust company, a trust fund by operation of law. These funds entered into, became commingled with, and to that extent augmented, the trust company's assets as a whole. Such assets may therefore be impressed with the trust to the extent of the funds so wrongfully obtained and commingled with them."

The Springfield Court of Appeals followed the Huntsville Trust Company case in the case of Consolidated School District v. Citizens Savings Bank, 21 S. W. (2d) 1. c. 788, and the Huntsville case is cited with approval in the case of White, County Treasurer, v. Greenlee, 49 S. W. (2d) 132.

Also, in the case of Boone County v. Cantley, Commissioner, 51 S. W. (2d) 56, 1. c. 58, the Supreme Court further said:

"A bank which has given a bond that does not comply with the provisions of Section

March 5, 1937.

12187 R. S. 1929, regardless of the action taken by the county court with respect to it, is not a county depository either in law or in fact. And upon the receipt of county funds by such a bank, under color of being a county depository, a trust as to funds so deposited arises in favor of the county. *Huntsville Trust Co., v. Noel*, 321 Mo. 749, 1. c. 757; 12 S. W. (2d) 751."

It is therefore the law that if there is not a full compliance with the statutes pertaining to the selection of a depository for the county funds, and a bond is not given which complies with the statutes, it is considered an unlawful deposit and in the event of the failure of the bank and loss in consequence thereof the county is entitled to a preferred claim, and if the preferred claim is not sufficient to pay the full amount of the deposit the county treasurer and his sureties would be liable for the deficiency.

The case of *Marion County v. First Savings Bank of Palmyra*, 80 S. W. (2d) 861, is more applicable to the facts stated in your letter, and the court said (1. c. 864-865):

"In the instant case, the original penalty of the depository's bond was reduced from \$40,000 to \$20,000 as of October 5, 1932. Thereafter, the deposits in said depository increased from \$16,462.66 between November 26, 1932, and January 31, 1933, to \$38,721.67. The county officials were without lawful authority to deposit and said depository, as such, was without lawful authority to receive the \$18,721.67 excess of deposits over the penal amount of the bond. Under such circumstances the title to said \$18,721.67 did not pass, but remained impressed with the trust imposed upon it while in the lawful possession of the official rightfully entitled to it, and said depository held the same as trustee ex maleficio. *School Dist. v. Cameron Trust Co.*, 330 Mo. 1070, loc. cit. 1077, 51 S. W. (2d) 1025; *State ex rel. v. Page Bank*, 322 Mo. 29, loc.

March 5, 1937.

cit. 35, 14 S. W. (2d) 597, 599; Harrison Township v. People's State Bank, 329 Mo. 968, loc. cit. 971, 46 S. W. (2d) 165; Clearmont School Dist v. Jackson Bank (Mo. App.) 37 S. W. (2d) 1006; City of Macon v. Farmers' Trust Co. (Mo. App.) 21 S. W. (2d) 643, loc. cit. 644 (3); Special Road Dist. v. Cantley, 223 Mo. App. 89, loc. cit. 93, 8 S. W. (2d) 944. (and other cases cited)."

From the above and foregoing we find that a public officer is an insurer of public funds which he has lawfully received, unless the Legislature has provided otherwise; and that the bank or trust company does not become a county depository merely by being selected, but bonds or securities must be pledged which satisfy the mandates of the statute. And if, as in your case, \$50,000.00 worth of bonds were pledged and there was \$127,000.00 to the credit of the county treasurer, there would be a deficiency of \$77,000.00, and, therefore, in event of the bank's failure, whatever is lost thereby the treasurer and his bondsmen would be liable therefor.

II.

Your second question is:

Will you kindly advise whether the depository, proceeding under Section 12187, is required to deposit a bond of not less than \$300,000, when the average daily balances of the county are between twenty and forty thousand dollars?

In answer to this question we can only quote you the statute (Sec. 12187, supra), which says:

"* *; the penalty of each depository's bond to be not less than such proportion of the total annual revenue of said county for the years for which such bond is given as the sum of the part or parts of the funds awarded to such bidder selected respectively bears to the whole number of said parts the amount of the bond to be fixed by the court, * * *."

March 5, 1937.

The penalty of the county depository bond was discussed in the case of Marion County v. First Savings Bank of Palmyra, supra, wherein it was held (l. c. 864):

"The penalty of the bond should be not less than such 'total annual revenue' to comply with the letter, as well as the spirit, of the statute; and if for but one of the four parts, then the penalty of the bond should be not less than one-fourth of such 'total annual revenue.' The county court is without authority to fix any less amount as the penalty of the bond; but may determine upon a greater sum therefor."

It is therefore our opinion that the depository should deposit a bond and the penalty of same should be not less than such "total annual revenue" of the county, and that a bond, the penalty of which is only for the average daily balances of the county, would not be in compliance with Section 12187, as amended by Laws of Missouri, 1935, at page 316.

We hope that this answers the questions submitted in your letter.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR,
(Acting) Attorney-General.

CRH:EG

TOWNSHIP ELECTIONS:

Ballots need not conform with Sec. 10300, R. S. 1929, as amended, pertaining to General Elections.

March 17, 1937.

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Honorable H. J. Simmons
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of March 6th, in which you request the opinion of this Department on the question therein submitted. Your letter is as follows:

"Will you kindly advise me in time for the printing of ballots for the Township election to be held on the last Tuesday in March of this year, whether the names of candidates of each political party shall be printed in separate columns with a heavy perpendicular line between, with the name of each political party appearing at the top of each column, conforming to ballots under the general election law, Section 10300 of the revised statutes of Missouri of 1929.

"This county is under Township organization, and section 12270 Revised Statutes of 1929, provides that Ballots shall contain the name of every officer voted for, written or printed on the face of the ballot, with the name of the office for which the persons voted for are intended to be chosen. Said township election shall in all things conform to the general election law concerning elections for state and county officers, so far as same is consistent with the provisions of this chapter.

"I have contended that the form of the Township ballot shall conform with ballots printed under Section 10300, providing for the listing of candidates of different political parties in separate columns."

The question, as we understand it from your letter, is whether or not the township ballot to be used at a township election shall conform with the ballots printed under Section 10300, R. S. Mo. 1929, which provides the form of the official ballot for general elections held in this State; same now provides for a blanket ballot.

The laws relating to township organization are found at Chapter 86, Revised Statutes of Missouri, 1929. Some twenty-odd counties of this State have adopted the township organization law as provided in said chapter. The township organization laws were enacted pursuant to Article IX, Section 8 of the Constitution of Missouri, 1875. Your particular question pertains to the form of the ballots to be used at the township election, and we set forth Section 12270, Revised Statutes of Missouri, 1929, which bears on the question, as follows:

"On the day of the township election the polls shall be opened between seven and eight o'clock a. m. and be kept open until six o'clock p. m. by the judges of the election, and when so opened the electors of the township shall have to elect all officers to be chosen at said election. Said officers shall be chosen by ballot. Each ballot shall contain the name of every officer or measure voted for, written or printed on the face of such ballot, with the name of the office for which the persons voted for are intended to be chosen, which ballot shall be folded so as to conceal the names of the persons voted for; where the names of two or more persons appear on any ballot for the same office, such ballot shall be rejected by the judges in canvassing the votes, only as to the persons erroneously voted for.

Said township election shall in all things conform to the general law concerning elections for state and county officers, so far as the same is consistent with the provisions of this chapter."

Upon examination we find that Section 12270, supra, is in identically the same form as when originally enacted. See Section 4, page 221, Laws 1879. The general election laws, and more particularly Section 10300, R. S. Mo. 1929, as amended by Laws of Missouri, 1933, at page 225, has been subject to many amendments and changes over a period of years and provides for an entirely different form of ballot than had theretofore been provided for. We now have what has been designated a "blanket form of ballot" for our general elections.

It will be noted that the language of Section 12270, supra, states that "each ballot shall contain the name of every officer or measure voted for, written or printed on the face of such ballot, with the name of the office for which the persons voted for are intended to be chosen, which ballot shall be folded so as to conceal the names of the persons voted for;" etc. Said section does not provide for any particular form of ballot or for any particular emblem on the ballot or that it shall be under a party label and for other provisions as found in Section 10300, as amended. It provides for a simple form of ballot, which may be written or printed, for the use of the electors of the township selecting the township officers biennially on the last Tuesday in March, as provided in Section 12267, R. S. Mo. 1929. Since this section of the statute has been uniform since its adoption in 1879, we do not think it has been subject to the many changes pertaining to the form of the ballot in our general election laws, and is not governed by the provisions of Section 10300, supra.

It is, therefore, our opinion that the form of the ballot for the township election need not conform with the provisions of Section 10300, supra, as amended. We think it was the intention of the lawmakers to provide for a simple form of ballot to be used at township elections and that a political party or a group of electors may sponsor certain candidates for

Hon. H. J. Simmons

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March 17, 1937.

office and the candidates may be selected in any manner as the party or sponsoring groups may see fit, either by a mass meeting or a primary, if that be the chosen method, which, of course, is not provided for in the township law, or any other lawful manner of selection.

Yours very truly,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

(Acting) J. E. TAYLOR
Attorney-General

CRH:EG

TAXATION & REVENUE : Corporations do not have to file tax
INCOME TAX : returns if they have no income.

Individuals do not have to file tax
returns unless income exceeds \$1,000.00
in case of a single person, or \$2,000.00
for head of family or married.

July 16, 1937

Mr. H. J. Simmons
Prosecuting Attorney
Vernon County
Nevada, Missouri



Dear Sir:

This Department is in receipt of your request
for an opinion containing two questions, as follows:

"No. 1. Is a non-exempt Manufacturing Business Corporation required under Chapter 22 of the Revised Statutes of Missouri 1929 and more particularly under Article 7 of said Chapter which has no income for the year 1936 of its fiscal year ending March 31, 1937, that is taxable under Article 20, Chapter 59 of the Revised Statutes 1929 and amendments thereto, required by such article and amendments or any other law of this State to make an income tax return to the State in respect of such tax year?

"No. 2. Is an individual who has no income for the year 1936 that is taxable under Article 20, Chapter 59 of the Revised Statutes of 1929 required by such Article and amendments or any other law of this State to make an income tax return to the State in respect of such tax year?

Or does Section 10125, Revised Statutes of Missouri, 1929, contemplate and require the filing of the

return only where there is liability for an income tax?"

It appears that in the last analysis a construction of Section 10125, Revised Statutes Missouri 1929, is necessary, and that both questions being similar in nature will be treated in the analysis of said section, the section being as follows:

"Every one who is subject to a tax based on income shall on the first day of January of each year, or as soon thereafter as practicable, apply to the assessor of the proper district for a proper blank on which to make a return of income for the preceding year, which return shall be filed with the assessor on or before the 15th day of March next following, except in cases where such return is made by a corporation on a fiscal year basis and then such blanks shall be obtained and such return filed, with the assessor, on or before seventy-four days after the end of such fiscal year. The assessor shall be furnished all necessary printing, stationery, postage and office equipment, and he and his deputies shall be entitled to receive their actual necessary expenses incurred in the performance of their duties; and all such expenditures shall be audited and paid out of the state treasury in the same manner as other similar expenses are audited and paid. "

The above quoted section was amended in 1927. Instead of the clause "every one who is subject to a tax based on income shall on the first day of January each year * * *", as now contained in the statute, the statute of 1919, being Section 13116, contained the following

clause:

"Every person who has a taxable income shall on the first day of January each year* * * *".

The question arises what, if any, reason did the Legislature have in mind in changing the words "who has a taxable income" to "who is subject to a tax based on income." What, if any, difference is to be attributed to the meaning or to the change in the statute.

In the case of State ex rel. Buder v. Hackmann, 305 Mo. 1. c. 352, the Supreme Court defines "taxable income" as follows:

"Determination of the liability of the State to compensate relator for a part of the items for taking certain individual and corporation returns, depends upon what is meant by 'taxable income.'

"Relator contends that the words 'taxable income' relate to the source, class or nature of a given income, rather than to the amount thereof. But it is evident that both source and amount must be considered in determining whether a given income is taxable. All incomes from sources not specifically exempted (Section 13109) over and above the further general exemptions and deductions provided for (Sections 13110 and 13111) are taxable. Without entering into a consideration of fine shades of meaning of words, we are satisfied that 'taxable income' means income which may be taxed after all exemptions and deductions have been allowed from the total income.

Section 13116 plainly contemplates that only persons having a 'taxable income' shall make returns, which means that only persons shall make such returns who have incomes from taxable sources of such size that something is left to which the tax may be applied after all lawful deductions are made. For receiving and filing such returns (Sec. 13116) the assessor is entitled to be compensated 'in like manner and in like amounts as for the assessments of other taxes.' (Sec. 13124.) By Section 12816, Revised Statutes 1919, as amended by Laws 1921, page 671, assessors in counties of over 45,000 inhabitants are allowed twenty cents per list for all lists in excess of 3,000. This is the fee relator is entitled to receive. But this fee is payable for income tax returns made by persons having a 'taxable income.'

"It is clear from the admitted facts that relator is entitled only to \$62.20 for taking 311 corporation returns, and that he is not entitled to fees for taking 198 corporation returns 'which did not report any income and on which no taxes were assessable.' Relator is entitled to \$201.40 for taking 1007 individual returns and is not entitled to compensation for taking 233 such returns in which were reported 'net incomes, the amount of which, however, were not sufficient to require the assessment of a tax.' "

Succinctly stated by the Court "taxable income" means income which may be taxed after all exemptions and deductions have been allowed from the total income, and, as

stated by the Court in construing section 13116, the statute contemplates that only persons having a taxable income shall make returns, which means that only persons shall make such returns who have incomes from taxable sources of such size that something is left to which the tax may be applied after all lawful deductions are made.

In the decision of Hannibal Trust Company v. Elzea et al. 286 S. W. 371, 1. c. 377, the words "subject to" are defined as follows:

"In the interpretation of statutes, words in common use are to be construed in their natural, plain, and ordinary signification. 36 Cyc.1114. The words 'subject to' are defined by lexicographers as meaning 'liable,' and the word 'liable' is defined as 'bound or obliged in law or equity; responsible; answerable.' Webster's New International Dictionary; Century Dictionary. "

Clearly, by Section 10125, the legislators contemplated only those, whether it be an individual or a corporation, make a return by applying to the assessor at the proper time for a blank who are subject or liable or who have taxable income.

Under Section 10122, Revised Statutes Missouri 1929, the statute uses the following words:

"* * there shall be allowed as an exemption in the nature of a deduction from the amount of the net income of each resident individual, ascertained as provided herein, the sum of \$1,000 plus \$1,000 additional if the person making the return be the head of a family, or a married man with a wife living with him* *."

The words "exemption and deduction" contained in said statute being based on other conditions and facts.

Under Section 10115, Laws of Missouri 1931, page 365, the third paragraph, which refers to corporations, it is stated that taxes are levied, assessed and to be collected "of the net income from all sources in this state during the preceding year."

CONCLUSION

We are of the opinion

First: As to manufacturing and business corporations who are not exempt by any section of the statute, if they have no income for the year 1936 of any nature it is not necessary for said corporation to make an income tax return to the State of Missouri;

Second: In the case of an individual who has no income for the year 1936 or if the person's or individual's income is not subject to or liable for a tax, then such individual or person is not compelled to make any income tax return to the State of Missouri.

Third: To place any other construction on the words "subject to" would compel every person or corporation who has any income to make a return to the State Auditor and thereby place the burden on the State Auditor of determining, after deductions and exemptions are allowed, whether such person or corporation is subject to a tax. We think a reasonable construction of the statute is to the effect that every person or corporation

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July 16, 1937

must be the judge or determine themselves as to whether or not such person or corporation should make an income tax return. The statutes prescribe certain penalties for failure to make returns and pay a tax when such person or corporation is liable for the same. In other words, every person or corporation is presumed to know the law and failure to file a return when such person or corporation is subject to a tax, is a peril or risk which the person or corporation assumes.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

COUNTY COURT: Does not have authority to divert funds derived by levies of special road district for purpose other than that for which same were levied.

Special road district may recover from county funds to which it was entitled under Sec.8042, R. S. Mo. 1929, When.

August 17, 1937

Honorable L. B. Shuck
Prosecuting Attorney
Shannon County
Eminence, Missouri



Dear Sir:

This Department is in receipt of your letter of August 12, wherein you make the following inquiry:

"I am wanting your opinion relative to the construction of section 10818 Missouri Statutes, relating to roads, highways and bridges.

"What I desire to know is whether a county court has any right to withhold any part of a levy for road purposes from a special road district organized under this section, or divert to some county fund or purpose other than the purpose for which it is levied.

"Can a special road district recover from the county money which has been collected as taxes on property in such special road district and used by the county court for other purposes."

The section concerning which you desire a construction, formerly 10818, Revised Statutes of Missouri 1919, is now Section 8042, Revised Statutes

Missouri 1929, Article IX, Chapter 42. Said section being as follows:

"In all counties in this state where a special road district, or districts, has or have been organized, or where a special road district, or districts, may be organized under this article, and where money shall be collected as county taxes for road purposes, or for road and bridge purposes, by virtue of any existing law or laws, or subsequent law or laws, that may be enacted, upon property within such special district, or districts, or where money shall be collected for pool or billiard table licenses, upon business within such special road district, or districts, the county court shall, as such taxes or licenses are paid and collected, apportion and set aside to the credit of such special road district, or districts, from which said taxes were collected, all such taxes so arising from and collected and paid upon any property lying and being within such special district, or districts, and also one-half of the amount collected for pool and billiard table licenses, so collected from such business carried on or conducted within the limits of such special road district; and the county court shall, upon written application by said commissioners of such special road district, or districts, draw warrants upon the county

treasurer, payable to the commissioners of such special road district, or districts, or the treasury thereof, for all that part or portion of said taxes so collected upon property lying and being within such special road district, or districts, and also for one-half the amount so collected for pool and billiard table licenses, so collected from such business carried on or conducted within the limits of such special road district, or districts."

The terms of the statute are plain and, we think, mandatory in its terms because the section uses the expression; "the county court shall, as such taxes or licenses are paid and collected, apportion and set aside to the credit of such special road district, or districts, from which said taxes were collected, all such taxes so arising from and collected and paid upon any property, etc."

In addition thereto, the Supreme Court has passed upon this question in the case of *State ex rel. v. Burton*, 283 Mo. 41, 1. c. 49:

"It appears from the record that the county court of Randolph County, in May, 1917, levied ten cents on the \$100 valuation of all the taxable property in said county for road purposes; that by virtue of the first proviso, contained in Section 37 supra, the ten per cent collected on all of said taxable property contained in the Moberly Special Road District was properly paid into the county treasury of said county, and belonged to said special road district.

August 17, 1937

It being conceded that the above amount collected for that purpose was \$4066.40, and due demand having been made for said sum, the right of relator to enforce the payment of same by mandamus, was clearly established. We are, therefore, of the opinion, that the trial court reached an erroneous conclusion as to the disposition of this case."

Again, in the case of Billings Special Road District v. Christian County, 319 Mo. 963, the court said:

"Under Section 10818, Revised Statutes 1919, all taxes for road-and-bridge purposes collected by virtue of any existing law upon property within a special road district must be set aside, as collected, to the credit of such district, and be paid to the treasurer of the district, upon the application of the commissioners of the district."

In view of the above quoted decisions, and there are other decisions in support thereof, we are of the opinion that the county court does not have the right to divert the funds derived by the levies of special road districts for some other purpose other than the purpose for which the same were levied.

In answer to your question as to whether or not the districts can recover money due said district from taxes collected on property in the special road district, the decisions herein quoted are also to the effect that if a timely application was made by the special road district said road district is entitled

to the funds and to recover the same from the county.
State ex rel. Barry County, 302 Mo. 280.

Again, in the case of Billings Special Road
District v. Christian County, 319 Mo. 964, it is said:

"Three several applications by the special road district 'for all funds now in the hands of the county treasurer, belonging to said road district and from whatever source derived,' made in March, November and January of the two years for which the money sued for was collected, is not to be considered as a demand for only a part of the taxes collected during those years, or as a demand made after the fund was spent, or as a demand from which the county court might presume that the district was intending to forego a part of the fund, and relying thereon contracted obligations and used the money to meet them; but the inference to be drawn is that the county court did not, as required by Section 10818, Revised Statutes 1919, as the tax was collected, apportion and set it aside to the credit of the district, but from the beginning of each such year appropriated the part of the tax sued for.

"The statutes require the county to collect road and road-and-bridge taxes, and to set aside and credit all such taxes collected from property in a special road district to the district, which is only a legislative sanction of a method of distribution

August 17, 1937

of taxes legally levied, and collected by one public or quasi-public corporation for the use of another, which is the real party in interest and by statute is capable of suing the county for the money so collected.

"A special road district can maintain a timely action at law, such as a suit for money had and received, against the county, for road or road-and-bridge taxes collected by the county from property in the district and appropriated to the use of the county and spent by it."

We are of the opinion that a special road district may recover from the county funds which it was entitled to under Section 8042, Revised Statutes Missouri 1929, if said district makes timely application and demand for the same.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

COUNTY COURT:

Under Section 9868, R. S. Mo. 1929,
additional levy can be placed on
the collector's books and collected
in the year 1937

August 25, 1937

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Mr. H. J. Simmons
Prosecuting Attorney
Vernon County
Nevada, Missouri



Dear Sir:

This Department is in receipt of your letter of August 9, wherein you request an opinion regarding the following:

"Vernon County, Missouri, has outstanding warrants for the years 1935 and preceding years which cannot be met by the regular taxes. The County Court is contemplating requesting me, as Prosecuting Attorney, to petition the Circuit Court to make a levy to take care of these outstanding warrants by virtue of Section 9868 R. S. Mo. 1929. A question arises as to when this levy will take effect if made at the present time. To be more explicit, if the Circuit Court makes a levy during the month of August this year, can that levy be placed on the books and collected by the collectors this fall?

"I would appreciate your opinion on this matter within the next few days so that the court may decide on this matter."

Section 9866, Revised Statutes Missouri 1929, which was amended by the 1933 session of the Legislature, Laws of Missouri 1933, page 362, relates to the levy for state

purposes.

Section 9867 refers to the taxes to be assessed, levied and collected.

It was held in the case of State ex rel. v. Railroad, 247 S. W. 182, that current county expenditures means expenditures for the years for which the taxes were levied. It was further held that for the purposes of taxation the county's fiscal year begins on the 1st day of January and ends on the 31st day of December, annually.

In State ex rel. v. Allison, 155 Mo. 325, referring to Section 9868, the same being the section which contemplates following the procedure as therein contained, the said section contains no provision as to the time the additional levy, if approved by the circuit court, should be made or the limitation as to the time. Section 9868 following immediately the other two sections, to-wit, 9866 and 9867, hereinbefore referred to would indicate that all sections are to be taken into consideration by the county court at the same time with reference to a levy. However, the fallacy in this statement may be noted by viewing the matter from a practical standpoint, that is, considerable time would elapse before obtaining the court order in Section 9868 and perhaps the financial condition at the time that the regular levy is made could not be determined by the county court with reference to past indebtedness.

Section 9876, as amended by the Legislature, Laws of Missouri 1933, page 421, limits the time for the county clerk to extend the taxes, but makes no reference as to the time allowed for any special levy or for any levy made under Section 9868.

However, coming closer to your question which, in substance, is "can the levy be placed on the books and collected by the collector this fall," we think the answer can be determined by the statute itself. Among other things, Section 9868 contains the following expression,

"and that the assessment, levy and collection thereof will not

be in conflict with the Constitution and laws of this state, shall make an order directed to the county court of such county, commanding such other tax or taxes, and shall enforce such order by mandamus or otherwise. Such order, when so granted, shall be a continuous order, and shall authorize the annual assessment, levy and collection of such other tax or taxes for the purposes in the order mentioned and specified, and until such order be modified, set aside and annulled by the circuit court or judge thereof granting the same.* * "

By the provisions of Section 9868 it would appear that if the court was satisfied of the necessity "for such other tax or taxes" then, immediately upon its finding, such finding would be in full force and effect. The statute further states that the order can be carried out by the remedy of mandamus and that the order shall continue from year to year. Therefore, we think that in the absence of the court specifying that the order was not to become effective until a certain date that it would immediately become effective.

We have referred to certain sections dealing with the time of the levy, knowing that the tax books have probably been extended and completed by the county clerk thereby creating a situation which might make it impractical for the additional levy to be levied and collected for the year 1937, yet, we think that such a situation might be overcome by Section 9878 which refers to the making of a supplemental tax book.

Based on the provisions of section 9868 itself, and the provisions of other statutes relating to assessment, levy and collection of taxes, we are of the opinion

Mr. H. J. Simmons

-4-

August 25, 1937

that the levy can be placed on the books and collected by the collector this fall.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN LC

ELECTIONS: Board in Kansas City may not pay additional assistants more than that fixed by statute.

December 6, 1937

12-8



Board of Election Commissioners
Kansas City, Missouri

Gentlemen:

This department is in receipt of your request for an opinion which reads as follows:

"The opinion of your office is respectfully requested upon the lawful right and power of the Board of Election Commissioners of Kansas City to pay to its employees compensation for overtime hours of labor performed by such employees at the request or direction of the Board.

"Under the provisions of Section 89 of the Act relating to registration in Kansas City, appearing on pages 339 and 340 of the Laws of Missouri, 1937, the Board may not pay to any of its employees other than its four assistants compensation in excess of \$6.00 per day. With the vast amount of work to be done in providing registration for Kansas City within time and in preparing for the city primary and the city election in 1938, the Board itself has found it necessary to meet frequently at night and on Saturday afternoons and on Sundays. It will be compelled to make similar requirements of some of its employees, and this work will be indispensable to the necessary and proper preparation for and conduct of registration and the city primary and the city election.

Board of Election Commissioners

- December 6, 1937

The Board is hopeful that it may have the power to pay for overtime so as to justly compensate faithful employees who are assisting it in this task."

The pertinent part of Section 89, Laws of 1937, page 339, is as follows: "All additional assistants, if any, shall receive not to exceed six dollars per day for the time actually employed". This is the only provision of the election law pertaining to Kansas City which fixes the compensation of the assistants provided for except those on a stipulated monthly salary.

The election law is complete within itself, and the Board of Commissioners is only authorized to do that which the law permits and nothing more.

It is well settled in this state that statutes relating to fees and compensation of public offices must be strictly construed and the officer is only entitled to that which is clearly given by law. *Holman v. City of Macon*, 137 S.W. 16. It is further said that "if by statute, compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation". *King v. River Levee District*, 279 S.W. 195, 218 Mo. App. 490.

The compensation fixed by statute for these assistants here is six dollars per day for the time actually employed. In California, the statute provides that election officers cannot be paid more than ten dollars for each election for which they serve. In a case in which the question arose as to whether more than the statutory allowance might be received, it was held that the compensation of such officers cannot exceed the amount expressly limited by statute. *Jones v. Manning*, 169 P. 912.

In Illinois, the statute fixes the compensation of judges and clerks of elections at six dollars per day for their services, and then provides that for the day of election and for each primary, judges and clerks shall be credited with only one days' services each, but in Presidential elections they shall be credited with two days'

Board of Election Commissioners -

December 6, 1937

service. The judges and clerks had attempted to obtain compensation for two extra days spent in posting notices, etc. The court held in *People v. Elliott*, 240 Ill. App. 355 that "the board of supervisors is powerless to allow different fees or commissions from those fixed by statute", and rejected the claim of the judges and clerks.

While the above cases mentioned are not all directly in point, due to the fact that in some instances the compensation concerned is that of public officers, they are in point as to the prohibition against paying fees in excess or other than that fixed by statute. The action of the board in paying these additional assistants more than the amount fixed by statute would clearly contravene this prohibition.

CONCLUSION

Therefore, it is the opinion of this department that the Board of Election Commissioners of Kansas City may not pay their additional assistants an amount in excess of that expressly fixed by statute.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED BY:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

BOARD OF ELECTION COMMISSIONERS - Shall select names of judges and clerks at least 60 days prior to the city election to be held on March 29, 1938

December 8, 1937.

12-14



Board of Election Commissioners
Court House
Jackson County
Kansas City, Missouri

Attention: Mr. Edgar Shook, Member

Gentlemen:

This is to acknowledge receipt of your request for an opinion concerning the construction of subdivision (e) of Section 1 and Section 7 of an Act relating to the registration of voters and for holding of elections in cities of 300,000 to 700,000, Laws of Mo. 1937, at page 294. Your precise question reads:

"Do the above provisions of law oblige the Board of Election Commissioners to select and publish the names of judges and clerks at least sixty days prior to the city election to be held March 29, 1938, or do the provisions oblige the Board of Election Commissioners to select and publish the names of judges and clerks at least sixty days prior to the city primary to be held in Kansas City on March 8, 1938?"

It is provided by Section 7 in part:

"Said board of election commissioners shall at least sixty days prior to the first city or state election after this article becomes a law, and at least sixty days prior to each presidential election thereafter, select and choose four electors as judges of election for each precinct in such city."

Other sections of this statute provide for the appointment of clerks of election in the same manner in which judges are to be appointed.

The above quoted portion of the statute is plain, unambiguous, in its terms, excepting as hereinafter pointed out, and requires that sixty days prior to the first city election it is the duty of the Board of Election Commissioners to select judges of election. The only ambiguity existing in this portion of the statute quoted, if any, is in the construction of the word "election" as has been used, but in our consideration of Subdivision (e) of Section 1, we find that the Legislature has defined what is meant by the use of the word "election" in the following language:

" 'Election' shall mean any general, special, municipal or primary election, unless otherwise specified."

It is elementary in the construction of a statute that words shall be construed in their ordinary and usual sense in order to arrive at the Legislative intent. *Cummins vs. K. C. Public Service Company*, 66 S. W. (2d) 920. Invoking this rule in our consideration of the word "election" in Section 7, supra, can it be said that the Legislature contemplated that judges be appointed sixty days prior to the primary election? We think not. Had the Legislature intended the word "election" to be used in relation to any primary we are of the opinion that such an expression would have been made.

We must, therefore, indulge in the presumption that the Legislature has not used idle or useless verbiage, *State vs. Haid*, 60 S. W. (2d) 41; *Ellis vs. Montgomery Elevator Co.*, 50 S. W. (2d) 130, and that when the words "first city or state election" were provided, that the Legislature meant an election where votes are cast for a candidate for a particular office and not a primary election where persons are chosen as candidates by political parties. By analogy, this reasoning is fortified by the expression of the Supreme Court in the case of *State ex rel. Taylor*, 220 Mo. 618, 631, wherein the court quoted approvingly the St. Louis Court of Appeals as follows:

"As said by the St. Louis Court of Appeals in Dooley v. Jackson, 104 Mo. App. 1.c. 30, 'The word "election" frequently occurs in the Constitution of the State. First in section 9, article 2, and article 8 of that instrument is wholly devoted to the subject of elections. But wherever used in the Constitution, it is used in the sense of choosing a person or persons for office by vote, and nowhere in the sense of nominating a candidate for office by a political party. Where the word is used in a certain or restricted sense in the Constitution and the Legislature uses the same word without restriction or qualification in an act in respect to the same subject-matter, the word in the statute should receive the same interpretation that the Constitution has given it'."

Thus, it will be seen in the construction of Section 7, supra, that the Legislature has not in any sense used the word "election" without restriction, but with a qualification, that qualification being a city or a state election. Had such intention been to the contrary, we can assume that it would have been expressed. This expression from the Taylor case has been followed in numerous decisions of our Supreme Court, reference to which would serve no useful purpose in the course of this opinion except to reiterate that which has been expressed.

Numerous cases support the view that the word "election" does not, standing alone, without restriction or qualification, include a primary election. The holdings in these particular cases are based on the premise that an election in its common acceptation means the choosing of a person for an office rather than the nominating of a candidate for an office by a political party. State ex rel. Taylor, supra; State vs. Hartman, 231 S. W. 982, 985 (Mo.); Woodruff v. State, 52 Atl. 294, 296 (N. J.); Kay vs. Schneider, 221 S. W. 880 (Tex.); Walton vs. Olson, 170 N. W. 107 (North Dakota); People vs. Cavanaugh, 44 Pac., 1057 (California).

December 8, 1937

We return in our consideration to the definition of the word "election" as defined by the Legislature in Subdivision (e) of Section 1, supra. We are not unmindful in reaching our conclusion that a Legislative construction should receive respectful consideration, but while such is the rule the courts will not be bound thereby. State ex rel. Board of Fund Commissioners vs. Smith, 96 S. W. (2d) 348. Thus, any consideration given by the court to a Legislative construction is in view of arriving at the Legislative intent. It has been held, however, in the case of State ex rel. Cobb vs. Thompson, 5 S. W. (2d) 57, that the Legislative construction will be invoked where the statute is unambiguous or doubtful. With these considerations, it follows that the Legislative construction of the word "election" is not to be considered in determining whether or not the Board of Election Commissioners shall appoint judges and clerks sixty days prior to a city primary election.

CONCLUSION

In view of the above, it is the opinion of this department that the Board of Election Commissioners shall select the names of judges and clerks at least sixty days prior to the city election to be held on March 29, 1938.

Yours very truly,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RCS:FE

MOTOR VEHICLE: Persons charged with the larceny of a motor vehicle or any part thereof, when found guilty, the punishment shall be assessed in accordance with the provisions of the Motor Vehicle Act.

January 8, 1937



Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

"Having received a cost bill from Douglas County, Missouri, which shows the following state of facts:

"The defendant was charged with the crime of grand larceny, the information charging that the defendant did feloniously take, steal and carry away certain parts for equipment of a motor vehicle over the value of \$30.00, and the instruction on the punishment in the case given by the Court was for a term of not less than two nor more than five years in the state penitentiary.

"Therefore, we desire an opinion from your office on the following question:

"If a defendant is charged under Section 4064 R. S. Mo. 1929, with the larceny of a motor vehicle or any part, tire or equipment of a motor vehicle of a value of \$30.00 or more, is the punishment assessed under Section 4065, R. S. Mo. 1929, or Section 7786, R. S. Mo. 1929?"

Under the provisions of Section 4065, R. S. Mo. 1929,

January 8, 1937

persons convicted of the larceny of a motor vehicle were punished in the penitentiary for a term not exceeding ten years. This was prior to the enactment of what is known as the motor vehicle act of 1921, passed at an Extra Session of the Legislature.

Under the provisions of Section 7786, R. S. Mo. 1929, which is a part of the Motor Vehicle Act, certain penalties were provided for any person convicted of feloniously taking or carrying away any motor vehicle or any part thereof of the value of thirty dollars (\$30.00) or more. Under another subdivision of the same section, other penalties were prescribed ranging from a fine, jail sentence or term in the penitentiary.

Under the provisions of Section 7758, R. S. Mo. 1929, it is provided in effect and substance that the motor vehicle act, passed at the extra session of the Legislature of 1921, should exclusively control concerning motor vehicles. It is further provided in substance and effect that any and all laws inconsistent with or contrary to the provisions of the act should be void.

In the case of State v. Liston, 2 S. W. (2d) 1. c. 784, the Court had before it for consideration an instruction which directed the jury as to the amount of punishment to be given in the event they found the defendant guilty of the crime as charged under the provisions of Section 4064. The Court held that this instruction misdirected the jury as to the range of punishment, and, in passing upon said instruction said:

" * * * Section 29 of the Motor Vehicle Act of 1921 provides that any person who shall be convicted of feloniously stealing any motor vehicle, or any part thereof, of a value of \$30.00 or more, 'shall be punished by imprisonment in the penitentiary for a term not exceeding twenty-five years or by confinement in the county jail not exceeding one year, or by fine not exceeding one thousand dollars (\$1,000) or by both such fine and imprisonment.' (Italics ours.) Moreover, section 31 of said act provides that all laws or parts of laws contrary to, inconsistent, or in conflict with, any of the provisions of said act, are repealed, and the repeal of such laws is properly referred to and covered by the title of said act. Laws Ex. Session 1921, pp. 76, 105, 106. Thus, it plainly appears that the jury

January 8, 1937

was improperly instructed as to the range of punishment for this offense, as prescribed by law at the time in question, and that appellant was thereby deprived of a substantial right--that is, the right to have the jury consider a less severe punishment than the minimum punishment fixed by the instruction mentioned. * * * "

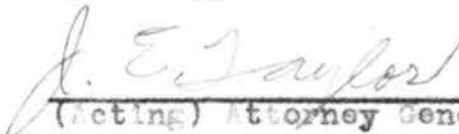
CONCLUSION

It is the opinion of this department that if any person is charged with the larceny of a motor vehicle or any part thereof under the provisions of Section 4064, supra, that the punishment if said person is found guilty shall be assessed under the provisions of Section 7786, supra, and not under the provisions of Section 4065, supra.

Respectfully submitted,

RUSSELL C. TONE
Assistant Attorney General

APPROVED:


(Acting) Attorney General

BOARD OF HEALTH:) A fee of 50¢ must be charged for certified
SOLDIERS AND SAILORS:) copies of birth or death records, except
RECORDS:) soldiers and sailors, when certain facts
exist, are entitled to same free of charge.

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January 8, 1937.



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

"Section 9060 R. S. Mo. 1929 fixes the fees that the State Board of Health shall charge for making certified copies of any birth or death certificate filed in their office.

"We are now making an audit of the Vital Statistics of the State Board of Health and find that they do not charge for any certified copies of birth or death certificates furnished all branches of the Veteran Administration, including Veterans' Bureau, Veterans of Foreign Wars, Disabled American Veterans, American Legion, individuals when certificates required are wanted to adjust claim with federal government, also certificates furnished the American Red Cross, War Department or for enlistment in the U. S. Army or Navy, in CCC camps or for claims of WPA employees and several others.

"We would like an opinion from your department as to whether the Board of Health has authority under the Statute to exempt any or all of certificates furnished the above parties or agencies."

Jan. 8, 1937.

Your letter invites attention to the fact that the State Board of Health does not charge certain organizations and individuals fees for certified copies of birth or death certificates. Failure of your letter to apprise us of the Board's specific ruling concerning said matter, we contacted you and were informed that the State Board of Health did not make such a ruling but that the certified copies were furnished by virtue of a rule promulgated by the then State Commissioner of Health. We mention the above solely to correct the statement in your letter that the State Board of Health furnished said certified copies of birth or death certificates free of charge.

Article 2, Chapter 52, Revised Statutes of Missouri, 1929, and amendments, relate to "Registration of Births and Deaths." Section 9040 of said article and chapter provides in part as follows:

"It shall be the duty of the state board of health to have charge of the state system of registration of births and deaths; * * * *"

Section 9041 of said article and chapter provides in part as follows:

"The secretary* of the state board of health shall have supervision over the central bureau of vital statistics, * * *, and shall act as state registrar of vital statistics. * * * The state board of health shall provide for such clerical and other assistance as may be necessary * * * and may fix the compensation of persons thus employed within the amount appropriated therefor by the legislature. * *"

* (The word "secretary" as mentioned in this section, now should read "commissioner of health" due to Section 9024, Laws of Missouri, 1933, page 269.)

The Legislature for the Biennium 1935 and 1936 appropriated money out of the state treasury, chargeable to the state revenue fund for "vital statistics." Laws of Missouri, 1935, p. 96, Section 22. We thus start with

the premise that the Commissioner of Health has supervision of the Central Bureau of Vital Statistics, the support of which is borne from the state revenue. Salaries, stamps, stationery and operating expenses of the Vital Statistics Department are paid from state revenue and the support of said division is not dependent upon its earning enough fees to pay its way.

To answer your question it is necessary to refer to three sections found in the 1929 revision of the statutes and to Section 46 of Article IV of the Constitution of Missouri. These sections and the Constitution are:

Section 9060, R. S. Mo. 1929, reads in part as follows:

"The state registrar shall, upon request, furnish any applicant a certified copy of the record of any birth or death registered under provisions of this article, for the making and certification of which he shall be entitled to a fee of fifty cents, to be paid by the applicant. * * * * * And the state registrar shall keep a true and correct account of all fees by him received under these provisions, and turn the same over to the state treasurer."

Section 13884, R. S. Mo. 1929, reads as follows:

"Whenever a certified copy or copies of any public record in the state of Missouri are required to perfect the claim of any soldier, sailor or marine, in service or honorably discharged, or any dependent of such soldier, sailor or marine, for a United States pension, or any other claim upon the government of the United States, they shall, upon request be furnished by the custodian of such records without any fee or compensation therefor."

Section 13885, R. S. Mo. 1929, reads as follows:

"Any person or persons violating any provision of section 13884 shall be deemed guilty of a misdemeanor."

Section 46, Article IV, of the Constitution of Missouri, reads as follows:

"The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity."

It is to be noted that Section 9060, supra, makes it mandatory upon the state registrar, when requested, to furnish certified copies of the record of any birth or death. When the state registrar furnishes certificates he is entitled to a fee of fifty cents. As heretofore pointed out, the Division of Vital Statistics is supported by the state revenue. Consequently, the fees earned from furnishing certified copies go into the state treasury and are not used to pay for the support of the Division. Thus when a certified copy is issued by the state registrar it entails the use of stationery purchased by state funds, as well as the use of state labor. If persons applying for certified copies receive same free of charge it would amount to the giving or granting of something of value to individuals and would violate the provisions of Section 46, Article IV, of the Constitution. No doubt the Legislature had in mind the provisions of Section 46, Article IV, of the Constitution, when it provided in Section 9060, supra, that the state registrar should be entitled to a fee of fifty cents for every certified copy.

In State ex rel. Parker Distilling Company, 139 S. W. 1. c. 486, the Supreme Court on a "motion for rule" held an act of the Legislature was unconstitutional which act provided that the Clerk of the Supreme Court was to furnish to counsel for litigants a copy of the opinions rendered by the Supreme

Court free of charge. The court held said act violated Section 46, of Article IV. The court said (p. 487):

"The state pays the stenographers for their services out of public funds. The state buys and pays for the machines which are worn out in the service. The state buys and pays for the stamps used for the transmission of these copies required to be furnished to the litigants. Under these circumstances, to my mind it is clear that as to private litigants this law contemplates the appropriation of public funds for the benefit of individual litigants, and is therefore void."

It is gratuitous grants that are barred by the Constitution of the State of Missouri. *State ex inf. v. Southwestern Bell Telephone Company*, 92 S. W. (2d) 612, 613. *State ex rel. Kelly v. Hackmann*, 205 S. W. 161.

While Section 9060, *supra*, entitles the state registrar to a fee of fifty cents for each certified copy, and by virtue of the Constitution, Section 46, Article IV, the Legislature cannot make or authorize the making or giving of any gratuitous grant to individuals, yet, the Legislature did enact Sections 13884 and 13885, *supra*, and made it mandatory that certified copies be given free of charge to soldiers, sailors or marines, or to their dependents, when such records were necessary "for a United States pension, or any other claim upon the government of the United States."

The constitutionality of Section 13884, *supra*, in our opinion, is doubtful. However, we are not deciding that question. Suffice it to say that Section 13885 makes it a misdemeanor if any person charged with the duty of furnishing certified copies of records, fails to so furnish such free of charge. Further, "Every statute will be presumed to be constitutional till the contrary plainly appears, and it is only when it manifestly infringes some provision of the constitution that it can be declared void. *State v. Burgdoerfer*, 107 Mo. 1, and cases cited." *Deal v. Mississippi County*, 107 Mo. 464, 1. c. 468. We, therefore, for the purpose of this opinion, assume that Section 13884 is constitutional.

Jan. 8, 1937.

Section 13884, supra, requires the custodians of records to give without fee or compensation certified copies to "any soldier, sailor or marine in service or honorably discharged, or any dependent" when such records are required to perfect a claim "for a United States pension, or any other claim upon the government of the United States." In other words, Section 13884 only requires the gratuitous giving of records or certified copies when certain facts exist. We do not know whether or not the certified copies were given in order to claim a United States pension or to perfect a claim against the government. Consequently, in order to answer your request, it necessitates a finding of fact in each individual case.

No soldier, sailor or marine, or their dependants, are entitled to certified copies free of charge unless it be for the purpose of getting a pension or to establish or perfect a claim against the government of the United States. The mere fact that the Veteran Administration, Veterans of Foreign Wars, Disabled American Veterans, American Legion, CCC camps, WPA, American Red Cross, request certified copies, do not of themselves or the nature of their work entitle them to gratuitous birth or death certificates. If such organizations or persons desire copies of birth or death records in order to perfect the claim of any soldier, sailor or marine in service or honorably discharged, for a pension or other claim against the government, then, in our opinion, the copies must be furnished free of charge. You will understand that we cannot write an opinion approving the gratuitous giving of certified copies to the parties or agencies enumerated in your letter, because we do not have the facts in each individual case.

From the above it is our opinion that every person applying for a certified copy of a birth or death record, is entitled to receive same, of which there shall be a charge made, for the service rendered, in the amount of fifty cents per copy, with the exception that if it is necessary or required to perfect the claim of any soldier, sailor or marine in service or honorably discharged, or any of their dependants,

Hon. Forrest Smith

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Jan. 8, 1937.

for the purposes of obtaining a pension from the United States or to establish any other claim upon the government of the United States, certified copies shall be furnished free of charge.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

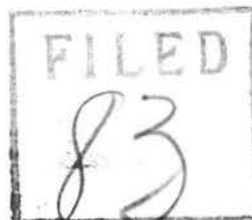
ROY MCKITTRICK
Attorney-General

JLH:EG

OFFICES: Superintendent of Trachoma Hospital at Rolla may accept employment as examiner for insurance company and Missouri Commission for the Blind if such does not interfere with his duties as Superintendent.

January 13, 1937.

11/8



J. E. Smith, M. D.
Superintendent
Trachoma Hospital
Rolla, Missouri

Dear Dr. Smith:

This is to acknowledge your letter as follows:

"As I am now a full time State employee I will thank you for an opinion concerning two appointments which I have and was allowed to accept while a Federal employee or prior to March 1936.

"About six years ago I was asked to be the Examiner for the Equitable Life Assurance Society on account of the fact that I was the only physician in the County who was a graduate from an A Grade Medical College. All of the other doctors had graduated before medical schools were so graded and was therefore allowed to accept the appointment by the U. S. Public Health Service under which I was working. This appointment rarely requires me to make more than three examinations during a year and as most of such examinations are done during the evenings it does not interfere with my hospital duties.

"The other appointment is the local Examiner for the Missouri Commission for the Blind. It so happens that I am the only eye physician that will examine for the Commission in this section. The Blind Commission and the Trachoma

Jan. 13, 1937.

Hospital have a great deal in common as we often hold our field clinics together at which time all of the trachoma patients are referred to us and all non-trachomatous patients are referred to the Commission. I am the only eye physician approved by the Commission between St. Louis to the north, Jefferson City to the west and Poplar Bluff to the east. There are other eye physicians in this area but for reasons of their own are not friendly with or toward to the Commission. Again the examinations for blind pension applicants do not exceed two or three in any month and therefore does not interfere in anyway with my hospital duties. The fees for the examinations are \$5.00 and being so few does not represent a big item but the contact between the two departments works for the good of both. However before continuing I will thank you for an opinion on this status."

We note that you state that you are a full-time State employe and that you have the right by contract to examine persons applying for insurance with the Equitable Life Assurance Society and that you are also local examiner for the Missouri Commission for the Blind. You state that the examinations for the Equitable Life Assurance Society are usually done evenings and do not interfere with your duties as Superintendent of the Trachoma Hospital; and that the examinations for the Missouri Commission for the Blind do not interfere with your hospital duties. In other words, the examination of persons for the Equitable Life Assurance Society as well as the Missouri Commission for the Blind do not in anywise interfere with or cause you to be taken away from your duties as Superintendent of the Trachoma Hospital.

It is against public policy of the State of Missouri for one holding an employment or office to accept other employment which would prevent such person from devoting his entire time to the performance of the duties of the office or employment he holds under the State. Your examinations, as we understand it, will not cause the State to suffer in anywise or the taking of your time from your official duties.

Jan. 13, 1937.

Article 1, Chapter 51, R. S. Mo. 1929, relates to "pensions to deserving blind." Section 8898 of said article and chapter makes it the duty of the Commission for the Blind to make regulations "relative to the examination of applicants for pension, including the examination by the oculist." And we assume, by virtue of that section, you were appointed as examining oculist for your district. We do not believe that your appointment as examiner for the Missouri Commission for the Blind amounts to the holding of an office, but believe it is merely an employment.

A person cannot hold two offices if such be incompatible. In 46 Corpus Juris, p. 941, Sec. 46, the following is said:

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of the two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment."

From the facts stated in your letter it is our opinion that you may continue to act as examiner for the

J. E. Smith, M. D.

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Jan. 13, 1937.

Equitable Life Assurance Society and as local examiner for the Missouri Commission for the Blind, just so long as said employments do not interfere or take your time away from your official duties as Superintendent of the Trachoma Hospital.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

JLH:EG

COLLECTOR--EX OFFICIO TREASURER--Required to give a new bond after
January 1, 1937.

February 2, 1937

Hon. John B. Smoot
Prosecuting Attorney
Scotland County
Memphis, Missouri



Dear Sir:

We have your letter of January 13, 1937, requesting
an opinion of this office as follows:

"I would like to have the opinion of your department with regard to the sufficiency of the enclosed bond of the Collector of Revenues of Scotland County. Will this bond protect the funds of Scotland County in the hands of the ex officio County Treasurer in the event said County Collector should default in his ex officio capacity?

The bond executed by the Collector of Scotland County was executed in 1935 and at that time he was collector of revenue only. Now he is also ex officio County Treasurer. Unless the words 'and ex officio County Treasurer' are contained in the condition of said bond could not his bondsmen say in defense to an action to recover on the present bond for a default made by the principal as ex officio County Treasurer, that by the very terms of the bond they are obligated only in case of default by the principal as Collector and not as County Treasurer."

The 1933 Legislature provided that the county collector in all counties of less than forty thousand population and not under township organization should be ex officio county treasurer. No effort was made to abolish the office of county treasurer in such counties. The two offices, County Treasurer and County Collector, are still separate and distinct offices, but with one public official performing the duties of each. The county treasurer is required to take an oath, 12135 R. S. Missouri 1929. He shall keep his office and records in such rooms and vault as the county court provides; shall receive all county moneys and disburse same on warrant of the county court, 12136; is required to keep a warrant book, 12139; to write "paid" in ink across the face of cancelled warrants, 12123 R. S. Missouri 1929, file the same and make a register of the number and date of such warrant, 12144. Whenever a county warrant is paid by the treasurer it is his duty to cancel the same by punching round holes through the signature on the paper on which the warrant is written, 12145. For all moneys paid into the treasury he is required to issue duplicate receipts in favor of the person paying such money and to keep the books, papers and moneys pertaining to his office at all times in readiness for inspection by the county, 12149. He is required to settle with the county court semi-annually, at its first and third regular terms of each year, 12152. The county clerk is required to keep a regular account between the county and the county treasurer, 12161. Further examination of the statutes will reveal other and additional specific duties imposed by law upon the county treasurer.

An examination of some of the duties imposed upon the county collector shows that he is required to collect the revenue, give notices of when and where he will meet taxpayers in various townships for the purpose of collecting taxes, Section 9908 R. S. Missouri 1929; to furnish non-resident taxpayers with a statement of taxes, 9912 R. S. Mo. 1929; to enter all payments of taxes on his records, and to mark "paid" on the tax bill against each tract or lot of land at the time he collects the taxes thereon, 9913. The collector is empowered to seize and sell property of delinquent taxpayers for the purpose of paying such taxes, 9915. At the March term of the county court annually the collector is required to return the delinquent lists of taxes under oath to the county court, 9918. Monthly statements and payments are required from the

county collector, 9927. He is required to pay state taxes monthly to the State Treasurer, 9929. Further and additional duties relative to delinquent and back taxes are imposed upon the collector by Article IX of Chapter 59 R. S. Missouri 1929 relating to taxation and revenue.

Thus, from an examination of the statutes it is apparent that the offices of county collector and county treasurer even in counties where the elective official performs the duties of both are still separate and distinct offices--as much so as though they were filled by separate individuals.

Section 12132a, Laws of Missouri 1933, page 338, among other things provides:

"Such collector shall act as ex officio treasurer and perform the duties attached thereto with no additional remuneration other than such moneys as are allowed by law for his services as county collector, and he shall not be required to give any bond other than the bond given as county collector."

The meaning of the above statute was to relieve the collector who went into office in 1935 from giving an additional bond as ex officio county treasurer upon assuming the duties of county treasurer in January 1937. These additional duties are imposed by law upon the county collector in the middle of his term, and approximately two years after he executed a bond solely as county collector.

The questions therefore treated in this opinion are:

(1) The power of the legislature to alter the terms of a surety bond so as to make it cover two offices instead of one.

(2) The liabilities of an officer and his bondsmen for the performance ex officio of the duties of another office.

(3) The bond of the county collector after January 1, 1937.

I.

The power of the legislature to
alter the terms of a surety bond
so as to make it cover two offices
instead of one.

Section 12132a, supra, provides that on and after December 31, 1936, the county collector in certain counties shall be ex officio treasurer. The county collector is elected in the off year elections, to-wit, 1934, etc., Section 9983 R. S. Missouri 1929; his term of office is for four years. The above statute therefore went into effect in the middle of the county collector's term of office. The sureties on the collector's bond may have been willing to sign said bond to cover the principal's duties as collector but may have been unwilling to sign such bond to cover the duties of county treasurer. The legislature had the right to postpone the effective date of the 1933 act, Section 12132a supra, until after December 31, 1936. An act passed by the legislature does not become a law until its effective date. The 1933 act is to be treated as though it was passed and became effective January 1, 1937. Ordinarily the liability on a bond cannot be effected by a law passed subsequent to its execution. 9 Corpus Juris, Section 5, page 56.

The rule as to the construction of surety contracts is stated in Schuster vs. Weiss, 114 Mo. 158, l. c. 166, as follows:

"The contract of the surety is voluntary, without the expectation of profit or gain, and the law demands that he be dealt with in the utmost fairness and good faith. Brandt on Suretyship, sec. 330. The rule was stated by Judge Lumpkin in Bethune vs. Dozier, 10 Ga. 235: 'No principle of law is better settled at this day than that the undertaking of the surety, being one stricti juris, he cannot, either at law or in equity, be bound further or otherwise, than he is by the very terms of his contract; and that if the parties to the original contract think proper to change the terms of it without consent of the surety (which it is not disputed they have a right to), the surety is discharged.*****'"

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The sureties are in an entirely different position from the principal. The principal's obligation to perform the duties of county collector and ex officio county treasurer are direct obligations while those of the sureties partake of a collateral undertaking. It may be said that the sureties enter into the agreement to be bound on certain conditions, Schuster vs. Weiss, supra, l. c. 173:

"Over their contract was the protection of the constitution. That contract was made with reference to the law as it then stood. In the light of that law it must be read. After it was made it was secure from any act of the legislature or amendment to the constitution impairing its obligations."

Placing a strict construction upon the bond, the sureties are only liable when made so by the express terms of the bond. There is nothing in this bond which could be construed to cover the duties of the collector as ex officio county treasurer. In State vs. Holman, 96 Mo. App. 193, the public administrator executed a statutory bond to cover the duties of his office. He was elected in November 1894 and gave a bond which was approved in March 1895 covering his duties as public administrator. The legislature by an act of April 11, 1895, amended the law relating to public administrators by adding thereto the office of ex officio public guardian. Thereafter a suit was instituted on the bond of Holman as public administrator to recover certain moneys which he failed to turn over as ex officio public guardian. The Supreme Court in denying liability on the bond for Holman's account as ex officio public guardian, l. c. 202 said:

"****In State to use, etc., vs. Roberts, it was held that 'the State can not by a legislative act, materially modify a contract between herself and a citizen, any more than she can impair the obligation of a contract between citizens.'*****"

The Court further quoted with approval the following, l. c. 202:

"*****Every contract (which does not expressly provide to the contrary) must be considered as made with reference to the existing state of the law; and, if by the intervention of the Legislature a change is made in the law which in any degree affects the contract, such contract, made without some clear and distinct reference to the prospect or possibility of a change, does not hold with reference to the state of things as altered by the new law.'

The condition in the bond in suit is, in terms, that the 'said William A. Holman shall faithfully discharge all the duties of his office.' It was not a part of the duties of his office at that time to have charge of the estates and persons of the insane under any circumstances; and there is nothing in the bond to indicate that it was made with reference to any prospective change of the existing law.*****

In *Mix vs. Vail* (1877) 86 Ill. 40, it was held that an injunction bond must be construed with reference to the statute in force at the time of its execution, and that the liability thereon could not be changed by the passage of a statute which takes effect after the execution of the bond.

CONCLUSION.

It is therefore the opinion of this office that the 1933 Act of the Legislature, Laws 1933, page 338, did not and could not impose any liability upon the sureties of the county collector under the bond given by the county collector in 1935 so as to make the bondsmen liable for any defalcations made by a county collector in his capacity as ex officio county treasurer after January 1, 1937.

II.

The liability of an officer and his bondsmen for the performance ex officio of the duties of another office.

In *People vs. Gardner*, 55 Cal. 304 (1880), a suit was instituted on a bond given by the Surveyor-General to recover certain fees collected and withheld. The surveyor-general was also ex officio register of the State Land Office. In the suit instituted on the bond of the surveyor-general, the Court excluded evidence of misappropriated moneys collected by him as ex officio register of the State Land Office. Commenting upon this phase of the case, the Supreme Court said, l. c. 306:

"We think that the court did not err in excluding the evidence of acts done by the defendant Gardner, as register of the State Land Office. Neither Gardner or his sureties were liable upon the official bond of the surveyor-general, for malfeasance in the office of the register, unless the acts of that office were part of the duties imposed upon the surveyor-general, or were provided for by the bond given by him in his capacity as surveyor-general. If the legislature had imposed these duties on the latter he would have been bound to perform them, and for non-performance he and his sureties would have been liable, for they bound themselves for the faithful performance of all duties which may have been made the appropriate functions of the office, whether made by such laws enacted prior or subsequent to the execution of his official bond; or if the legislature had provided that the bond given by the surveyor-general should include the duties required of the surveyor-general, and of the register of the land office, the sureties upon the bond of the former would be liable. But the legislature made no such provision. When it created the two offices it made them separate and distinct.

Quoting further from the same opinion, l. c. 307:

"The sureties on the bond of the surveyor-general are liable only for the non-performance of such duties as have been imposed by law upon him and come within the scope of his office."

In *People vs. Edwards* (1858) 9 Cal. 286, an action was instituted against the sureties upon the official bond of the sheriff. The bond was executed for the faithful discharge of the duties as sheriff and the breach as assigned consisted in the sheriff's failure to pay over moneys collected by him as taxes in his ex officio capacity of collector. The Court pointed out that, l. c. 292:

"the offices of sheriff and tax collector are as distinct as though filled by different persons. The duties and obligations of the one are entirely independent of the duties and obligations of the other.***The offices are not so blended that the bond executed for the faithful performance of the duties appertaining to the one would embrace in the absence of the statute the obligations belonging to the other."

The Court held the sheriff liable under his bond for moneys collected as ex officio tax collector because of a statute passed prior to the giving of the sheriff's bond:

"provided that the sheriff shall be liable on his bond for his duties in the collection of taxes."

In *Cooper vs. The People* (1877) 85 Ill. 417, a suit was instituted upon the bond of a sheriff which was given to secure the performance of his duties generally as sheriff. It was contended that the sheriff as ex officio collector had failed to pay into the county treasury commissions retained by him out of the revenue for collecting it, which commissions were in excess of the compensation allowed to him by the county board. In the opinion, l. c. 418, it was held:

"The provisions of the statute under which the bond in suit was executed relate entirely to the duties pertaining to the office of sheriff, and have not the slightest reference to the ex officio duties of collecting and paying over revenue."

It appeared however in this case that the sheriff as ex officio collector was required to give a totally distinct bond for such service.

In State vs. Thomas, the Supreme Court of Tennessee (1890) 12 S. W. 1034, held that the official bond of the State Treasurer did not cover his liability to individuals for his acts as ex officio insurance commissioner.

In Houser vs. State (1915) 110 N.E. 665, an Indiana statute provided that the County Surveyor shall be ex officio drainage commissioner and shall give a bond as such in addition to his ordinary official bond. Thereafter the county surveyor, as ex officio drainage commissioner, executed a bond to secure him in the performance of his duties as drainage commissioner, and thereafter was designated commissioner of construction for drainage work without giving a new bond as such commissioner of construction. He committed a default while acting in the latter capacity. It was held that the drainage commissioner's bond did not cover the default as commissioner of construction, the two offices being distinct and separate.

To the same effect is State vs. Holman, supra.

CONCLUSION.

It is therefore the opinion of this office that the county collector's bondsmen now are liable only for the non-performance of his duties as county collector; that the sureties on such bond are not liable for the non-performance of the collector's duties as ex officio county treasurer unless the bond given specifically covers such ex officio duties.

III.

The bond of the County Collector
as January 1, 1937.

It has always been the policy of this state to require all collectors of revenue, and all county treasurers to give bonds covering such funds as may come into their official custody. Section 12132a, Laws of Missouri 1933, page 338, among other things provides:

"Such collector shall act as ex officio treasurer and perform the duties attached thereto with no additional remuneration other than such moneys as are allowed by law for his services as county collector, and he shall not be required to give any bond other than the bond given as county collector."

The apparent meaning of this language is that the collector shall not give two bonds, one as county collector and one as ex-officio county treasurer. It means either first, that the county collector shall perform the duties of ex officio county treasurer without bond, or second, that his bond as county collector shall be extended to cover his duties as ex officio county treasurer. To construe the statute in the second alternative is to assume, contrary to the great weight of authority, that the liability of sureties is eternally flexible and at the will of the legislature is capable of being woven about the universe. To so construe the statute would be to allow the ex officio county treasurer to handle such funds without the protection of a bond, a result that has always been opposed to public policy and never intended by the legislature. The legislature intended by this act to extend the collector's bond to his duties as ex officio county treasurer, so that the moneys officially coming into his hands as county treasurer would be protected. We have heretofore pointed out why that cannot be done! While statutes in force become a part of the statutory bond, and such bonds are construed as though such statutes were written therein, *Zellers vs. Surety Company*, 210 Mo. 86, *Fogerty vs. Davis*, 264 Mo. 879, yet the bond cannot be enlarged by implication. The enclosed bond is not sufficient to cover the collector's duties as ex officio county treasurer. We recommend the following form of bond for county collectors who also are ex officio county treasurers:

February 2, 1937

"BOND.

KNOW ALL MEN BY THESE PRESENTS, that we,
_____, as Principal, and
_____, as sureties, are
held and firmly bound unto the State of Missouri
in the sum of _____ Dollars,
for the payment of which we hereby bind ourselves,
our heirs, executors, administrators and assigns,
jointly and severally and firmly by these presents;

The condition of this bond is such, that
whereas the said _____, was on the
_____ day of November 1934, duly elected to the
office of collector of revenue within and for the
county of _____, and on January 1, 1937,
became ex officio county treasurer of said county,
in the State of Missouri, and has been duly
commissioned as such county officer;

NOW THEREFORE, if the said _____
shall faithfully and punctually as county collector
collect and pay over all state, county and other
revenue for the four years from and after the first
day of March 1935, and shall faithfully keep,
account for or faithfully disburse all moneys, bonds
or securities received by him as ex officio county
treasurer and in all things faithfully perform all
the duties of his said office of collector and ex
officio county treasurer, according to law, then this
bond shall be void; otherwise to remain in full force
and effect. This bond is given in lieu of the pre-
ceding bond heretofore executed and is made subject
to any and all laws now or hereafter enacted, re-
lating to the the office of county collector and
ex officio county treasurer.

WITNESS our hands and seals at the said county
of _____, in the State of Missouri, this
_____ day of _____, 1937.

Principal.

Sureties."

Section 9992 R. S. Missouri 1929, provides that the county court shall examine the collector's bond at the end of the first year of his term of office, to-wit, March 1, 1936; that the county court may again examine said bond at any time before the tax books for the second year of his term shall be delivered to him. We judicially notice that the tax book for the second year of the collector's term of office have not as yet been delivered to him. The county court may now examine the collector's bond to ascertain whether or not it is sufficient. Under Section 2848 R. S. Missouri 1929, a general power is vested in all county courts to examine the collector's bond.

In an opinion heretofore written by this office dated January 23, 1934 to Hon. Joseph M. Bone, Jr., Prosecuting Attorney, Audrain County, Missouri, it was held that the county court has ample authority to inquire at any time into the sufficiency of the county collector's bonds and if in the opinion of the county court said bond is insufficient, then the county court may require the collector to give a new bond.

CONCLUSION.

It is therefore the opinion of this office that it is now the duty of all county courts to examine the bond of county collectors to ascertain whether or not it is sufficient; that in counties where the county collector is now ex officio county treasurer the bond of the county collector must be broad enough to specifically include all of his duties as ex officio county treasurer; that if the collector's bond is not so worded, then under the law it is insufficient, and the county court should make an order requiring the county collector to execute a new bond as county collector broad enough to cover his duties as ex officio county treasurer.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

COUNTY TREASURER, EX)
OFFICIO COLLECTOR)

Not entitled to percentage fee for
disbursement of school moneys referred
to in Section 9266 R. S. Mo. 1929.

February 26, 1937

3-15



Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

We are in receipt of your request for an opinion of this
office reading as follows:

"We are in receipt of an inquiry from a
member of the County Court of Carroll
County concerning the application of Sec-
tion 9266, R. S. Missouri 1929, and that
portion of the Section pertaining to the
compensation which may be allowed the
County Treasurer by the County Court in
counties operating under Township Organi-
zation.

We would appreciate it if you would render
an opinion advising us whether or not this
provision for compensation is applicable
to a County Treasurer in County operating
under Township Organization."

Section 9266 R. S. Missouri 1929, referred to in your
communication, designates the county treasurer of each county as
the "custodian" of the moneys belonging to the school districts
in the county until paid out by warrant duly issued by the Board
of Directors

"except in counties having adopted the town-
ship organization law, in which counties the
township trustee shall be the custodian of all
school moneys belonging to the township, and
be subject to corresponding duties as the
county treasurer;"

After the above quoted phrase, the section requires the county
treasurer to supply bond in double the amount of school moneys
coming into his hands, conditioned upon the "faithful disbursement"
of such moneys. After other provisions relative to his duties
under his bond it is provided:

"and the county treasurer shall be allowed such compensation for his services as the county court may deem advisable, not to exceed one-half of one per cent of all school moneys disbursed by him, and to be paid out of the county treasury."

It therefore appears that this section allows the county treasurer additional compensation for the handling of school moneys which cannot amount to more than one-half of one per cent "of all school moneys disbursed by him". However, this phrase is to be taken into consideration with the other provisions of this section. From the quotation heretofore set out, it appears that the custodian of school moneys in counties under township organization is in the proper "township trustee" and he is charged with "corresponding duties" as to those moneys as is the county treasurer in respect to the school moneys of which he is custodian and actually disburses.

It therefore appears that school moneys in counties under township organization are taken out of the general provisions of this section and it logically follows that they should not be considered in determining the amount of compensation to be allowed the county treasurer for the handling of those school moneys of which he actually is the custodian and "disburses". This conclusion is logical when we view the other statutory provisions relative to the duties of the township trustee in respect to the school moneys.

We direct attention to Section 12290 respecting the township trustee. This section requires him to keep a strict account of all money received from whatever source, and

"to show the amount of money in his hands belonging to each school district or fractional part in the township".

It requires him to make an annual settlement with the county clerk

"of all moneys received by him on account of school",

and it also directs him to

"pay all warrants drawn on him by the board of school directors in his township of the funds belonging to the district making the order."

Under Chapter 86, referring specifically to township organization, we find directions as to the duties of the township collector respecting school funds and involving the township trustee. Section 12340 of this Chapter refers to the duties of the township collector and directs him, in respect to the school moneys which he collects from the taxpayer, to pay such funds directly to the township trustee, who is also the township treasurer, stating

"the amount collected from each school district or fractional part thereof."

It is further provided:

"As soon as the school funds are appropriated, the township treasurer shall apply to the county treasurer for the school moneys belonging to each school district or fractional part thereof in his township, and the county treasurer shall pay over to him all of said school moneys, taking duplicate receipts thereof, one of which he shall file with the township clerk. The township treasurer shall safely keep such money until paid out upon order of the board of directors of the various school districts of his township."

Thus we see that by these statutory provisions the actual duties of disbursement and paying of expenses of school districts in counties under township organization revolves directly upon the township trustee upon whom the warrants are drawn by the board of directors of the proper district. The county treasurer in said county is merely the go between to get the "appropriated" school funds into the hands of the township trustee. He honors no warrants drawn by the district for the payment of its expenses but merely turns over these funds upon proper demand being made.

In speaking of compensation, it should not be overlooked by virtue of Section 12310, page 377, Laws of Missouri 131, the township trustee

"shall receive a compensation of two per cent for receiving and disbursing all moneys coming into his hands as such treasurer, when the same shall not exceed the sum of One thousand dollars and one per cent of all sums over said amount."

Thus by this provision we have the township trustee receiving a per centage commission or fee upon all moneys coming into his hands for receiving and disbursing the same. If the county treasurer were allowed one-half of one per cent there would be two fees allowed for disbursing school funds in counties under township organization. This was never contemplated by the legislature and in view of all the law cannot be permitted.

Before concluding this question, let us also consider the specific wording of Section 9266, heretofore quoted. By it the county treasurer receives

"not to exceed one-half of one per cent of all moneys disbursed by him."

In viewing all of the sections relative to the duties of the county treasurer ex officio collector, the county treasurer in counties not under township organization, and the township trustee or treasurer, it is clear that the word "disburse" is used in the sense of paying out in satisfaction of expenditures and not in the sense of merely turning over funds to another who in turn actually pays the same out or expends the money for the purposes for which the taxes it represents were levied. The case of State ex rel. Thompson vs. Board of Regents, 305 Mo. 57, 264 S. W. 698, is very much in point. In this case the Supreme Court had before it a construction of a statute requiring the Board of Regents to make a report of its disbursements. In construing this term the Court stated, page 701:

"If, as is contended by relator, all moneys received by the board were required to be paid into the state treasury, the only money that could be disbursed by the board and for which it

2/26/37

would have to render an account would be that which had been appropriated for the college by the Legislature. The authorized disbursements of the board are not thus limited by the section, which includes 'appropriations incidental fees and moneys received from all other sources.' In addition, the board is required to state the purposes for which these disbursements were made. Certainly it cannot, under any rule of construction, be held that a payment into the state treasury of incidental fees received by the college is in any sense a disbursement. Even the tyro in the use of our mother tongue attributes no other meaning to the word than to pay out or expend. A payment into the treasury, therefore, cannot be so classified, as it simply effects a change in the custodian and the place of deposit of the fund."

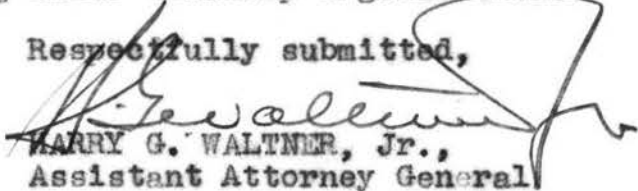
This decision of the Supreme Court dictates the construction which should be given the word "disbursed" in the statutes under examination. A fair and reasonable construction of Section 9266 leads to the conclusion that the word "disbursed" as there used means such moneys as the county treasurer actually pays out and expends, but not such moneys as he simply turns over or acts as a transfer agent in transmitting to the township trustee who actually proceeds to pay out and expend these funds on the order of the school district.

CONCLUSION

It is therefore the opinion of this office that the provisions for compensation contained in Section 9266 allowing compensation to a county treasurer for the disbursement of school moneys by him do not apply to a county treasurer ex officio collector in a county operating under township organization.

Respectfully submitted,

APPROVED:


HARRY G. WALTNER, Jr.,
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

AMENDMENT NO. 4: House Bill No. 218:

Rabbits are not protected at the present time, but if House Bill No. 218 is enacted by the Legislature the Conservation Commission, as set up in Amendment No. 4 will have the control and regulation of rabbits to the extent that said Bill confers authority on the Commission.

March 22, 1937

Honorable W. Randall Smart
House of Representatives
Jefferson City, Missouri



Dear Sir:

This Department acknowledges receipt of your letter relative to the following question:

"House Bill No. 218 now under consideration by the Fish & Game Committee of the House directs the new Conservation Commissioner to issue licenses permitting the exportation for commercial purposes of rabbits.

"For the guidance of the Committee, will you please advise me:

"If House Bill 218

1. is enacted, and
2. is not enacted,

will the Conservation Commission, in view of the constitutional amendment voted on as proposition '4', and in view of Sec. 8224 R.S. Mo. 1929, be vested with the authority to regulate or prohibit the exportation of rabbits for commercial purposes?

"This Committee is in arrears with its work and matters will be materially expedited if your office will render its opinion on this question at its earliest convenience."

On February 5, 1937, this Department rendered an opinion to Honorable E. Sydney Stephens, Columbia, Missouri, holding, in effect, that the Conservation Commission created by Amendment No. 4 accepted the laws now in existence and as hereinafter passed by the General Assembly and could enforce the same; that all the statutes now in existence remain potent except in so far as they might conflict with Amendment No. 4. In view of the opinion heretofore rendered your question relating to the power and authority of the Commission with reference to House Bill No. 218, if it is enacted, or if it is not enacted, must be considered from the standpoint of the statutes as they now exist.

Article II, Chapter 43, Sections 8224 to 8315, inclusive, refers to the preservation of fish and game; Chapter 43 of Article I, Sections 8204 to 8223, inclusive, refers to the powers of the Fish and Game Commissioner. Section 8224 places the title to birds, fish and game in the State, and is as follows:

"The ownership of and title to all birds, fish and game, whether resident, migratory or imported, in the state of Missouri, not now held by private ownership, legally acquired, is hereby declared to be in the state, and no fish, birds or game shall be caught, taken or killed in any manner or at any time, or had in possession, except the person so catching, taking, killing or having in possession shall consent that the title of said birds, fish and game shall be and remain in the state of Missouri, for the purpose of regulating and controlling the use and disposition of the same after such catching, taking or killing. The catching, taking, killing or having in possession of birds, fish or game at any time, or in any manner, by any person, shall be deemed a consent of said person that the title of the state shall be and remain in the state,

for the purpose of regulating the use and disposition of the same, and said possession shall be consent to such title in the state."

In the case of State v. Heger 194 Mo. l. c. 711, the decision is in conformity with the statute heretofore quoted:

"The authorities are uniform in holding that the absolute ownership of wild game is vested in the people of the State, and that such is not the subject of private ownership. As no person has in such game any property rights to be affected, it follows that the Legislature, as the representative of the people of the State, and clothed by them with authority to make laws, may grant to individuals the right to hunt and kill game at such times, and upon such terms, and under such restrictions as it may see proper, or prohibit it altogether, as the Legislature may deem best. (Haggerty v. Ice Mfg. & Storage Co., 143 Mo. 238; Geer v. State of Connecticut, 161 U. S. 519; American Express Co. v. People, 133 Ill. 649; Ex parte Maier, 103 Cal. 476; State v. Rodman, 58 Minn. 393; Wagner v. People, 97 Ill. 320; Phelps v. Racey, 60 N. Y. 10.) "

With respect to 'game' and the meaning of 'ferae naturae,' the Supreme Court of Missouri, in the case of State v. Weber 205 Mo. l. c. 45, said:

"As we have said, the deer in question come within the meaning of the term 'game,' which means animals *ferae naturae*, or wild by nature. It makes no difference that said deer were raised in captivity and had

become tame, they are naturally wild. 'There is no property in wild animals until they have been subject to the control of man. If one secures and tames them they are his property; if he does not tame them, they are still his so long as they are kept confined and under his control'. (Cooley on Torts, (2 Ed.) 435; Manning v. Mitcherson, 69 Gas. 447; Amory v. Flynn, 10 Johns. 102; Com. v. Chace, 9 Pick. 15.) That deer are animals *ferae naturae* is held by all the authorities, and disputed by none."

We know, as a matter of fact, that rabbits are considered as game, or an animal *ferae naturae*, and the Legislature could consider rabbits as 'game' and by law protect the same, and, as said in the Heger decision,

"grant to individuals the right to hunt and kill game at such times, and upon such terms, and under such restrictions as it may see proper, or prohibit it altogether,"

but heretofore, from a careful reading of the statutes, rabbits are not mentioned or in anywise protected. The statutes are definite as to certain game and place certain restrictions on the killing and taking and use of squirrels, deer, quail and fur bearing animals, but, as stated above, is silent as to rabbits. There is no statute general enough in its terms, except Section 8224, which is broad enough to include rabbits. But conceding, for the sake of argument, that Section 8224 does include rabbits as wild life, the Legislature has never seen fit to pass any statutes prohibiting or regulating the killing, taking or use of rabbits."

Therefore, we are of the opinion that if House Bill No. 218 is not enacted the Commission would have no greater control or authority than the Commissioner of Fish and Game as to rabbits.

From our consideration of House Bill No. 218 it appears to be an Act to provide for the conservation of

Honorable W. Randall Smart

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March 22, 1937

rabbits and the regulation and licensing of dealers therein. Without passing on the merits of the proposed Act or the form of the same, we are of the opinion that if said Bill is enacted the Conservation Commission will have power to control, regulate and conserve cotton tail rabbits to the extent that the Act grants the same to it; that rabbits will have the same protection and regulation, insofar as House Bill No. 218 gives the power to the Commission, as any other species of wild life, animals or fish, as contained in the Fish and Game Laws of the State of Missouri.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

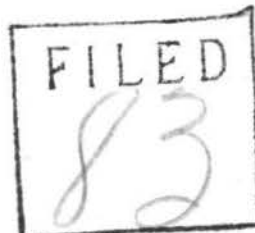
J. E. TAYLOR
(Acting) Attorney General

OWN:LC

CHECKS OR DRAFTS--Insufficient fund checks. Applicability of
Section 4305 R. S. Mo. 1929.

March 23, 1937

3-76



Hon. Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Sir:

We have your request for an opinion which is as follows:

"A gives B a check drawn on a bank in which A does not have sufficient funds (although he has a small amount not sufficient to cover the check) to pay said check in full upon its presentation, in payment of work and labor performed by B for A.

Should A be charged under Section 4304 or 4305, R.S. Mo. 1929, and if it should be brought under Section 4305 will you please furnish me the form for the information.

I have charged a number of similar cases under Sec. 4305 and have never had it questioned. However, I have one filed now and the Judge does not seem to think the information is sufficient."

Section 4305 R. S. Missouri 1929, is aimed at the making, drawing, uttering or delivering of a check on a bank at a time when the maker "has not sufficient funds" in or credit with such bank. I enclose herewith a copy of an opinion

Hon. Wayne V. Slankard

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March 23, 1937

written by this office February 10, 1937, to Mr. G. Logan Marr, relative to the applicability of Sections 4304, 4305 and 4306.

I am also enclosing a copy of the information used in the recent case of State vs. Taylor, 73 S. W.⁽²⁾ 378. Although this information was not specifically passed on by the Court we are of the opinion that it is sufficient to meet the requirements of the statutes.

Respectfully submitted,

BRANKLIN E. REAGAN,
Assistant Attorney General

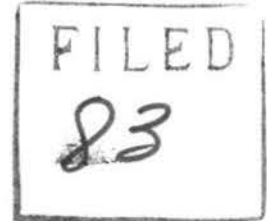
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM
Enclosures-2

Elections: The office of Collector of cities of the fourth class is an elective office. When an office does not appear on the ballot the electors may write in the name of a qualified person to fill that office.

April 1, 1937



Mr. Ed Smith
City Clerk
Gideon, Missouri

Dear Sir:

We are in receipt of your request for an opinion which reads as follows:

"At the request of our Mayor, I am writing you for information in regards to a little difficulty that has arisen in our coming election. Our understanding is that the office of City Collector is optional, either elective or appointive in a 4th class city.

"It has always been customary in our little City that the Mayor appoint a Collector. Here-to-fore the City Marshal has always been appointed Collector, thereby combining the two offices in that manner.

"That being customary, my Notice of Election does not mention the office of Collector. (Am enclosing one of our original notices.)

"Our Election Ballots are already made to conform with the Election Notice. After all preparations have been made, we have a citizen here who is going to contend for the Office of Collector by having his friends write his name in the Ballots as a candidate for "City Collector," thereby casting their votes for him in that manner. This is the first case of this kind we have had.

April 1, 1937

"Our question is this: Will the votes cast for him in this manner, lawfully entitle him to that office?

"We will highly appreciate this information if you will be so kind as to furnish us with same. If there are any charges, send statement with answer. We would like to hear from you before time to install newly elected officers."

Your request contains two questions:

1. Is the collector of a city of the fourth class an elective office or is such office filled by the city marshal?
2. If an office is not on the ballot, may the name of a qualified person be written in to fill such office?

I.

Section 6951, Revised Statutes of Missouri 1929, under the Article referring to cities of the fourth class provides, in part, as follows:

"The following officers shall be elected by the qualified voters of the city, and shall hold office for the term of two years and until their successors are elected and qualified, to-wit: Mayor, marshal, collector and board of aldermen, and the board of aldermen may provide by ordinance that the same person may be elected marshal and collector, at the same election, and hold both offices,**
***"

Under the above statute, a marshal and a collector both are to be elected and the mayor has no right to appoint

such officers. The board of aldermen may provide by ordinance that the same person may be elected and hold the office of marshal and collector. However, even if such an ordinance has been passed the electors must still vote on each officer, because, in view of the provision that "the same person may be elected marshal and collector at the same election and hold both offices," it is indicated that the offices are not combined but only that one person may be elected and hold these two particular separate offices.

II

Your second question is whether the electors may write in the name of a person for city collector when said office is not on the ballot.

In State ex rel Dunn v. Coburn, 260 Missouri, 177 1. c. 192, the Supreme Court of Missouri en banc provides:

"****the people would nevertheless have the right to express their choice by writing on the ballot the name of any qualified person whom they desired to designate for any office which the law permitted to be then filled by election. The electors are not restricted to the names or offices printed on the official ballot."

CONCLUSION

It is therefore the opinion of this department that the collector of a city of the fourth class must be elected and that if such office is not on the ballot, the electors may write in the name of a qualified person for such office.

Respectfully submitted,

OLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

AO'K:JMW

Barber Board: The moral character of an applicant for a barber's certificate is within the discretion of the board of examiners, conviction of a crime may be taken in consideration in determining same.

April 2, 1937

H-15



Mr. J. H. Skaggs, Treas.
Barbers' State Board of Examiners
405, 100 N. Broadway Bldg.
St. Louis, Missouri

Dear Sir:

We are in receipt of your request for an opinion which reads as follows:

"I have a party who has applied for permit to do barbering. But I do not feel justified in issuing such permit without advice from your office.

"The party in question is Tony Guarino, who was convicted in our Federal Courts in St. Louis, Missouri on March 28, 1935, and was sentenced to a term of two years in the Leavenworth Penitentiary. He was released on December 4, 1936, and is now applying for a permit to do barber work.

"And as Section 13532 Revised Statutes of Missouri 1929 provides that the Board should revoke licenses upon conviction of a crime, I am wondering whether or not it would be proper to issue a permit to a person who had been so convicted.

"Please give me your opinion as to whether or not our office would be justified in issuing such permit."

Section 13528 Revised Statutes Missouri, 1929, which deals with the examination of applicants for a qualified certificate, provides in part, as follows:

"* * * * whereupon said board shall proceed to examine such person, and, being satisfied that he is above the age of nineteen years, of good moral character, * * * *"

The status of a state board which has the power to examine and issue license is aptly stated in State ex rel Granville v. Gregory 83 Missouri 123, wherein, the court states:

"* * * *the board of health, in the discharge of duties in reference to the issuance of certificates (to doctors), is engaged in the performance of those things which essentially partake of a judicial nature requiring the exercise of judgment and the employment of discretion."

Practically the same rule is expressed in State ex rel Lentine v. State Board of Health 65 S. W. (2d) 943 1. c. 949:

"* * * *the question whether the acts or conduct charged are such as to constitute unprofessional and dishonorable conduct or render the licentiate a person of bad moral character within the purview of the statute 'calls for the exercise of judgment and sound discretion' on the part of the board of health"

It is, therefore, within the discretion of the board whether the applicant is of good moral character or not. Character is, as said in Harrison v. Lakenan

187 Missouri 581, 88 S. W. (2d) 53, "what a person is, character is in himself." However, as was pointed out in Lindsay v. Bates 122 S. W. 682,

"Character is a continuous quality, not quickly changed or changeable * * * his character at another time may well be considered as evidencing his character at the time of testifying."

Does a previous conviction of a crime of itself make a person of such bad moral character that his application for a license should be refused? Speaking of a pool license, the applicant for which must be of good moral character, the court in State ex rel McClanahan v. DeWitt 160 Missouri Appeal 308, 142 S. W. 366 said:

"We believe the law lodges in the court the discretionary power to refuse such license, when in their opinion there are reasonable grounds to apprehend that the person applying is not a suitable person * * *. For instance, the applicant may be an habitual lawbreaker."

In the case of In re Casablanca 30 P. R. C. 368, the court held,

"If the act first committed twelve years ago stood alone, we might say perhaps that the applicants good conduct thereafter made him worthy of the honor of being admitted to practice law. But the applicant has quite recently relapsed and committed an act equally serious * * *. We do not mean to say that Casablanca is forever barred from the profession. Perhaps by repeated acts showing permanent reformation he may sat-

isfy this same court that he is qualified."

Finally, it seems to be the rule that where good moral character is a requirement that the burden of proving same is upon the applicant, *Rosencranz v. Tiddington* 193 Ind. 472, 141 N. E. 58, *Spears v. State Bar* 294 Pac. 697, 211 Cal. 183.

CONCLUSION

It is, therefore, the opinion of this department that the moral character of an applicant for a Barber's certificate is a question of fact which must be determined by the State Board of Examiners. The character should be determined from all the evidence and conviction of a crime is evidence that may be taken into consideration with the rest of the evidence in determining such character.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

AO'K:JMW

Re: INHERITANCE TAXES: Non-resident beneficiaries have the same exemption as resident beneficiaries.

April 2, 1937.

4-5
FILED
83

Honorable G. J. Smith,
Probate Judge, Cass County,
Harrisonville, Missouri.

Dear Sir:

This Department is in receipt of your letters requesting an opinion as to the following facts:

Facts in above case are as follows: Mrs. Thompson, the deceased, a citizen of Canada, died intestate leaving her husband, a son and daughter, all citizens of Canada, also a daughter a citizen of Mo. Her estate consists of money and notes in Cass County valued at \$4100.00. What are the rights of the Canadian heirs as to inheritance taxes. Please advise.

I.

As to the question relative to the taxation of intangible property physically located in the State of Missouri and owned by a foreign decedent, we are enclosing copy of an opinion of this office to Newhoff and Miller, dated Feb. 27, 1936.

II.

Since, as developed by the attached opinion, we have concluded this property is subject to taxation in Missouri, the succession to the property must necessarily be taxed according to the applicable law. The exemptions provided by the statutes are based, not upon geographical distinctions, but upon relationship of the beneficiaries to the deceased.

We are, therefore, of the opinion that the exemptions provided for in section 575, R. S. Mo. 1929, extend to non-resident

Page #2

April 8, 1937.

as well as to resident beneficiaries of the deceased.

Respectfully submitted,

JOHN W. HOFFMAN, JR., Assistant
Attorney General.

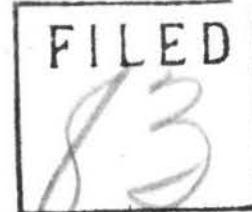
APPROVED:

(ACTING) ATTORNEY GENERAL

JWH:EG

Inter-state Compacts: House Bill 459 not in conflict
with Constitution of Missouri
and United States.

4-23
April 20, 1937



Honorable Francis Smith
Representative
59th General Assembly
Jefferson City, Missouri

Dear Mr. Smith:

We acknowledge your request for an opinion
under date of April 13, 1937, wherein you state as
follows:

"Enclosed herewith is a perfected
copy of House Bill Number 459
introduced by myself at the request
of the Missouri Bar Association."

"The wording of this Act was
patterned after a similar law now
on the Statute Books of the State of
Kansas."

"I would appreciate your office giv-
ing me an opinion as to the constitu-
tionality and practicability of this
Act. Points which have been questioned
are - 1. constitutionality of the bill.
I would think in view of the Federal
Statute that this objection is not well
put. 2. whether the power conferred upon
the Governor by the bill can be constitu-
tionally delegated to him- in view of
the fact that he exercises similar powers
in extradition and other matters, and in
view of the principle of law that powers
may be delegated to a ministerial officer

Inter-state Compacts: House Bill 459 not in conflict
with Constitution of Missouri
and United States.

Honorable Francis Smith.

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April 20, 1937.

"if those powers are outlined and defined by the Legislative body, it would seem that this objection also is not tenable.

"In requesting your opinion I have mentioned the foregoing to illustrate what sort of objections have been made, whether or not in good faith by opponents of the bill.

"In view of the fact that this session is in its last stages, I should very greatly appreciate a response as soon as possible in this matter."

House Bill No. 459 (perfected) (59th General Assembly) provides that

"AN ACT

"To authorize the Governor of the State of Missouri to enter into reciprocal agreements with the officials of other states relating to the recognition by this state and the validity in this state of subpoenas, court orders and summons issued by the authority of other states; providing for compensation and immunities for anyone so summoned; relating to privileges to be accorded to peace officers of other states; providing for the issuance of proclamation by the Governor on the acceptance of such reciprocal agreements by other states.

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"Section 1. The Governor of the State of Missouri shall be empowered to enter

into reciprocal agreements with other states under authority of the Act of Congress of the U. S. of June 6, 1934 (48 Stat.909; U. S. C. A. 18, Sec. 420) relating to reciprocal agreements by the states for the prevention of crime in order that this state may join with such other states for the co-operative effort and mutual assistance in the prevention of crime and in the enforcement of the respective criminal laws and policies of the respective states.

"Section 2. Such agreements shall provide that if on the trial in another state of one charged with a crime there committed, a person within this state is wanted by either party by a witness at such trial, this state, its courts and court officials, will recognize as valid any subpoena, summons or court order issued or made in accordance with the law of the state where the trial is to be had, for the appearance of the person in this state as a witness at such trial the same as though such subpoena, summons, or court order had been duly issued or made by a court of this state for the person to appear as a witness at a trial in this state: PROVIDED, A resident of this state so asked to go as a witness to another state shall not be required to do so until there is paid to him a sum equal to five dollars per day for the time he necessarily would be gone from home and ten cents for each mile by the ordinarily traveled route to and from the place where he is to testify: AND PROVIDED FURTHER, That he be immune from the service of civil or criminal process upon him while enroute to and from the place where he is to testify as to all matters occurring prior thereto.

April 20, 1937.

AND PROVIDED STILL FURTHER, This proposal has been accepted by the state in which the trial is to be had and that state has granted similar rights to this state to subpoena or order the appearance as a witness at a trial in this state of a person in such other state.

"Section 3. Such agreements shall provide that if an officer of another state, in conformity with a valid writ, order of court, or statute of that state, brings a person charged with or convicted of crime in that state into or through this state, his rights to the custody of such person and to use the state penal institutions or county jails for the temporary lodging of such person shall be recognized by this state, its courts and court officials, astthough the person were in custody of a wheriff or a proper officer of this state, in conformity with a writ, order of court, or statute of this state: PROVIDED, This proposal has been accepted by such other state and that state has granted similar rights and privileges to officers of this state.

"Section 4. Such proposals, when accepted by any state, shall be liberally construed with the view of promoting their obvious purposes, and to that end technicalities not affecting substantial rights shall be disregarded.

April 20, 1937.

"Section 5. The Governor of the State of Missouri is hereby made the agent and representative of the state to negotiate with the proper officials of the several states of the Union for the acceptance of these proposals, and he hereby is specifically authorized to conduct such negotiations for and on behalf of this state, and to execute on behalf of this state agreements or compacts with any or all of the other states of the Union putting into effect any or all of such proposals. The Governor shall preserve in his office a record of such negotiations, and when an agreement or compact is entered into with another state he shall issue a proclamation to that effect and cause the same to be published, and the agreement or compact shall thenceforth be in force as proclaimed."

48 Stat. 909, U. S. C. A. 18, Section 420, provides as follows:

"The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts."

April 20, 1937

Gordon Dean of the Department of Justice, Washington, D. C., in an address delivered at the Attorney General's conference on crime held in Washington, D. C. on December 10-13, 1934, makes the following statement with respect to Interstate Compacts for Crime Control (21 American Bar Association Journal, 89):

"This constitutional provision made compacts possible. Its wording is interesting, because it is phrased in the negative. Specifically, it provides that no compacts might be entered into without the consent of congress. In practice, the states, therefore, have either worked out the general outline for such a compact, secured congressional approval in advance and then, in turn, secured its enactment into law by the legislatures of the states concerned, or the procedure has been reversed- the state legislatures first enacting laws establishing the terms of the compact and then securing congressional approval later.

"Surprising as it may seem, however, little attention has been paid to the compact clause of the Constitution, and the compact device has consequently been availed of in a comparatively rare number of instances.

"About seventy compacts in all have been approved by congress. These concern such matters as taxation, control of navigation, utility regulation, conservation of natural resources, and boundaries. Only eight compacts have been approved by Congress in the crime field, and all of these have been restricted to the narrow field of the service of process on, or the jurisdiction over, boundary waters.

April 20, 1937

"A typical compact of this type is that entered into between the states of Mississippi and Arkansas." * * *

"When it was suggested by some that there was no reason why the laws of both states should not be made effective over the entire river, even when such laws conflicted, others pointed to the territorial boundary which seemed, according to traditional boundary concepts, an insurmountable barrier to concurrent jurisdiction. It soon became quite evident that cooperative effort on the part of both states was needed. Mississippi and Arkansas therefore entered into a compact, which literally, at least for the purpose of enforcing the laws of the respective states, extended the western boundary of Mississippi to the western shore of the Mississippi River and the eastern boundary of Arkansas to the eastern shore of the same river.

"Until 1934, when Congress began consideration of the so-called Interstate Compact Bill, which later became law, public attention had never been focused on the possibilities of the compact device. This law gave a blanket congressional consent in advance to all compacts entered into by any two or more states in the field of the 'prevention of crime and the enforcement of their respective criminal laws and policies'."

The above statement of Gordon Dean is set out for the purpose of demonstrating the use that has been made of interstate compacts in crime and other fields.

April 20, 1937.

In the case of State v. Cunningham, 59 So.76, a compact was made between the states of Mississippi and Arkansas extending the criminal jurisdiction of Mississippi to the banks of the Mississippi River on the Arkansas side, and agreeing that the two states should have concurrent jurisdiction over such river. The court said:

"States are sovereigns may enter into any compact or agreement they see fit with each other except as prohibited by section 10 of article 1 of the Constitution of the United States. This section provides that "no state shall, without the consent of Congress, enter into any agreement or compact with another state," etc. * * *

"The question here is solely as to the power of the states, under the resolution, to enter into this compact or agreement. * * *

"The exercise of concurrent criminal jurisdiction over the waters which form the boundaries of states, even to the very borders of each state, is not new to the law or to congressional legislation. It seems to be favored and not opposed by Congress, and, in creating territories and states, it has been voluntarily inserted in the creating acts of Congress and forced upon many states. When the territories of Washington and Oregon were organized, concurrent jurisdiction was given to each over all offenses committed on the Columbia River where said river forms a common boundary. See Act March 2, 1853, c.90, 10 U.S.Stat. 172; 11 U. S. Stat. 383. The same is true of the states of

April 20, 1937.

"Minnesota and Wisconsin (Act Aug. 6, 1846, c. 89, 9 U.S. Stat. 57); the same of Iowa and Illinois (Act March 3, 1845, c. 48, 5 U. S. Stat. 742), and Kentucky and Missouri. * * *

"We think that the case of Central Railroad Co. v. Jersey City, 209 U.S. 473, 28 Sup. Ct. 592, 52 L. Ed. 896, is conclusive of the proposition that states having a river forming a common boundary may, with the consent of Congress, fix the jurisdiction to be exercised over the waters from one state to the very borders of the other, irrespective of the boundary line between the two states for other purposes. If one state may grant to another exclusive jurisdiction over the waters to its banks for any purpose, when Congress consents, we cannot understand why the same states may not grant to each other concurrent jurisdiction each to the banks of the other over offenses committed on the waters which may constitute a violation of the laws of the state undertaking the prosecution, whether such offense be malum prohibition or malum se."

If, as it has been held (Central Railroad Company, supra), that states may by compact grant to each other exclusive jurisdiction over the water to its banks for any purpose, we see no reason why same cannot be extended from one border of the state to the other.

April 20, 1937.

The court, in the case of La Plata River & Cherry Creek Ditch Co. v. Hinderlider, 25 Pac. (2d) 187, 1.c.188, points out, however, that the compact must not violate Federal or State Constitutions, thus:

"No state shall, without the consent of Congress, * * * enter into any agreement or compact, with another state. * * * Article 1, Sec. 10, par. 2, U. S. Constitution.

"Conceding for the purposes of this case that this negative implies an affirmative, it falls far short of a grant of power to any state, with the consent of Congress, to enter into a compact violating Federal or State Constitutions."

In the case of the City of New York v. Wilcox, 189 N.Y. Sup. 724, 1.c.726, the compact was designed to prevent congestion at the port of New York and New Jersey by means of a joint port commission, the court, in holding that subject to the approval of Congress, any two states could enter into a joint adventure to promote the welfare of their citizens, said:

"It is well established that subject to the approval of Congress any two states may enter into a joint adventure to promote the common welfare of their citizens. Such an agreement was entered into between New York and New Jersey in regard to Palisades Park, which lies upon the borders of the two states. The same states have another agreement as to the construction of a vehicular tunnel connecting the two states. In such cases it is not necessary or permissible to limit or surrender the sovereign rights of the people, but where such rights are properly preserved no question can be raised as to the validity of the compact."

Honorable Francis Smith -11- April 20, 1937.

That a compact between the State of Missouri and other states relating to the recognition of subpoenas, court orders and summonses issued by the authority of the respective states, would promote the welfare of the citizens cannot be challenged when we consider that twentieth century crime is no longer confined to intra-state activities. Furthermore, the sovereign rights of the people are not being surrendered inasmuch as the Act provides for compensation and immunity for any one summoned. Nor is the subject of compacts new to this state.

In the case of State v. Joslin, 227 Pac.543, 1.c. 544, and agreement by the states of Kansas and Missouri that a waterworks plant in Kansas City, Missouri, situated in Kansas City, Kansas, adjoining a similar plant of the latter city, the two plants being capable of use, and being in fact to some extent used in co-operation, each supplementing the other in certain instances, was held free from assessment and taxation by the other state, and a valid agreement. The court said:

"By the action referred to the Kansas Legislature has in effect declared that upon the grounds indicated the exemption of the waterworks plant in Wyandotte County owned by the City of Kansas City, Mo., is of peculiar public benefit. This decision of the Legislature, having been made in the exercise of its proper functions and being based upon grounds that the court cannot pronounce to be capricious or without foundation in reason, is beyond judicial interference.

"The federal Constitution (article 1, sec. 10, par. 3) by forbidding states to enter into any agreement or compact with each other without the consent

April 20, 1937

of Congress recognized their power to do so with that consent. *Poole v. Fleeger*, 36 U.S. (11 Pet.) 185, 209, 9 L.Ed.680. Moreover, some contracts or business arrangements between states may be effected without congressional consent. *Virginia v. Tennessee*, 148 U.S. 503, 518, 13 Sup. Ct. 728, 37 L.Ed.537. 'The terms 'compacts' and 'agreements', as used in this section, cover all stipulations affecting the conduct or claims of state, whether verbal or written, formal or informal, positive or implied, with each other'. (Annotated Constitution published by authority of United States Senate, p.365) not forbidden by the Constitution, for even with the consent of Congress the states may not disobey its injunctions-- may not, for instance, do any of the things prohibited by the first paragraph of the section cited (*In re Rahrer*, 140 U.S.545, 560, 11 Sup.Ct. 865, 35 L.Ed.572), such as entering into a treaty, alliance, or confederation. It has been said that the clause 'compacts and agreements,' as distinguished from 'treaty, alliance or confederation,' may 'very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary; interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of states bordering on each other.' (Quoted from Story's Commentaries on the Constitution, Sec. 1403, in *Virginia v. Tennessee*, 148 U. S. 503, 519, 13 Sup. Ct. 728, 37 L.Ed.537) There is nothing in the subject matter of the arrangement here under consideration which because of any inhibition of the federal Constitution removed it from the category of permissible agreements or compacts."

Sec. 2 of Article 2 of the Missouri Constitution of Missouri provides that the people of this state have the inherent, sole and exclusive right to regulate the internal government and police thereof.

"That the people of this State have the inherent, sole and exclusive right to regulate the internal government and police thereof, and to alter and abolish their Constitution and form of government whenever they may deem it necessary to their safety and happiness: Provided, Such change be not repugnant to the Constitution of the United States."

As we have pointed out, the Federal government has given blanket approval in advance towards the interstate compact where no boundary line of states would be recognized, as far as it related to subpoenas of witnesses. The State of Missouri having the right to regulate the internal government and police thereof, the authorization of the Legislature of such a compact would not violate the above Constitutional provision.

Section 30 of Article 2 of the Missouri Constitution provides:

"That no person shall be deprived of life, liberty or property without due process of law."

April 20, 1937.

In the case of *Ivie v. Bailey*, 5 S.W. (2d) 50, 1.c. 54, 319 Mo. 474, the court, in construing the 'due process clause of the Constitution', said:

"Nor do the statutory sections violate the due process provisions of either the state or the federal Constitution. By due process of law, defined in terms of the equal protection of the law, means, in each particular case, such an exercise of the powers of government as the settled maxims and rules of procedure sanction, and such safeguards for the protection of individual rights as those maxims and rules prescribe for the class of cases to which the one in question belongs. It means, in short, the law of the land."

All safeguards for the protection of individual rights have been provided for in this Act, and therefore cannot be said to be a violation of the 'due process clause' of the Constitution.

It is to be noted that provision is made in Sec. 3 of the above Act that where an officer of another state, in conformity with a valid writ, brings a person charged with or convicted of a crime, in or through this state, he may use our state penal institutions or county jails for the temporary lodging of such person.

No provision is made for feeding such prisoners, and we have been unable to find any Constitutional or statutory provision which would prohibit the operation of Sec. 3, supra. As a matter of fact, we understand that although there is no provision for same at the present time, many penal officers of our state have been

April 20, 1937.

co-operating with the penal officers of other states in temporarily housing persons charged with or convicted of crime, when in the custody of an officer of another state, in conformity with a valid writ.

Secs. 1 and 5 of the above Act authorize the Governor, as agent and representative of the State, to enter into reciprocal agreements with other states, and Secs. 2 and 3 proscribe the provisions that must be contained in the reciprocal agreements. This authorization of the Governor cannot be attacked as repugnant to Article 4, Section 1 of the Missouri Constitution, providing that the Legislative power shall be vested in the General Assembly, since it gives the Governor no authority to make a law, but only to determine a fact or thing on which the action of the law depends.

And in case of State ex rel. Field v. Smith, 49 S.W. (2d) 74, 1.c.76, 329 Mo. 1019, the court said:

"The Legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise any unrestricted discretion in applying a law; but it may enact a law complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. Bailey v. Van Pelt, 78 Fla. 537, 82 So. 789, 793.

"The Legislature may, without violating any rule or principle of the Constitution, confer upon an administrative board or officer a large measure of

discretion, provided the exercise thereof is guided and controlled by rules prescribed therefor.' People v. Products Co., 195 Cal. 548, 234 P.398, 402, 38 A.L.R. 1186; see, also, Ex parte Cavanaugh v. Gerk, 313 Mo. 375, 280 S.W. 51; St. Louis v. Ice & Fuel Co., 317 Mo. 907, 296 S.W. 993, 54 A.L.R. 1082; Merchants' Exchange v. Knott, 212 Mo. 616, 111 S.W. 585, and cases cited."

The authorization of the Governor to act as agent and representative of the State to enter into reciprocal agreements with other states being controlled by definite valid limitations is not a delegation of power to enact a law or to declare what the law shall be, or to exercise an unrestricted discretion in applying the law, and hence is not a conflict with Article 4, Section 1 of the Missouri Constitution.

From a consideration of the whole Act, we are of the opinion that the adoption of same by the General Assembly would not be in conflict with the Constitution of Missouri, or the Constitution of United States.

Respectfully submitted,

APPROVED:

WM. ORR SAWYERS
Assistant Attorney-General.

J. E. TAYLOR
(Acting) Attorney-General.

ADMINISTRATION: Estates of persons presumed to be dead must be administered according to the terms of the statutes.

May 4, 1937

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Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

ATTENTION: John Graves

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads as follows:

"The question for determination is whether or not Alvina Zacheis and her sister can rightfully claim the part of the Louis Zacheis estate due the brother of said Louis Zacheis, to-wit, Arthur Zacheis who disappeared in 1904 and has not been seen or heard of since that time, without having the said Arthur Zacheis declared legally dead under the seven year statute."

Appended to your request for an opinion is a copy of a letter received from Frank C. Boland, an Attorney at Law, of St. Louis, Missouri, which reads as follows:

"Arthur Zacheis disappeared during the Worlds' Fair in St. Louis and has not been seen or heard from since 1904. His share of Louis Zacheis's estate amounts to

\$476.13 and the only living relatives are Alvina Zacheis and her sister and rather than go to the expense of taking out letters of administration and having Arthur Azcheis declared civilly dead the sisters are asking you under the circumstances if there is any way in which they can obtain this money without incurring any expense whatsoever."

An examination of our statutes reveal that the legislature has provided a complete scheme for the granting of letters of administration upon estates of persons presumed to be dead, by reason of their absence from the place of their last known domicile within this state.

Section 265 of R. S. Missouri 1929, relating to the granting of letters upon the estate of a person presumed to be dead, reads as follows:

"Whenever application shall be made to any probate court, or judge thereof in vacation, for letters of administration upon the estate of any person supposed to be dead, because of the absence of such person for seven consecutive years from the place of his last known domicile within this state, or because, having been a resident of this state, such person has heretofore gone from and has not returned to this state for seven consecutive years, or, because having been such resident of this state, such person shall hereafter go, from and shall not return to

this state for seven consecutive years, or, because being a resident of this state, such person shall have so concealed or conducted himself within this state that he shall not have been heard of for seven consecutive years by the judge of the probate court having jurisdiction of his estate, or by the persons interested therein, then said probate court, or the judge thereof in vacation, if satisfied that the applicant would be entitled to such letters if the supposed decedent were in fact dead, shall cause a notice to such supposed deceased person to be published in a newspaper, published in the county, once a week for four consecutive weeks, setting forth the fact that such application has been made, together with notice that on a day certain, which shall be at least two weeks after the last publication of such notice, the court will hear evidence concerning the alleged absence of the supposed decedent, and the circumstances and duration thereof. The persons applying for such letters of administration shall file a petition, verified by affidavit, stating the facts upon which such application is based and the place where such supposed deceased person resided when last heard from by him--by any person within his knowledge."

Briefly, other sections of the statutes provide in substance and effect as to who may testify at the hearing for the purpose of declaring one legally dead; publications of the finding of the court; requirement of the alleged decedent, if alive, or any other person for him to produce in court within twelve weeks from the date of the last date of publication satisfactory evidence that he is alive; when within the period of twelve weeks evidence shall not be offered to the Probate Court that the alleged decedent is in fact still living, letters may issue; letters being revoked upon proof that the alleged decedent is alive; of the distribution of the estate of any alleged decedent upon the giving of a refunding bond by persons who are to receive the estate of such decedent; of the alleged decedent being substituted for the administrator should alleged decedent subsequently appear and the payment of costs. Sections 266 to 272 of R. S. Missouri 1929.

In the case of Vaughn vs. Cadwell, 279 S. W. 170, 1. c. 171, the court, in discussing the statutes relating to the declaring of a person legally dead said:

"It was only by reason of statutory enactment that administration could be had upon plaintiff's estate, due to the presumption of death after an absence of seven years, and the statutes must be strictly complied with."

In the case of Cunnius vs. Reading School District, 198 U. S. 458 1. c. 470, the Supreme Court of the United States had before it for consideration statutes concerning the declaring of a person legally dead within the State of Pennsylvania, from which it appears our statutes are patterned. In this case the court aptly discusses the reason for the necessity of this type of legislation. The court said:

"Three characters of interest invoke a necessity for legislation concerning this difficult and important subject."

First. The interest of the person himself who has disappeared. If it is true that generally speaking every person is held at his own peril to watch over his own property, nevertheless the law owes a duty to protect those who from incapacity are unable to direct their affairs. It is upon this principle of public order that the appointment of tutors to minors or curators to the insane rests. It is indeed natural to presume that a person who has disappeared, if he continues to exist, is prevented from returning by some obstacle stronger than his own will, and which, therefore, places him in the category of an incapable person, whose interest it is the duty of the law to protect. And it is for this reason that the provisions as to absence in the code are placed in the chapter treating of the status of persons because the absentee, in the legal sense, is a person occupying a peculiar legal status. Second. The duty of the lawmaker to consider the rights of third parties against the absentee, especially those who have rights which would depend upon the death of the absentee. Third. Finally, the general interest of society which may require that property does not remain abandoned without some one representing it and without an owner. . . ."

CONCLUSION

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In view of the above it is our opinion that the estate of Arthur Zacheis must be administered in accordance with the terms of the statutes relating to the administering of estates of persons presumed to be dead.

Very truly yours,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

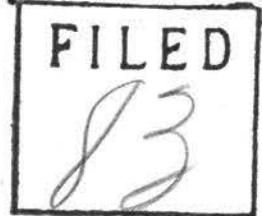
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TAXATION AND REVENUE: Liability of employees of
Federal Reserve Banks for
Missouri Income Taxes.

May 5, 1937.

Hon. Forrest Smith,
State Auditor,
Jefferson City, Mo.

5-7



Dear Sir:

A request for an opinion has been received from you under date of April 19, 1937, such request being in the following terms:

"I would like an opinion from your office as to whether or not the compensation received by employees of the Federal Reserve Banks is exempt from Missouri income tax."

R. S. Mo. 1929, sec. 10119, provides in part as follows:

"The following income shall be exempt from the provisions of this article.
* * * (5) The compensation of public officers for public service where the taxation thereof would be repugnant to the constitution * * *."

The question which you have asked, therefore, raises the question of whether the United States Constitution or any federal statute prohibits the imposition of the tax in question, since the Missouri statute above quoted leaves it to federal law to decide if this income is exempt, and the Missouri statute only purports to follow the federal law. In other words, if federal law does not prohibit the tax, it is levied by the Missouri statute, as such a tax would not be repugnant to the Missouri Constitution or other Missouri statutes.

There is a federal statute on tax exemption of Federal Reserve Banks, which provides as follows:

"Federal reserve banks, including the capital stock and surplus therein, and the income derived therefrom shall be exempt from Federal, State and local taxation, except taxes upon real estate."
(December 23, 1913, c.6, sec. 7, 38 Stat. 258; March 3, 1919, c.101, sec. 1, 40 Stat. 1314; 12 U.S.C.A., sec. 531.)

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It might be noted in passing that R. S. Mo. 1929, sec. 10119, quoted above, only exempts compensation of "public officers for public service", and only in such cases where it would be repugnant to the constitution, and says nothing about repugnance to any federal statute. However, in our opinion, this federal statute cannot be controlling for reasons which will appear more fully below. If the State of Missouri is not prohibited by the Constitution of the United States or by its organic law from assessing this tax, Congress cannot take away the state's power to impose it, and if the tax is prohibited by the Constitution of the United States, the federal statute is unnecessary.

This leaves for consideration the nature and functions of Federal Reserve Banks and their relationship to the Government of the United States, in order that it may be determined whether they are so closely related to that government, and such essentially governmental instrumentalities, that the income of their employees is withdrawn by the Constitution of the United States from taxation by the State of Missouri.

I.

FEDERAL RESERVE BANKS.

The Federal Reserve Banks were originally created by an Act of December 23, 1913, known as the "Federal Reserve Act", 38 Stat. 251. The major amendments have been made by an Act of June 16, 1933, known as the "Banking Act of 1933", 48 Stat. 162, and an Act of August 23, 1935, known as the "Banking Act of 1935", 49 Stat. 684. These statutory provisions are found in Vol. 12 of the U.S. Code Ann., pp. 466 et seq. They are so voluminous that we deem it advisable to offer only a brief synopsis of them.

There are twelve Federal Reserve Banks in this country, of which two are in Missouri, and each Federal Reserve Bank has member banks located in its district, including all national banks therein and certain state banks. The capital of the Federal Reserve Banks is provided by member banks who subscribe for shares to the extent of 6% of their own capital and surplus, which shares pay dividends at the rate of 6%. Dividends earned by the Federal Reserve Banks in excess of 6% are added to the surplus of the Federal Reserve Banks.

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Among the functions of the Federal Reserve Banks are the following: 1. Acting as depositaries of the reserves which their member banks are required to maintain, these reserves consisting of certain percentages of deposit liabilities of member banks fixed within statutory limits by the Federal Reserve Board. 2. Making loans and discounts for member banks, with the interest and discount rates subject to review and determination by the Federal Reserve Board. 3. Acting as fiscal agents and depositories of the United States Treasury, performing services such as paying government checks, taking subscriptions for government bonds, redeeming government bonds, etc. 4. Issuing federal reserve notes which are legal tender, such notes constituting about two-thirds of the circulating currency of the country (Fed. Res. Bulletin 1936, p. 989).

Each Federal Reserve Bank is governed by a Board of Directors, six of whom are chosen by member banks and the other three by the Federal Reserve Board, which consists of seven members appointed by the President of the United States and which exercises a general supervisory control over the Federal Reserve Banks.

The foregoing does not purport to be a complete description of the Federal Reserve System, but it should be sufficient to serve as a basis for this opinion.

II.

INTER-GOVERNMENTAL EXEMPTION FROM TAXATION OF CERTAIN STATE AND FED- ERAL INSTRUMENTALITIES.

There was established, in the case of *McCulloch v. Maryland*, 4 Wheat. 316 (1819), the principle that it is a necessary correlary to our dual system of government that one government should be free, in the exercise of its governmental functions, from tax burdens imposed by the other government. There is no specific provision in the constitution to this effect, but Chief Justice Marshall deduced it from the four corners of the Constitution of the United States.

"It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the states, and that the instrumentalities, means and operations whereby the states exert the governmental powers belonging to them

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are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. *Collector v. Day* (*Buffington v. Day*) 11 Wall. 113, 125, 127, 20 L.ed. 122, 126, 127; *Willcutts v. Bunn*, 232 U.S. 216, 224, 225, ante, 304, 306, 71 A.L.R. 1260, S.Ct. 125. Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute. *McCulloch v. Maryland*, 4 Wheat. 316, 430, 4 L.ed. 579, 607; *United States v. Baltimore & O.R.Co.* 17 Wall. 322, 327, 21 L.ed. 597, 599; *Johnson v. Maryland*, 254 U.S. 51, 55, 56, 65 L.ed. 126, 128, 129, 41 S.Ct. 16; *Gillespie v. Oklahoma*, 257 U.S. 501, 505, 66 L.ed. 338, 340, 42 S.Ct. 171; *Crandall v. Nevada*, 6 Wall. 35, 44-46, 18 L.ed. 745, 747, 748.

"Of course, the reasons underlying the principle mark the limits of its range. Thus * * * it * * * has been held where a state departs from her usual governmental functions and 'engages in a business which is of a private nature' no immunity arises in respect of her own or her agents' operations in that business. *South Carolina v. United States*, 199 U.S. 437 (1905), 50 L.ed. 261, 26 S.Ct. 110, 4 Ann.Cas. 737."

Indian Motorcycle Co. v. U.S., 283 U.S. 570, 575, 576 (1931).

The case of *South Carolina v. United States*, supra, was the first case in which the Supreme Court of the United States definitely enunciated the limitation on the rule of inter-governmental exemptions from taxation. In that case the State of South Carolina had taken over, as a state monopoly, the liquor business and advanced the doctrine of *McCulloch v. Maryland*, as a basis for opposing the payment of federal license taxes. The Supreme Court reviewed the doctrine of inter-governmental instrumentalities, and especially certain of such

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decisions which intimated that the doctrine has limits, and said:

"These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of state agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."

199 U.S. 461.

The court held that the tax must be paid.

Thirty years later the same question was presented to the Supreme Court of the United States in the case of *Ohio v. Helvering*, 292 U.S. 360 (1934) and the court reached the same result, and said:

"If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power. When a state enters the market place seeking customers, it divests itself of its quasi sovereignty pro tanto, and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned."

292 U.S. 369.

If the argument should be made that the retail liquor business is a purely private and proprietary enterprise, and not for the public welfare, and therefore is entirely different from the public purposes sought to be served by the Federal Reserve System, the case of *Helvering v. Powers*, 293 U.S. 214 (1934) will be of interest. In that case the question was whether the compensation of the members of the board of trustees of the Boston Elevated Railway Company were constitutionally exempt from federal income taxes. The trustees were appointed by the Governor with the advice and consent of the Council, were obliged to be sworn before entering upon their duties and were charged with the management and operation of the company, and were

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given "possession of said properties in behalf of the Commonwealth". Under the act governing the railway, the trustees were to fix fares, and in the event there were any operating deficits, the Commonwealth was to pay them, and for a ten year period there were deficits every year.

The Supreme Judicial Court of Massachusetts had upheld the statute as one enacted for a public purpose and characterized the "public operation" as "undertaken by the Commonwealth, not as a source of profit, but solely for the general welfare". Chief Justice Hughes held that the trustees could not escape the federal income tax, and said:

"The State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from the usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend. The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity (citing cases). The necessary protection of the independence of the state government is not deemed to go so far."

293 U. S. 225.

"If the business itself, by reason of its character, is not immune, although undertaken by the State, from a federal excise tax upon its operations, upon what ground can it be said that the compensation of those who conduct the enterprise for the State is exempt from a federal income tax? Their compensation, whether paid out of the returns from the business or otherwise, can have no quality, so far as the federal taxing power is concerned, superior to that of the enterprise in which the compensated service is rendered."

293 U. S. 227.

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III.

THE FEDERAL IMMUNITY FROM STATE TAXATION IS MUTUAL AND CO-EXTENSIVE WITH THE STATE IMMUNITY FROM FEDERAL TAXATION.

We have attempted above to show the origin and present status of the doctrine of tax exemption of inter-governmental instrumentalities and to show that a qualification on that doctrine has become as well established as the doctrine itself. In all of the cases which we have discovered, we have found no distinction made between the state's exemption from federal taxation and the federal exemption from state taxation, and many of the cases have specifically stated that they are mutual and have the same scope and extent. Thus, in *Indian Motorcycle Co. v. U. S.*, 283 U. S. 570, 577 (1931) the court said "that under the implications of the Constitution the governmental agencies and operations of the states have the same immunity from Federal taxation that like agencies and operations of the United States have from taxation by the states".

In *Willcuts v. Bunn*, 282 U. S. 216 (1931) the court said "the familiar aphorism is (that as the means and instrumentalities employed by the general government to carry into operation the powers granted to it are exempt from taxation by the states, so are those of the states exempt from taxation by the government". And in *Fox Film Corp. v. Doyal*, 286 U. S. 123, 128 (1932), the court said "the principle of the immunity from state taxation of instrumentalities of the Federal Government, and of the corresponding immunity of state instrumentalities from federal taxation - essential to the maintenance of our dual system - has its inherent limitations. It is aimed at the protection of the operations of government. (*M'Culloch v. Maryland*, 4 Wheat. 316, 436, 4 L.ed. 579, 608), and the immunity does not extend 'to anything lying outside or beyond governmental functions and their exertions.'"

If the immunity of one government from taxation by the other is completely reciprocal, and if, as is established by the cases above, a state instrumentality must exercise an essential governmental function to escape federal taxation, and cannot escape such taxation merely because it is functioning for the general welfare or the public benefit, then the same principle must apply to federal agencies. The case of *Railroad Co. v. Peniston*, 18 Wall. 5 (1873) involved a state property tax on the assets of a railroad chartered by Congress. The court said:

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"Admitting, then, fully, as we do, that the company is an agent of the General government, designed to be employed, and actually employed, in the legitimate service of the government, both military and postal, does it necessarily follow that its property is exempt from State taxation?"

18 Wall. 32.

The court answered this question in the negative.

To return to the employees of the Federal Reserve Banks, it has been seen that all of the stock in these banks is owned by the member banks, and six of the nine directors of each Federal Reserve Bank are selected by the member banks. The Federal Reserve Banks engage in the business of accepting certain kinds of deposits both from the government and the reserve deposits of the member banks. They discount notes and make private loans, and dividends from profits are paid to the member banks who are stockholders. It is true that the Federal Reserve System was created for a public purpose and that it guides the fiscal and banking policies of the United States Government to a large extent, but its non-governmental functions and dealings would seem sufficient to justify the application of the Missouri income tax laws to its employees. As noted in *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911):

"In the case of *South Carolina v. United States*, 199 U.S. 437, this court held that when a State, acting within its lawful authority, undertook to carry on the liquor business it did not withdraw the agencies of the State carrying on the traffic from the operation of the internal revenue laws of the United States. If a State may not thus withdraw from the operation of a Federal taxing law a subject-matter of such taxation, it is difficult to see how the incorporation of companies whose service, though of a public nature, is, nevertheless, with a view to private profit, can have the effect of denying the Federal right to reach such properties and activities for the purposes of revenue.

#9 - Hon. Forrest Smith

May 5, 1937.

"It is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water and the like. These objects are often accomplished through the medium of private corporations, and, though the public may derive a benefit from such operations, the companies carrying on such enterprises are, nevertheless, private companies, whose business is prosecuted for private emolument and advantage. For the purpose of taxation they stand upon the same footing as other private corporations upon which special franchises have been conferred."

220 U. S. 172.

The question which you have asked is not free from doubt. A similar question is now pending before the Supreme Court of Missouri in a test case involving the applicability of the Missouri Income Tax Law to an employee of the several units of the United States Farm Credit Administration - State ex rel Baumann v. Bowles, No. 35209 - which will probably be argued before the Court en banc in September of this year. If that case is decided on the merits and is decided in our favor, we believe that its decision would govern the employees of Federal Reserve Banks, and unless that case is decided adversely to us, we are not willing to advise you to exempt employees of the Federal Reserve Banks from Missouri income taxes.

In conclusion, it is our opinion that employees of the Federal Reserve Banks are liable for Missouri income taxes on their income received as compensation from such banks.

Very truly yours,

EDWARD H. MILLER,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

LIQUOR: Appropriation for Department of Liquor Control
cannot be used to pay expenses of witnesses
subpoenaed by the State or Liquor Control.

May 24, 1937. 5-26

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this Department, which reads as follows:

"I have had presented to me for payment a number of bills similar to the following:

'The following is an itemized account of the mileage and expenses due me in the matter of the application to revoke the state Liquor License of C. A. Cantrell.

Mileage from Quilin	
to Jefferson City	
and return, 560 miles	
at 5¢.....	\$28.00
Room and meals.....	4.90
Total.....	\$32.90'

These bills have been approved by the Liquor Commissioner for payment out of his appropriation for Operation.

The question has arisen as to whether the state is liable for the payment of mileage and expenses in a hearing before the Supervisor of Liquor Control of this state.

Honorable Forrest Smith

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As the payment of similar bills promises to run into a large sum of money during the next biennium, I would like an opinion from your office as to the legality of such payments."

The following Section of the Liquor Control Act provides that the Supervisor of Liquor Control may issue subpoenas and all necessary processes when necessary.

"Sec. 13: The Supervisor of Liquor Control shall have the authority to revoke for cause all such licenses; * * *

"Establish rules and regulations for the conduct of the business carried on by each specific licensee under the license and such rules and regulations if not obeyed by every licensee shall be grounds for the revocation of the license;

"The right to examine books, records and papers of each licensee and to hear and determine complaints against any licensee;

"To issue subpoenas and all necessary processes and require the production of papers, to administer oath and to take testimony;

"And to make such other rules and regulations as are necessary and feasible for carrying out the provisions of this act, as are not inconsistent with this act."

Furthermore, Section 26 of the Liquor Control Act provides when the Supervisor of Liquor Control may revoke licenses and in what manner.

"Sec. 26: Whenever it shall be shown, or whenever the Supervisor of Liquor Control has knowledge that a dealer licensed hereunder, has not at all times kept an orderly place or house, or has violated any of the provisions of this act, said Supervisor of Liquor Control shall revoke the license of said dealer, but the dealer must have ten (10) days' notice of the application to revoke his license prior to the order of revocation issuing, with full right to have counsel, to produce witnesses in his behalf in such hearing and to be advised in writing the grounds upon which his license is sought to be revoked."

From a careful reading of the above provisions of the Liquor Control Act it can be easily seen that the Legislature fully intended the Supervisor of Liquor Control should, when he deemed it necessary, subpoena witnesses to appear before him and testify in behalf of the State, as well as giving the licensee cited notice to appear and show cause why his license should not be revoked, and like opportunity to appear with witnesses and be heard. The law is mandatory that the Supervisor of Liquor Control give the licensee ten (10) days' notice to appear and show cause why his license should not be revoked for a violation of the Liquor Control Act. It follows that the same privilege is accorded the Supervisor of Liquor Control to present witnesses for the State when he deems it necessary. In many instances this is absolutely essential to prove the

guilt of said licensees. In the absence of such testimony there would be insufficient evidence to support a revocation.

Now that the Supervisor of Liquor Control has the power to subpoena witnesses when necessary to his case, we come to the main question, which is-- "Is the State liable for said witnesses' expenses, and if so, has the Legislature appropriated money for the payment of same?"

The common law rule was that witnesses' expenses and fees should be tendered before they could be compelled to attend court. *Smith vs. Barger*, 9 Yerg. (Tenn.) 322. This rule has been abrogated in most jurisdictions today by statutory provisions. In this State statutory provisions have been enacted whereby witnesses in most cases are entitled to fees and expenses. Section 11798 R. S. Mo. 1929 reads in part as follows:

"Witnesses shall be allowed fees for their services as follows:
For attending any court of record, reference, arbitrators, commissioner, clerk or coroner, at any inquest or inquiry of damages, within the county where the witness resides, each day, \$1.50. For like attendance out of the county where witness resides, each day \$2.00.
For traveling each mile in going to and returning from the place of trial, .05. For attending before a justice of the peace, each day, \$1.00. For traveling each mile in going to and returning from the place of trial before a justice of the peace, .05.
For attending under the law to perpetuate testimony, the same fees as are allowed for attending a court of record in like cases."

May 24, 1937.

For this service the Clerk makes out a fee bill, and same is charged as costs in the case.

After a careful examination of the Appropriation Act of 1935 we find no provision in the whole Act specifically appropriating any money to defray expenses of witnesses called in by the Supervisor of Liquor Control, or subpoenaed by him to testify. Provisions pertaining to appropriations for the Liquor Department are contained in three Sections, which read as follows:

Section 33, pp. 102-103, Laws of 1935.

"There is hereby appropriated out of the State Treasury, chargeable to the general revenue fund, the sum of Four Hundred Six Thousand Dollars (\$406,000.00) to the Department of the Supervisor of Liquor Control, to pay for the personal service, additions and operating expenses required in connection with the administration of the Liquor Control Law, passed by the Fifty-Seventh General Assembly, Extra Session, as follows:

A. Personal Service.

Salaries and wages of Supervisor of liquor control, accountants, auditors, bookkeepers, inspectors, stenographers, clerks and other necessary employees... \$200,000.00

B. Additions:

Original purchase of transporting and conveying equipment, and necessary office furniture and equipment..... \$ 6,000.00

D. Operation:

General expenses consisting of communication, binding and printing, transportation of things, travel, stationery, office supplies, and other general and miscellaneous expenses..... \$200,000.00

TOTAL..... \$406,000.00"

The Missouri Constitution prohibits any money being paid out of the Treasury of this State in the absence of an Appropriation Act by the General Assembly. Section 19 of Article X of the Missouri Constitution, provides in part:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law. * * "

The reason for such a Constitutional provision is stated in C. J., Sec. 381, pp. 235-6, which reads as follows:

"The constitutions in many states provide that no money shall be paid or drawn from the state treasury or warrant drawn therefor except in pursuance of specific appropriations made by law. The object of such a provision is to prevent the expenditure of the people's funds without their own consent, expressed either by themselves in the state constitution or by their representatives in legislative acts. * * * "

Section 43 of Article IV, of the Missouri Constitution prohibits money to be drawn from the State Treasury except in pursuance to regular appropriation made by law.

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law."

May 24, 1937.

We think the Legislature never intended a witness who might have such information or knowledge of illegal acts by liquor licensees should be required to defray his own expenses to and from Jefferson City, Missouri, in order that the State of Missouri should gain the benefit of his testimony. This in no other instance is required of a witness in this State. Therefore it unquestionably must have been the intention of the Legislature in enacting Sections 13 and 26, supra, that said witnesses subpoenaed by the Supervisor of Liquor Control should testify for this State against a liquor violator should receive their expenses.

However, in determining the law on this question the intention of the Legislature is not the predominating factor. It may have fully intended these witnesses be reimbursed for expenses, but in the absence of an Appropriation Act to defray said expenses, said witnesses are not entitled to their expenses. The reason for this is already stated in 59 C. J., Section 381, supra, the object being to prevent the expenditure of the people's funds without their consent expressed either by themselves in the State Constitution or by their representatives in Legislative acts. Also Section 19 of Article X, Missouri Constitution and Section 43 of Article IV, supra, support this theory.

Turning to the Appropriation Act of 1935 for the Liquor Department, a most liberal interpretation of Sub-sections A and B cannot possibly include an appropriation for reimbursement to witnesses for expenses to and from said hearings. This leaves Sub-section D, which is an appropriation for operation, and the only provision in this Act which might be applicable, reads as follows:

" * * * And other general and miscellaneous expenses."

In Meyers vs. Kansas City, 18 S. W. (2d) 900, 1. c. 901, the Court had the following to say as to the proper construction to be placed on Appropriation Acts:

"Another general rule in the construction of statutes, applicable as well to municipal ordinances, is that acts of the character here under review are to be strictly construed."

In William P. Dunwoody vs. U. S., 22 Ct. Cl. 269, 1. c. 280, the Court said:

"The adjectives contingent, incidental and miscellaneous, as used in appropriation bills to qualify the word 'expenses' have a technical and well-understood meaning; It is usual for Congress to name the principal classes of expenditure which they authorize, such as clerk hire, fuel, light, postage, telegrams, etc., and then to make a small appropriation for the minor and unimportant disbursements incidental to any great business which cannot be well foreseen, and which it would be useless to specify more accurately. For such disbursements a round sum is appropriated under the head of 'contingent expenses', or 'incidental expenses', or 'miscellaneous expenses' * *.

"It is clear that specific appropriation being made for the clerks, messengers, laborers, rent, light, fuel, stationery, postage, no disbursements can be made for any such expense from the appropriation for 'miscellaneous expenses' which covers non-enumerated petty disbursements necessarily made in the performance of the duties imposed by law".

The decision rendered above classifies miscellaneous expense as being more in the nature of a minor or unimportant disbursement which cannot well be foreseen, or petty disbursements.

It is our opinion that witnesses' expenses could have been specifically mentioned and avoided this confusion. Furthermore, a reasonable estimate as to the amount required for this purpose could have been determined, and therefore miscellaneous expense could not include witnesses' expense in view of the Appropriation Act of 1935 as passed by the General Assembly.

At the outset the General Assembly used the term "general expenses" following this by enumerating certain items of general expense. By the General Assembly enumerating certain items of expense we contend they confined said appropriations to these items; otherwise there would have been no need to enumerate since the term "general expenses" was in itself sufficient to include all items enumerated in Sub-section D of this Appropriation Act.

"Communication, binding and printing, transportation of things, travel, stationery, office supplies, and other general and miscellaneous expenses."

The general rule of construction of Appropriation Acts is that when general words follow particular words, the general words will be considered as applicable only to persons or things of the same general character or class, and cannot include wholly different things. In other words, the general words are restricted and limited to the particular words used in the Act.

Honorable Forrest Smith

-10-

May 24, 1937.

In Puritan Pharmaceutical Co. vs. Penn., 77 S. W. (2d) 508, 1. c. 511, the Court in construing the following Section

"When any officer shall discover--
being transported contrary to law"

had this to say:

"We do not see how this section can be made applicable to railroad transportation unless we discard the rule of construction, known as the ejusdem generis rule, that where general words in a statute follow specific words, designating special things, the general words will be considered as applicable only to things of the same general character as those which are specified. Mangelsdorf vs. Pennsylvania Fire Ins. Co., 224 Mo. App. 265, 26 S. W. (2d) 818."

It is therefore the opinion of this Department that the money appropriated in this Act can be used only for items enumerated therein, and cannot be used to defray expenses of witnesses subpoenaed by the Supervisor of Liquor Control to and from Jefferson City, Missouri.

Respectfully submitted,

APPROVED:

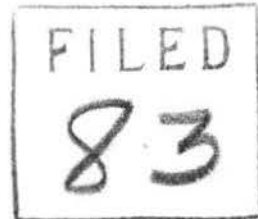
AUBREY R. HAMMETT, JR.
Assistant Attorney-General

J. E. TAYLOR
(Acting) Attorney-General.

ARH/R

CORONER: Duty of attending physician to notify coroner upon death of person from injuries received by violence.

June 9, 1937



Mr. Wayne V. Slankard,
Prosecuting Attorney,
Neosho, Missouri.

Dear Sir:

We wish to acknowledge your request for an opinion wherein you state as follows:

"Coroner, Corley Thompson, of Newton County has requested that I obtain your opinion on the following:

"Within the past week two deaths have occurred by violence the parties having died in the local hospital. The doctor in charge of this hospital and who was in attendance upon these parties, failed to notify the coroner even after being requested after the first death to so notify the coroner in the event of a death in his hospital of someone injured by violence.

"I have attempted to ascertain from the Statutes, but I am not clear on it. Will you please let me know whether or not a physician under these circumstances would be required to notify the coroner, and whether a physician who attends upon a person who later dies from injuries received by violence, is required to notify the coroner, and if so, in the event they failed to do so what means may be taken to force such notification.

"Mr. Thompson has handed me the opinion you rendered to Mr. L. D. Rice in regard to the duties to hold inquests and it strikes me that the physician would be required to notify the coroner."

Section 9046, R. S. Mo. 1929, provides that the medical certificate of death shall be signed by the physician, if any, last in attendance, and if caused by violence, shall state its nature, in part, as follows:

"The medical certificate shall be made and signed by the physician, if any, last in attendance on the deceased, * * *. Causes of death, which may be the result of * * * violence, shall be carefully defined; and, if from violence, its nature shall be stated, and whether (probably) accidental, suicidal, or homicidal."

In the case of O'Donnell v. Wells, 323 Mo. 1170, 21 S. W. (2d) 762, 1. c. 765, the court in holding that in cases calling for an inquest it would be the duty of the attending physician to notify the coroner, said:

"It is clear the lawmakers had in mind the best information obtainable, for they provided in section 5802, Rev. St. 1919, that the medical certificate of the death certificate must be made and signed by the attending physician. They not only commanded the attending physician to make and sign the medical certificate but provided he would be guilty of a misdemeanor if he failed or refused to do so. Section 5817, Rev. St. 1919. In cases calling for an inquest it would be the duty of the attending physician to notify the coroner. It would then be the duty of the coroner to hold an inquest under chapter 48 (sections 5916-5957), Rev. St. 1919."

June 9, 1937

From the foregoing, we are of the opinion that it is the duty of the attending physician to notify the coroner in case of the death of a person due to injuries received by violence.

Yours very truly,

MAX WASSERMAN,
Assistant Attorney General.

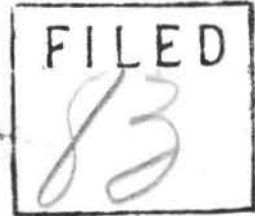
APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

BONDS: OFFICERS: Collector who fails to certify delinquent state income taxpayers within thirty days after delinquency is liable on his official bond.

June 17, 1937.

6-18



Hon. Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Mr. Smith:

We wish to acknowledge your request for an opinion under date of June 11th, wherein you state as follows:

"Under Section 10136 of the State Income Tax Law, as passed by the Fifty-eighth General Assembly, it was made compulsory on the part of the various County Collectors throughout the State of Missouri, and the City Collector of St. Louis, to certify all delinquent state income tax to the State Auditor within thirty days after it becomes delinquent.

"This office has had considerable trouble by reason of the fact that many Collectors throughout the State fail to make the above certification within the time required by law.

"Will you kindly advise whether or not a Collector who fails or refuses to certify delinquent state income taxpayers appearing on his records would be liable on his official bond for any state income tax which may be made uncollectable due to his negligence, failure or refusal to certify such delinquents in accordance with the law."

June 17, 1937

Section 10136, Laws of Missouri, 1935, page 410, makes it the duty of the collector to certify all delinquent state income tax to the State Auditor within thirty days after it becomes delinquent:

"All taxes assessed on account of incomes shall become delinquent on the second day of June, where assessments are required to be made and certified to by the assessor prior to April 30, and subsequent to March 15; in all other cases taxes assessed on account of income, shall become delinquent thirty days after the tax book is required by law to be delivered to the collector; within thirty (30) days after such delinquency the collector shall certify the names of the delinquent taxpayers to the State Auditor,
* * * ."

The Court in the case of State ex rel. Stephens v. Wurdeman, 295 Mo. 566, in referring to the word "shall", said:

"Usually, the word 'shall' indicates a mandate, and unless there are other things in the statute it indicates a mandatory statute."

We are of the opinion that the duty imposed upon the collector to certify all delinquent state income tax to the State Auditor within thirty days after it becomes delinquent is mandatory and gives no room for opinion or discretion.

Section 9885, Laws of Missouri, 1935, page 409, provides that the collector's bond is conditioned that he will in all things faithfully perform all the duties of his office according to law:

"Every collector of the revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before entering

June 17, 1937

upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent, of said amount: Provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. * * *

46 C. J., Sec. 398, page 1068, in discussing the liability of officers on their bonds for negligence, states that:

"The condition of an official bond providing for the faithful discharge by the principal of his official duties is broken by the mere negligence, without corruption, of the principal in the performance of a ministerial duty, which performance does not involve the exercise of discretion."

In the case of *People v. Smith*, 55 Pac. 765, 1. c. 766, 767, 123 Cal. 70, the court in pointing out that where the bond requires the faithful exercise of all official duties, the neglect to perform a duty which is ministerial, and does not involve an exercise of discretion, is a breach of the obligation, said:

June 17, 1937

" * * * the duty of the assessor to collect the tax is merely ministerial, and gives no room for opinion or discretion, and the neglect to discharge that duty is a breach of the obligation of the bond. In People v. Gardner, 55 Cal. 304, 307, it was said: 'It is the duty of an officer to do what the law requires to be done in his office, for the law is to him a command which he must obey. If it prescribes the course which shall be taken, and the thing which must be done by any one in office, the officer cannot disregard it. A failure to obey the law, or a disregard of duty, is a non-performance of duty, and a breach of the official bond of the officer, for which he and the sureties thereon are liable.'"

From the foregoing, we are of the opinion that a collector who fails or refuses to certify all delinquent state income taxpayers appearing on his records to the State Auditor within thirty days after they become delinquent is liable on his official bond for any state income tax which may be uncollectable due to his negligence, failure or refusal to certify such delinquents in accordance with the law.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

TAXATION - INCOME TAXES: Liability of employees of railroad federal equity receiver or trustee under Section 77 of the National Bankruptcy Act.

6-19
June 18, 1937.

FILED
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Hon. Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of June 1, 1937, such request being in the following terms:

"This office has had many inquiries asking whether or not the salaries paid to employees of railroads operating under Federal receiverships are subject to state income tax.

"This office has been holding that the salaries of such employees are subject to tax for state income tax purposes, except in the case of a receiver appointed by the Federal Court. The State Supreme Court held in the case of State ex rel vs. Truman 4 SW (2) 433 that salaries paid receivers are not subject to state income tax.

"I would very much appreciate a written opinion as to whether or not salaries of employees of railroads operating under Federal receiverships, other than the receiver appointed by the Federal Court, are subject to state income tax."

Most of the railroad companies under the jurisdiction of the Federal Court and employing a large number of persons in Missouri, are being operated by a trustee in reorganization proceedings under Section 77 of the National Bankruptcy Act, such as the Missouri Pacific Railroad Company, the St. Louis Southwestern Railway Company, the St. Louis-San Francisco Railroad Company, and their subsidiaries. The Wabash Railway Company is the only large railroad having headquarters in Missouri which is operating under a federal equity receivership. We presume your inquiry relates to employees of the receivers or trustees operating all of these companies.

July 18, 1937.

We have recently, in an opinion to you dated May 5, 1937, concerning the taxability of employees of Federal Reserve Banks, reviewed at some length the history and present status of the constitutional principle that a state cannot tax the essential governmental functions of the United States Government, and we refer you to that opinion, deeming it unnecessary to set these matters forth again.

It is true that in the Truman case ((State ex rel Thompson vs. Truman, 4 S.W. (2d) 453 (1928)) mentioned in your letter, the Supreme Court of Missouri held that the compensation of a federal equity receiver is not subject to Missouri income taxes. However, the decision in that case was based on the theory that the United States Constitution prohibits such taxation, and there have been developments since the date of that decision which would seem to have the effect of allowing such taxation even if the decision in the Truman case stated the law at the time it was handed down.

In 1934 Congress enacted a statute contained in 28 U.S.C.A. as Section 124a thereof, as follows:

"State taxation; business conducted by receivers, trustees or other court officers subject to

"Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation: Provided, however, That nothing in this section contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to June 18, 1934, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States imposing the same. (June 18, 1934, c. 555, 48 Stat. 993)."

June 18, 1937.

Also, since the decision in the Truman case, the Supreme Court of the United States has decided the case of *Michigan v. Michigan Trust Co.*, 286 U.S. 334 (1932), holding that a receiver appointed by a Federal Court must pay franchise taxes to the state of incorporation for the privilege of exercising the corporate franchise which he is authorized to exercise by the Federal Court itself. In the course of this opinion the court said:

"To protect through a receiver the enjoyment of the corporate privilege and then to use the appointment as a barrier to the collection of the tax that should accompany enjoyment would be an injustice to the state and a reproach to equity."

Even before the decision in the Truman case the Supreme Court of the United States in the case of *St. Louis-San Francisco Railroad Co. v. Middlekamp*, 256 U.S. 226 (1921) had held that the Missouri Franchise Tax could be collected from a railroad being operated under war time governmental control.

The only way in which an employee of a business can escape state income taxation on the theory that to tax his income would be to impose a burden on an essential governmental function of the United States, is for him to establish that a tax on the business or instrumentality employing him would constitute a burden on a federal governmental instrumentality. This is illustrated by the case of *New York ex rel Rogers v. Graves*, 31 L.Ed. 202, decided January 4, 1937 in which, on page 206, the court said:

"The railroad company being immune from state taxation, it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune."

It has always been recognized by the federal courts that it is unfair for a purely private business to escape taxes to which its competitors are subject, when a receiver is appointed for it. In 1933 the United States District Court for the Western District of Missouri decided, in the case of *Howe v. Atlantic, Pacific & Gulf Oil Co.*, 4 Fed.Supp.162, that a federal equity receiver was not liable for Missouri gasoline taxes. That decision has been offered as the reason for the enactment of Section 184a of the United States Code quoted above (CCH Bankruptcy Law Service, Paragraph 681, quoting a House Report of the United States Congress to that effect).

Hon. Forrest Smith

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July 18, 1937.

The Howe case was reversed by the Circuit Court of Appeals under the name of Kansas City v. Johnson, 70 Fed. (2d) 369 (1934), and certiorari was denied - 293 U.S. 617 (1934). To the same effect is Gillis v. California, 293 U.S. 62 (1934). Where the business is essentially private, it is manifestly unfair to allow it to escape state taxes merely because a receiver has been appointed for it by a federal court, and if the business is subject to taxes, the income of its employees is likewise so subject. The reasoning in Kansas City v. Johnson and Gillis v. California, supra, is likewise applicable to income taxes of employees because it gives a corporation under receivership or trusteeship an advantage in obtaining employees, if those employees are not required to pay state income taxes, when the employees of competitors of such business are required to pay income taxes.

In conclusion, it is our opinion that employees of a federal equity receiver or of a trustee under Section 77 of the National Bankruptcy Act, operating a railroad under the jurisdiction of a federal court, are liable for Missouri income taxes on their income so received.

Very truly yours,

EDWARD H. MILLER,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

COUNTY SURVEYOR: Entitled to salary as Surveyor and as ex officio County Engineer.

July 14, 1937.

7-16

FILED

83

Honorable F. H. Slocum,
Judge of the County Court of Knox County,
Baring, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion as to the following:

"Please give me your opinion on the following question.

For the month of April the Knox County Court with the Equalization Board was in session 14 days. Our Surveyor of course was with us drawing his \$70.00 for the 14 days in session. A few years ago our County voted to not have a Highway Engineer. When the Government commenced putting on special road projects the Court had to have an Engineer for that and according to law appointed the Surveyor for the Engineer for the project not for the county or dirt roads. The Court set his salary at \$133.00 per month as the project Engineer. For April he not only drew the \$70.00 as a member of that board but his entire salary as Highway Engineer. Look like salary for the 14 day should be taken out of salary of \$133.00. We are divided. Please answer soon."

Section 8020, R. S. Mo. 1929 provides, in part, as follows:

"In all counties wherein the services of a county highway engineer are dispensed with, as provided by section 8019 of this article, the county surveyor, shall be ex officio county highway engineer, and as such, shall perform such services pertaining to the working, improvement, repairing and maintenance of the roads and highways, and the building of bridges and culverts as provided by this article to be done and performed by the county highway engineer, or as may be ordered by the county court; and for his services as ex officio county highway engineer he shall receive such compensation as may be allowed by the county court, of not less than three dollars nor more than five dollars for each day he may be actually employed or engaged as such county highway engineer."

Since Knox County has voted against the County highway engineer law as provided in Section 8019 R. S. No. 1929, the provisions of Section 8020 set out above are now controlling in Knox County. You will notice that this section requires that the County Surveyor serve as ex officio County Highway Engineer and to perform the duties of the County Highway Engineer or such duties as may be ordered by the County Court. The County Court, therefore, has the authority to limit the duties of the County Surveyor as ex officio County Highway Engineer to certain specific projects. We assume that the County Court, in assigning these duties to the County Surveyor and fixing his compensation therefor, acted by virtue of the authority granted by this Section of our laws.

However, the compensation contemplated by Section 8020 was for the payment of services rendered by the County Surveyor as ex officio County Engineer and has nothing to do whatsoever with his fees received by reason of his holding the office of County Surveyor. Section 9818 R. S. No. 1929, however, provides for a fee of five dollars per day to the County Surveyor for his services as a member of the county board of equalization, a totally different office from that of ex officio Highway Engineer.

In the case of State ex rel Koehler v. Bulger, 233 S. W. 486, the Court had a similar question to determine. That is, whether the County Surveyor of Jackson County was entitled to a fee as County Surveyor and a fee for duties as ex officio County Engineer. In concluding that the Surveyor was entitled to two fees, Judge Graves said:

"We conclude that relator is entitled to two salaries of \$3000 each, one as County Surveyor under Section 11041 R. S. No. 1919, and one under Section 10784 R. S. No. 1919."

While we are here considering different statutes than those construed by the Court in the Koehler case, nevertheless the principle is the same, and we conclude that the County Surveyor is entitled to a fee as provided by Section 9818 R. S. No. 1929 and also is entitled to a fee as ex officio County Engineer as provided in Section 8020 R. S. No. 1929.

Respectfully submitted,

JOHN W. HOFFMAN, JR., Assistant
Attorney General.

JWH:EG

APPROVED:

(Acting) ATTORNEY GENERAL

SALES TAX:

Sections 13,
24 and 25,
Sales Tax Act
of 1937.

) In case the State Auditor extends time for
) making any return or paying any tax required
) by this Act, such taxpayer is relieved of the
) payment of the interest prescribed by Section
) 24 and is entitled to deduct the 3% of the tax
) as provided by Section 25 of the Act.
)

July 14, 1937.

7-17



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your letter of July 12, 1937, wherein you request an opinion as to the provisions of the following sections of the Sales Tax Act of 1937 (Senate Committee Substitute for House Committee Substitute for House Bill No. 6, enacted by the 59th General Assembly); which said sections and your question concerning same, as set out in your letter, are as follows:

"Section 13 of the Act provides as follows:

'The Auditor for good cause may extend, for not to exceed sixty days, the time for making any return or paying any tax required under the provisions of this Act.'

"Section 24 provides as follows:

'All taxes not paid to the Auditor by the person required to remit the same on the date when the same becomes due and payable to the Auditor, shall bear interest at the rate of three (3) percent per calendar month, or fraction thereof, from and after such date until paid.'

"Section 25 of the Act provides as follows:

July 14, 1937.

'From every remittance to the State Auditor made on or before the date when the same becomes due, the person required to remit the same shall be entitled to deduct and retain an amount equal to three per cent thereof.'

"The question is whether or not, if this Department has granted a taxpayer an extension for filing returns under the provisions of Section 13, is the taxpayer entitled to retain 3% of the amount of tax collected as provided in Section 25. Also if the taxpayer has been granted an extension for filing returns, would it be necessary for the taxpayer to pay 3% interest per month or fraction thereof as provided in Section 24 for each month or fraction thereof after the 15th day of the month following collection until remittance is received at this office?"

In arriving at our conclusions it is necessary to consider, together with the foregoing sections, the following provisions of Section 5 and Section 10, of said Act, as follows:

"Section 5. Every person receiving any payment or consideration upon the sale of property or rendering of service subject to the tax imposed by the provisions of this Act, or required to make collection of the tax imposed by the provisions of this Act, shall be responsible not only for the collection of the amount of the tax imposed on said sale or service but shall, on or before the 15th day of each month, make a return to the State Auditor of all taxes collected for the preceding month or required to be collected for the preceding month, and shall remit the taxes so collected or required to be collected to the State Auditor. * * * *"

"Section 10. Every person making or rendering any sale, service or transaction taxable under this Act shall on or before the fifteenth day of the month after this Act becomes effective, and on or before the fifteenth day of every calendar month thereafter, individually or by duly authorized officer or agent make and file with the Auditor a written return, in the manner and form designated or prescribed by said Auditor, and upon blanks furnished by him showing the amount of gross receipts from sales, services and taxable transactions by such person and the amount of tax due thereon during and for the preceding calendar month, or that portion thereof subsequent to the effective date of this Act, and with such written return such person shall remit to the Auditor the amount of said tax due. * * * * *

Section 13 of the Act provides as follows:

"The Auditor for good cause may extend, for not to exceed sixty days, the time for making any return or paying any tax required under the provisions of this Act."

Section 24 of the Act provides as follows:

"All taxes not paid to the Auditor by the person required to remit the same on the date when the same becomes due and payable to the Auditor, shall bear interest at the rate of three (3) per cent per calendar month, or fraction thereof, from and after such date until paid."

Section 25 of the Act provides as follows:

"From every remittance to the State Auditor made on or before the date

July 14, 1937.

when the same becomes due, the person required to remit the same shall be entitled to deduct and retain an amount equal to three per cent thereof."

The general provisions of Sections 5 and 10 of the Act, making the sales tax payable by the fifteenth day of every calendar month after the collection of such tax, do not apply where the Auditor by authority of the provisions of Section 13 for good cause extends, not to exceed sixty days, the time for making any return or paying any tax required. By this section it appears that the Legislature has especially given the Auditor power to grant an extension of time for making the return and payment of the tax for a period not to exceed sixty days, and thereby changing the "due date" for such report and payment. The term "due date," or date when same becomes due, seems to refer to the general provisions of the statute that the tax shall be paid by the fifteenth.

The Auditor, by the provisions of Section 13, may extend the time for making any return paying any tax required under the provisions of said Act. Within that time the tax will not be determined. It is true the statute imposes the tax, but that does not constitute a debt in the ordinary sense. It is rather a liability to a debt; there remains to be determined that the person or firm is subject to the tax, and the amount of the tax, before an indebtedness can be said to have accrued and be payable. If the Auditor grants to the person or firm such extension of time to make their return and/or pay the tax, then such indebtedness would not accrue until the time of such extension and the taxpayer would not be liable for the payment of any interest as provided by Section 24, and if he has paid the tax on the "due date", which is especially fixed by the Auditor, he is entitled to deduct and retain an amount equal to three per cent. of such remittance, as provided by Section 25 of the Act.

Conclusion.

We are, therefore, of the opinion that the taxpayer who has been granted an extension of time by the Auditor in which to pay the tax provided by this Act, and if he makes

July 14, 1937.

report and pays his tax within such time, is not liable for the payment of the interest provided in Section 24 of the Act, and he is entitled to deduct and retain an amount equal to three per cent. of such remittance.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

TWB:EG

COUNTY COLLECTORS: County Collectors liable on official bonds, where they fail or refuse to publish a list of delinquent lands for sale.

August 13, 1937

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri



ATTENTION: W. A. Holloway, Chief Clerk

Dear Sir:

This is to acknowledge receipt of your request for an opinion, reading as follows:

"We would like for your office to advise us concerning the liability of a county collector and his bondsmen should the county collector fail or refuse to make the required publication and hold the certificate sale for the collection of taxes as prescribed by the Jones-Munger back tax law; and by that failure or refusal to hold such sale permit taxes due to outlaw under the statute of limitations.

"Concerning this publication, it has been the understanding of this office that under the provisions of Section 9952b as amended by the 58th General Assembly, Laws of Missouri 1935, page 403, that the costs of the afore mentioned publication should be paid out of

August 13, 1937

the county treasury, and that said costs of publication should be taxes as costs in the certificate sale and paid by the certificate purchaser, thereby reimbursing the county treasury.

"We would like for you to advise us if this interpretation is correct."

Your attention is respectfully directed to Section 9885, relating to the requirements of every collector of revenue in the various counties of this state, in giving bond, Laws of Missouri, 1935, p. 409. It reads in part as follows:

" * * * conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law."

From the above quotation you will particularly notice the phrases "faithfully and punctually collect" and "faithfully perform * * * according to law". We shall consider these phrases and words in light of adjudicated cases and standard definitions of the same.

In this connection your attention is directed to the case of Perry v. Thompson, 16 N. J. (Law) 72, 73, wherein the court in speaking of the word "faithfully", said:

"The word 'faithfully', as it respects temporal affairs, means diligent, without unnecessary delay: as a faithful officer, a faithful servant, in applying to their duties".

In the case of Archer v. Noble 3 Me., 418, 420, the court had before it for consideration the construction of a bond that had been given by a constable in office wherein the bond was conditioned by the faithful performance of the duties of that office, and in construing the bond the court said:

"Now, as Noble, constable, and his surities, were bound for his faithful performance of the duties of his office, the condition of the bond must be construed to embrace all those instances of malfeasance, misfeasance, and nonfeasance, in the execution of his office, which would subject a principal to responsibility for similar wrongful actions of his deputy; and we have seen how far this responsibility extends."

A diligent search has not disclosed wherein a judicial interpretation has been placed upon the word "punctually", and we have relied upon the definition ascribed to the word by Webster's New International Dictionary. It is defined as follows:

" * * * promptly * * * "

The word "punctual", an adjective, is defined by the afore mentioned dictionary as follows:

"Punctilious in regard to appointed time; of action; manifesting attentiveness to exact time determined by an engagement or schedule."

In the case of Shanahan v. State, reported in 142 Md. 616, 630, 631, 635, the court considered the

liability of one William J. Shanahan, on his bond executed in the favor of the State of Maryland. The conditions of the bond were substantially the same as the conditions imposed by Section 9885, supra. The court in speaking of the duties imposed upon the collectors of public moneys said:

"There are many cases, both in this state and elsewhere, which prescribe with more or less clearness the duties of such an official as a county treasurer, but nowhere is it more clearly defined than in the case of United States v. Thomas, 15 Wall, 337, which opinion was written by Justice Bradley, and in it he lays down the rule that 'a collector of public moneys is a bailee and only bound to due diligence and only liable for negligence or dishonesty. * * * The measure of his accountability is to be found in the official bond.' This decision is in accord with Colerain v. Bell, 9 Metc. (Mass.) 499. In Olean v. King, 116 N. Y. 355, the collector and his bond were held liable because of the fact that he rendered no account whatever of uncollected taxes, and the case of Supervisors v. Otis, 62 N. Y. 88, follows the same rule as did Justice Bradley in United States v. Thomas, supra.

* * * * *

" * * * a collector may be liable for taxes which he never collects, where the

failure to collect was due to some omission or act of negligence upon his part."

The evidence in this case tended to show that the defendant was derelict in his duty for failure to make a return of defunct corporations, chattels no longer in existence, property in custodia legis; and, further, that in the case of property in custodia legis, the collector made no application to the court under the jurisdiction of which the property was for an order for leave to sell, which would have given him a priority for taxes.

The court, in speaking further of the duties imposed upon the collector, at page 635, said:

"It is perfectly manifest that, after Mr. Shanahan ceased to be the county treasurer, he had no means at his command by which to enforce the payment of taxes due for the years when he had been county treasurer which he had not collected, but this cannot be carried to the point of saying that he and his bond were relieved of all liability for the non-collection of taxes when that was the result of some dereliction upon his part."

From the above considerations you will have noticed: that when a collector of public moneys is charged with the duty of faithfully and punctually effecting the collection of moneys due the sovereign, and fails, it amounts to non-feasance in office, and such dereliction while in office may make the collector and his sureties liable upon his therefore executed bond.

We next turn in our consideration to the duties imposed upon the various collectors of this state relat-

ing to the publishing and printing of lists of the delinquent lands and lots to be sold on the first Monday in November of each year.

Under the provisions of Section 9949 Laws of Mo., 1933, p. 427, it is provided in substance and effect that the collectors of the respective counties of this state shall proceed to collect the taxes contained in the back tax book or recorded list of delinquent lands and lots in the collector's office.

Section 9952a, Laws of Mo., 1933, p. 430 provides in substance and effect that all lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes.

Section 9952b, Laws of Mo., 1935, p. 403, 404, provides in part as follows:

"The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November."

In the case of *ex parte Brown*, 297 S. W., 445, 447, the court in discussing whether a statute was mandatory or directory, said:

"When a fair interpretation of a statute which directs acts or proceedings to be done in a certain way shows that the Legislature intended a compliance with such provision to be essential to the

validity of the act or proceeding, then such statute is mandatory."

In the case of State ex rel Stephens v. Wurdeman, 295 Mo. 586, the court said:

"Usually the word 'shall' indicates a mandate and unless there are other things in the statute it indicates a mandatory statute."

The general proposition of law relating to the condition of an official bond is found in 46 C. J., 1068, paragraph 398. It reads as follows:

"The condition of an official bond providing for the faithful discharge by the principal of his official duties is broken by the mere negligence, without corruption, of the principal in the performance of a ministerial duty, which performance does not involve the exercise of discretion."

In the case of People v. Smith, 55 Pac. 765, 1. c. 766, the court said:

" * * * the duty of the assessor to collect the tax is merely ministerial, and gives no room for opinion or discretion, and the neglect to discharge that duty is a breach of the obligation of the bond. In People v. Gardner, 55 Cal. 304, 307, it was said: 'It is the duty of an officer to do what the law requires to be done in his office, for

August 13, 1937

the law is to him a command which he must obey. If it prescribes the course which shall be taken, and the thing which must be done by anyone in office, the officer cannot disregard it. A failure to obey the law, or a disregard of duty, is a nonperformance of duty, and a breach of the official bond of the officer, for which he and the sureties thereon are liable * * *."

Your attention is further directed to Section 9952b, Laws of Mo., 1935, p. 403. It reads in part as follows:

"The expense of such printing shall be paid out of the county treasury and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed one dollar for each description, which cost of printing at the rate paid by the county shall be taken as part of the costs of the sale of any land or lot contained in such list."

Construction of the above part of the statute is unnecessary where words as used are plain and without ambiguity. Thus it follows the expense of printing the list of delinquent lands and lots shall be paid by the county and taxed as part of the cost of the sale to be paid by the purchaser of such lands and lots. And by this means the county treasury is reimbursed.

In view of the above, it is the opinion of this department that if a collector, due to his own fault or neglect, fails or refuses to make the requir-

Hon. Forrest Smith

-9-

August 13, 1937

ed publication, and conduct the sale for the collection of delinquent taxes, as prescribed by the Jones-Munger Act, and thereby causing and permitting the statute of limitation to run, such collector or collectors are liable on their official bonds.

Very truly yours,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS:JMW

PROSECUTING ATTORNEY: (1) May make and swear to complaint for a felony under Section 3467, R. S. 1929.
(2) No civil liability on prosecuting attorney in event of failure of prosecution by acquittal, dismissal or otherwise.

September 4, 1937.

9-8



Honorable Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of August 27th, in which you request the opinion of this Department as follows:

"I would like to have your opinion on the following:

"Can the Prosecuting Attorney make an affidavit charging a person with a felony before a Justice of the Peace?

"If he does so, and there is no conviction, is he subject to be sued and is he liable for damages as would be a private person?"

I.

Can the Prosecuting Attorney make an affidavit charging a person with a felony before a Justice of the Peace?

In your first question you, of course, refer to the complaint mentioned in Section 3467, R. S. Mo. 1929, 4 Ann. Statutes, p. 311Q which section provides as follows:

"Whenever complaint shall be made, in writing and upon oath, to any magistrate hereinbefore mentioned, setting forth that a felony has been committed,

and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant reciting the accusation, and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such magistrate, to be dealt with according to law."

And Section 3503, R. S. Mo. 1929, provides that,

"No prosecuting or circuit attorney in this state shall file any information charging any person or persons with any felony, until such person or persons shall first have been accorded the right of a preliminary examination before some justice of the peace in the county where the offense is alleged to have been committed in accordance with article 5 of this chapter. * * * * *

The filing of the complaint is the initial step in the prosecution of those charged with the commission of felonies.

Prior to the adoption of Section 12, Article II of the Missouri Constitution, which was adopted November 6, 1900, an information by a prosecuting attorney could not be filed for a felony but all felonies were prosecuted by indictment of a grand jury. In answering your question it might be well to trace the history of the word "complaint" as used in Section 3467, supra, and as it has been used in connection with the prosecution of felonies.

By the General Statutes of 1865, Chapters 208-209, on "Arrest, Examination, Commitment and Trial," Sections 2 and 3, page 832, it was provided:

Section 2:

"Whenever complaint shall be made to any such magistrate that a criminal offense has been committed, it shall be his duty to examine the complainant and any witnesses who may be produced by him on oath."

Section 3:

"If it appear on such examination that any criminal offense has been committed, the magistrate shall issue a proper warrant reciting an accusation, and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such magistrate, to be dealt with according to law."

It will be noted that the complaint mentioned therein was not necessarily in writing and sworn to before an officer, but the complainant and the witnesses who were produced were examined on oath, and Section 3 provided that if it appear on such examination that any criminal offense has been committed the magistrate was authorized to issue proper warrant and brought before such magistrate to be dealt with according to law. If it was found that a felony had been committed and there was probable cause to be guilty he was bound over to await the action of the Grand Jury.

By the Revised Statutes of 1879, Article 13, on "Arrest and Preliminary Examination," Section 1726, it is provided:

"Whenever complaint shall be made, in writing and upon oath, to any magistrate hereinbefore mentioned, setting forth that a felony has been committed, and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant, reciting the accusation and commanding the officer to whom it shall be directed forthwith to take the accused, and bring him before such magistrate, to be dealt with according to law."

Under the Revision of 1879, the complaint was made in writing and upon oath. We then had the first written complaint to be filed before a magistrate in felony cases. The above section (1726-1879) has been carried through the various revisions and is now Section 3467, supra, and is in exactly the same form as Laws of 1879, Section 1726.

It will be seen that originally the complaint to the magistrate may have been an oral complaint and later in 1879 it became a written complaint under oath.

We now come more directly to your question as to whether a prosecuting attorney may make the complaint mentioned above. This section of the statute, 3467, supra, requires only that the complaint be in writing and upon oath, setting forth that a felony has been committed and the name of the person accused thereof. It does not state that the complainant must have first-hand knowledge of all the constituent elements of the felony alleged to have been committed.

As the principal law enforcement officer of the county we see no reason why a prosecuting attorney, who upon investigation finds that in his opinion a felony has been committed and there is probable cause to believe the defendant guilty, cannot file the complaint called for in Section 3467, supra. We know as a matter of practice that in a great many cases the prosecuting attorney does file the necessary complaint and it is his duty in many cases to do so. However, we can readily see that in many instances the prosecuting attorney may require a complainant to swear to the complaint required under this section, especially is this true where it is a crime committed against a person, and more or less of a personal nature.

In the case of State v. Layton, 58 S. W. (2d) 454, 1. c. 457, Judge Ellison, in a case in which an assistant prosecuting attorney had filed the complaint, said:

"As to the complaint's being based on hearsay evidence, Mr. Chalender admitted he had no first-hand knowledge of the facts attending the assault; and that he obtained the information on which he filed the complaint from parties present thereat. But the complaint is not expressed to be verified on information and belief; it contains a positive recital of the facts, unconditionally sworn to. We know of no reason why this is not entirely sufficient to meet the requirements of section 3467, R. S. Mo. 1929 (Mo. St. Ann. Sec. 3467). See 16 C. J. Sec. 504, p. 292; State v. Carey, 56 Kan. 84, 42 P. 371."

In the case of State v. Tull, 62 S. W. (2d) 389, 1. c. 390, in which case the appellant questioned the sufficiency of the oath of the prosecuting attorney to a complaint filed before a justice of the peace, the court set forth briefly a part of the complaint as follows:

"The complaint introduced in evidence by defendant is regular on its face and sufficiently charges the offense. It recites: 'Before me, M. F. Foster, a justice of the peace within and for the county aforesaid, personally came Elbert L. Ford, prosecuting attorney, who, being duly sworn according to law, deposes and says,' etc. It closed with: 'Sworn to and subscribed before me this the 15th day of April, A. D. 1931. M. F. Foster, J. P.'"

In State v. Frazier, 98 S. W. (2d) 707, 1. c. 712, the appellant contended that he was not accorded a valid preliminary examination for the reason,

"* * *that the affidavit filed before the magistrate as a basis therefor was made by a complainant who had no actual knowledge of the commission of the crime charged and was not competent as a witness to prove the same. In support of the allegations of fact in the plea in abatement the appellant adduced evidence at the trial establishing without contradiction that the affidavit was made by W. W. Kemp, sheriff of Madison county; and that he had no knowledge of the homicide except such as he obtained by hearsay from the deceased and others. It appears that he did not testify at the preliminary hearing.

"This assignment is without merit. The affidavit was unconditionally sworn to, not simply verified on information and belief; and this was held to be sufficient

in State v. Layton, 332 Mo. 216, 221, 58 S. W. (2d) 454. The statute, section 3467, R. S. Mo. 1929, Mo. St. Ann. Sec. 3467, p. 3110, merely provides that 'whenever complaint shall be made, in writing and upon oath,' the preliminary hearing shall be held."

The enforcement of the criminal law is primarily the duty of the sworn officers elected or appointed for that purpose, and one who violates the law should not be permitted to escape because some individual citizen does not come forward and voluntarily sign the complaint. As later will be seen in this opinion, the officer has many safeguards thrown around him that the individual citizen does not have.

It is, therefore, our opinion that a prosecuting attorney may make the complaint under oath and file same with the magistrate and thus start the necessary legal machinery of the State in the prosecution of the crime. It is a permissible and legal practice which has received the sanction of the courts of this State from time immemorial. We all know that the complainant, whoever he may be, necessarily, in many cases, does not have knowledge of all the necessary elements of a crime, and the statute does not require such knowledge. If it were true, a great many criminals would escape for want of a complainant who knew all of the facts and elements necessary to make up the crime.

II.

Coming now to the second question in your request:

If he does so, and there is no conviction, is he subject to be sued and is he liable for damages as would be a private person?

A private person is not necessarily liable for damages even though there is no conviction. But it seems unnecessary to go into that question and we will endeavor to answer the specific question asked in your letter.

In examining the law on this question there seem to be a scarcity of cases where a prosecuting attorney has been sued and reaching the appellate courts. This, we think, is because the rule, that a prosecuting attorney is not liable and is immune from civil actions involving his official duties, is so well established.

In support of this statement of the law we quote from authorities which we think substantiate this rule.

In 18 C. J., p. 1318, it is said:

"A prosecuting attorney, being a judicial officer of the State, is not liable in damages for acts done in the course of his duty, although willful, malicious or libelous."

In Cooley on Torts, 3d Ed., Vol. 2, page 795, and restated in the same work, 4th Ed. Vol. 2, page 426, the author says:

"Whenever, therefore, the state confers judicial powers upon an individual, it confers them with full immunity from private suits. In effect, the state says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely, and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the state, and the peace and happiness of society; that if he shall fail in the faithful discharge of them he shall be called to account as a criminal; but that in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. This is what the state, speaking by the mouth of the common law, says to the judicial officer."

The Supreme Court of California said in Pearson v. Reed, 44 P. (Cal.) (2d), 592, 1. c. 596, wherein the prosecutor was sued for malicious prosecution:

"A prosecutor is called upon to determine, upon evidence submitted to him, whether a criminal offense has been committed by the person accused-- exactly the same question that is presented to a court or jury upon trial. His decision is no less judicial in character if it be erroneous or swayed by prejudice or malice. It does not matter whether the evidence before him be much or little or whether he hears all or only some of it. His authority to investigate the facts before acting is unlimited, and the matter rests in his own discretion."

Griffith v. Slinkard, 44 N. E. (Ind.) 1001, 1. c. 1002, is a leading case on the subject, in a case where a prosecuting attorney was sued for malicious prosecution. The court said, in referring to the prosecuting attorney:

"He is the legal adviser of the grand jury. We think he is an 'officer intrusted with the administration of justice.' The prosecuting attorney, therefore, is a judicial officer, but in the sense of a judge of a court. The rule applicable to such an officer is thus stated by an eminent author: 'Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached or indicted; but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it.' Townsh. Sland. & L. (3d Ed.) Sec. 227, pp.395,396."

We cite the following cases as further supporting this rule:

Rogers v. Marion, 54 Pac. (2d) 760 (Cal.);
Watts v. Keator, 228 Pac. 135 (Ore.), 22
R. C. L. 96, 34 A. L. R. 1489;
Smith v. Parman, 101 Kan. 115, L. R. A.
1917E, 698, 165 Pac. 663;
Yaselli v. Goff, 12 Fed. (2d) 396, 56
A. L. R. 1239;
Kittler v. Kelsch, 216 N. W. 898, 56 A. L. R.
1217.

We think that the reason for the rule could not have been stated more clearly than as set forth by Judge Cooley in the above text.

It is, therefore, our opinion that a prosecuting attorney who makes and files the complaint as required by Section 3467, supra, as the preliminary step in the enforcement of the criminal laws of the State, is not liable for damages although he may err in his judgment and the case may later be dismissed or the defendant declared to be innocent. This is the only reasonable and sound rule to be followed in the administration and prosecution of the criminal statutes.

As stated by an eminent jurist in the case of Watts v. Gerking, 228 Pac. 135 (Ore), 34 A. L. R. 1489, l. c. 1500, "public policy dictates rather that one citizen should suffer some financial loss than that the district attorneys of the state should be harassed by actions, to defend which might require a large portion of their time, to which the public has a right, and a large portion of the emolument prescribed by law as compensation for their services, and that it is better, on the whole, that redress be afforded by prosecutions for misconduct in office, than that the results above indicated should be made possible."

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

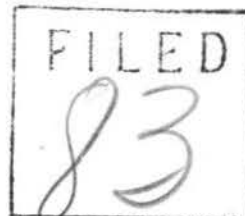
APPROVED:

J. E. TAYLOR
(Acting) Attorney-General CRH:EG

TAXATIONS : Fees and charges paid for privilege of fishing
SALES TAX : are not subject to the provisions of the 2%
Sales Tax Act.

September 23, 1937.

9-24



Mr. Wayne V. Slankard,
Prosecuting Attorney
Newton County,
Neosho, Missouri.

Dear Sir:

This office acknowledges receipt of the following request from your office dated September 15, 1937:

"A man in this county who operates a fish farm, has asked me whether or not he should collect and remit sales tax on his business. The business is operated as follows: He has two or three ponds in which the fish are kept and he allows any person, who so desires, to fish in these ponds and charges them for this privilege, so much per inch on the fish caught. I would like your opinion on this question."

In passing upon this question we have considered the following sections of the 2% Sales Tax Act which we think are applicable to the subject of your inquiry, viz:

Sub-section "b" of Section 2 of said Act is as follows:

"A tax equivalent to two (2) per cent of the amount paid, for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events."

Relative to definitions of the term "sale at retail" we find clause "1" of Sub-section "g" of Section 1 of said Act includes the following:

"Sales of admission tickets, cash admission, charges and fees to or in places of amusement, entertainment and recreation, games and athletic events."

In Sub-section "1" of Section 1 of said Act we find the following in reference to the term "admission":

"For the purposes of this Act the term 'admission' includes seats and tables, reserved or otherwise, and other similar accommodations and charges made therefor and amount paid for admission, exclusive of any admission tax imposed by the Federal Government or by this Act."

From our research upon the question of the Sales Tax being applicable to the charge made for fishing, we find that the 2% Sales Tax Act as applicable to such charges is similar to the provisions of the 1% Sales Tax Act of Missouri passed in 1935 except that the words "or in" have been inserted in clause 1 of Sub-section "g" of Section 1 of the Act and in Sub-section "b" of Section 2 of the Act.

By the foregoing Sections and Sub-sections of the Act, the legislature imposed the tax upon charges paid to or in places of recreation, etc. The word "recreation" is defined by Webster's New International Dictionary as, "refreshment of the strength after toil or diversion". Diversion is synonymous with the words amusement, entertainment, pastime, sport, game, play and merriment, and the word "sport" is defined in said dictionary as some particular play, game or mode of amusement such as, fowling, hunting fishing, rowing, etc. We, therefore, find that if fishing is taxable under the Act it is because it comes within the classification of "recreation".

Next, is the charge or fee paid for the privilege of fishing, one that the lawmakers intended to include within the Act. In construing sales tax statutes, we find the following rule laid down in the case of Doby v. State Tax Commission, 174 So. 222:

"Sales Tax Statutes must be strictly construed in consideration of the coverage and no strained construction may be indulged against the taxpayer because of the purpose to raise needed revenue."

The same rule has been applied in Missouri in the case of, In re: Estate of Clark, 270 Mo. 1. c. 362, wherein Judge Faris J. states as follows:

"Statutes by which the state taxes the property of the citizens are to be strictly construed."

This rule is not, however, to be followed so far and so technically as to defeat the intention of the legislature and the same rule has been followed in the case of State ex rel. Ford Motor Company v. Gehner, City Assessor, et al 27, S. W. (2d) 1. c. 3. The Supreme Court of Missouri in the case of State ex rel. Smith 90, S. W. (2d) 405, has held that the sales tax is an excise tax.

If said Act by the terms "charges and fees paid to or in places of recreation", includes those who participate in such recreational activities, then it applies to those who pays for the privilege of taking an active part in such recreation or sport.

We further find, that under the 1% Act and before the aforesaid amendment, no tax or charge was made for those taking part in recreational activities and we conclude that if they are taxable under the 2% Act it is on account of the additions of the words "or in" to the aforesaid Section of the said 2% Sales Tax Act.

The legislature in no uncertain terms, in clauses 3 and 5 of Sub-section "g" of Section 1 of said Act, stated, what shall be taxed for the use of certain services and things, that is, hotel rooms, tourist cabins, telephones, etc., but it failed to include those who participate in recreational activities, such as fishing, within the definition of the words "sale at retail", and it also failed in Section 2 of the Act to impose a 2% Tax upon the amount paid by those participating in recreational activities for the privilege of taking part in such activities. When a legislature has spoken in such specific terms it ceases to speak in general terms and only those subjects mentioned within the bounds specifically referred to can be included in such Act, Authority 25 C. J. 220.

If the legislature had intended to tax those who participate in recreational activities, such as fishing, upon the amount they pay for such privilege, then it could easily have found appropriate language in which to express that purpose. By failing to do so, it indicated its purpose not to impose the Sales Tax upon such recreational activity. We think the maximum "the expression of one thing is the exclusion of the other" would apply in this particular case, 25 C. J. 220; Lexington et al v. Commercial Bank, 130 Mo. App. 692.

Further considering the Act and the words "or in" which were added to the aforesaid sections and by considering the definition of the word "admission", Section 1, Sub-section "i", as "applying to seats and tables, reserved or otherwise, and other similar charges made therefor", we conclude that the words "or in" were inserted in the 2% Sales Tax Act for the purpose of collecting a tax on the charge that is made for reserved seats and tables within such places of amusement, and after the person is admitted and has paid an admission charge to enter such places.

CONCLUSION

The legislature having failed to embrace within the definition of the term "sale at retail" in Section 1 of the Act, those participating in recreational activities, such as fishing, hunting, etc. or any other activity for which the participants pay the fee or charge and having failed in Section 2 of the Act to levy and impose a tax upon the amount paid for the privilege of entering into such activity and by strict construction of the Sales Tax Act, so far as it applies to the aforesaid subjects, but not such a strict construction as to destroy the intention of the legislature, it is the opinion of this department that the amount which a party pays for the privilege of fishing in lakes, ponds, etc. or for entering into any other recreational activity as a player, is not subject to the provisions of the 2% Sales Tax Act and is not taxable under the Act.

Yours very truly,

TYRE W. BURTON
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

TWB:LB

NURSERY STOCK -- Subject to inspection, when.

November 4, 1937

11-22

Honorable Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri



Dear Sir:

We acknowledge receipt of your request for an opinion dated October 26, 1937, which reads as follows:

"A dealer in Nursery stock who operates a nursery at Neosho, loads a truck with nursery stock and goes to surrounding towns and there sells the stock from the truck.

"All of the stock sold is either grown by the nursery or is purchased by him from legitimate growers and passed through his plant, here at Neosho. He has a registration-inspection certificate for his plant here in Neosho.

"Under paragraph (3) of Section 12371 Mo. Stat. Anno. Page 384, (as amended, Laws 1933, p. 170, Section one (1); Laws 1937 p. 177, Section two (2), would this nursery man be required to secure an additional registration-inspection certificate for each place where he parked his truck and sold nursery stock."

Section 12368, R. S. Mo. 1929 defines the particular premises, which come under the State's inspecting jurisdiction of nursery stock, as follows:

"For the purposes of this article, the following terms shall be construed, respectively, to mean:

(c) Places: Vessels, cars and other vehicles, buildings, docks, nurseries, orchards and other premises, where plants and plant products are grown, kept or handled. ***** "

The Laws Mo. 1933, page 170, Section 12371 do not change the definition of premises subject to plant inspection as above set out in Section 12368, supra.

The Laws Mo. 1937, page 177, provide for the appointment of an entomologist to administer the Missouri Insect Pest and Plant Disease Law, and Section 12371, page 179, provides:

"(1) The fees for inspection hereunder shall be as follows; a nursery shall be required to pay as a fee per annum for the regular inspection of the nursery stock and premises the actual cost of such inspection and which cost in any event shall not exceed five (\$5.00) dollars for the first acre or fraction thereof and fifty (50¢) cents for each additional acre or fraction thereof inspected. Fees for inspections of other than nursery stock and premises shall not exceed the actual cost of inspection, such inspections to be made annually or more often as may be necessary in the judgment of the State Entomologist for the safeguarding and protection of agriculture and horticulture against dangerous and destructive insect pests and plant diseases. The term "Nursery", when used in this section, shall be construed to mean any land, ground or premises, within this state on or in which nursery stock is propagated or grown for sale, or any land, ground or premises within this state on or in which nursery stock is being fumigated, packed or stored.

"(2) Whenever the term, "Nursery Dealer", is used in this chapter, as contradistinguished from nursery or nursery agent, it shall be construed to mean and include any person not a grower of nursery stock, who (a) buys nursery stock for the purpose of reselling or reshipping within the State of Missouri, (b) who both makes landscape plans and plants wild trees, shrubs or vines (which must be certified prior to planting) or other nursery stock or negotiates in the purchase of same for his clients, or (c) who transplants or moves trees, shrubs or other nursery stock, regardless of where or how grown, from place to place within this State for other persons for a consideration in payment of the nursery stock, for the planting of same, or for both nursery stock and planting.

"(3) Each nursery dealer, before selling or offering for sale or otherwise distributing nursery stock within this state, must annually obtain a nursery dealer's registration-inspection certificate for each individual location from which the said dealer sells or offers for sale nursery stock. Each nursery dealer shall make application on forms to be provided by the State Entomologist for each individual location, which shall include (a) the name and complete address of nursery dealer's place of business for which such certificate is requested, (b) a declaration that applicant will obtain and distribute only inspected and certified nursery stock, (c) that applicant will maintain with the State Entomologist an up-to-date confidential listing of all sources from which he secures nursery stock, (d) make affidavit before an officer with a seal or certify in writing before the State

Entomologist or his agent that the statements in said application are complete and correct, and (e) each nursery dealer shall pay at the time of making application the annual registration inspection fee of ten (\$10.00) dollars. The State Entomologist shall inspect or cause to be inspected the premises, including any sales yard, packing-shed, nursery stock on hand or equipment, for the presence of dangerous and destructive insect pests and plant diseases which may be disseminated on nursery stock.

"(4) All moneys received for inspection fees or other receipts under Article 3, of Chapter 87, Revised Statutes of Missouri, 1929, as amended, shall be deposited in the State Treasury to the credit of the agricultural fees fund, subject to appropriation by the General Assembly; all checks and drafts remitted to the State Entomologist shall be made out to the order of the state treasurer, subject to deposit as herein directed."

Section 655, R. S. Mo. 1929, provides in part as follows:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import; *** "

CONCLUSION

Construing Section 12368, supra, we are of the opinion that where nursery stock is sold from a truck, said truck is subject to inspection against diseased plant life of said nursery stock offered for distribution from said truck, as said truck falls within the premises described by the statute as subject to inspection.

The intention of the Legislature, as shown by the quoted law, is to establish an intelligent and thorough scheme of nursery plant inspection in this state, to the end that nursery plants growing, kept and handled in nurseries, and nursery plants kept and handled at other premises, be inspected in a sincere effort to eradicate and control plant diseases and plant insects. When we consider the purpose of such legislation, there is no reason to narrowly construe the statutes to the end that nursery growers, who should have a vital interest in seeing that plant diseases and insects are eradicated and controlled, be given special privileges from inspection when they become also nursery dealers in plant life from vessels, cars, buildings, docks, orchards and premises away from the nursery proper.

Under the technical import in the above statutory definition of "nursery dealer", we are of the opinion that the operator of an inspected and approved nursery may become, at premises away from the nursery proper, while keeping nursery plants in his truck for distribution, including nursery plants from other nurseries, a spreader of plant disease and plant insects. It was not intended that a certificate of nursery inspection was to operate as a license to spread disease from premises described as proper places for inspection.

We are of the opinion that the nursery plants in the truck of the nurseryman from Neosho, away from the nursery proper, are subject to inspection wherever he parks his truck to sell and distribute nursery stock to the public, and that before selling or offering for sale or otherwise distributing nursery plants from his truck he must annually obtain a nursery dealers' inspection certificate for each individual location of said truck, where said truck is located in the towns surrounding Neosho where the dealer intends to sell or

Honorable Wayne V. Slankard -6- November 4, 1937

offer for sale nursery stock from said truck.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WOS:FE

MISSOURI ATHLETIC COMMISSION: Commission has no jurisdiction over boxing events held at Jefferson Barracks.

Kansas City, Missouri
November 5, 1937.

11-6



Mr. Garrett L. Smalley, Chairman,
Athletic Commission of the State of Missouri,
Wirthman Building,
Kansas City, Missouri.

Dear Sir:

This Department is in receipt of your request for an opinion as to the following:

"Near the City of St. Louis is Jefferson Barracks. Each week or so they hold a big boxing show, open to the public with an admission charge, and most always to a capacity house of from three to five thousand.

"These boxing contests are between members of the Government Post and opponents from elsewhere throughout that part of the state.

"Jefferson Barracks is located on United States Government property and those in charge claim that because of this, the Missouri State Athletic Commission has no jurisdiction over these shows, nor have we a right to collect the five per cent tax according to the law.

"It appears to me that this would come under the jurisdiction of this Commission the same as other boxing events held in the state, because of the fact that it is open to the public and primarily dependent upon the public for its support.

"Because of the attitude of those in charge at the Post, the State of Missouri has lost several thousands of dollars in state taxes.

"I will appreciate it if you will give me an opinion on this right away so we can clear up this situation in St. Louis."

The 17th clause of Section 8 of Article I of the Constitution of the United States provides:

"The Congress shall have power * * * To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to execute like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings * * *."

Section 11072, Revised Statutes of Missouri, 1929 provides:

"The consent of the state of Missouri is hereby given in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States to the acquisition by the United States by purchase or grant of any land in this state which has been or may hereafter be acquired, for the purpose of establishing and maintaining post offices, internal revenue and other government offices, hospitals, sanatoriums, fish hatcheries, game or bird preserves and lands for reforestation. Provided, that said lands shall not exceed twenty-five acres in quantity in any one lot or parcel in any town or city and shall not exceed two thousand (2,000) acres in any one county."

We assume, for the purpose of this opinion, that the property now comprising "Jefferson Barracks" was acquired by the United States in accordance with the above section of our statutes. If so, Section 11073, R. S. Mo., 1929 applies:

"The jurisdiction of the state of Missouri in and over all such land purchased or acquired as provided in section 11072 is hereby granted and ceded to the United States so long as the United States shall own said land: Provided, that there is hereby reserved to the state of Missouri, unimpaired, full authority to serve and execute all process, civil and criminal, issued under the authority of the state within such lands or the buildings thereon."

In the case of United States v. Unzenta, 74 L.Ed. 761, the Supreme Court of the United States said:

"When the United States acquires title to lands, which are purchased by the consent of the legislature of the state within which they are situated 'for the erection of forts, magazines, arsenals, dockyards and other needful buildings' (Const. art. I, sec. 8), the Federal jurisdiction is exclusive of all state authority."

In view of the foregoing, therefore, and assuming the property upon which Jefferson Barracks is situated was acquired by the United States in accordance with section 11078 R. S. No. 1929, we are of the opinion that the Missouri State Athletic Commission has no jurisdiction with regard to boxing events held on said property.

Respectfully submitted,

JWH:ME

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

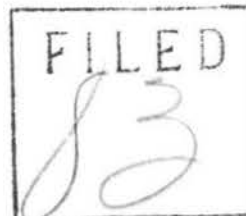
APPROVED:


Acting Attorney General.

MOTOR VEHICLE FUEL) No refund of tax on gasoline exported in
TAX:GASOLINE) tanks of automobiles.

December 2, 1937

12-3



Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your letter of November 3, 1937, in which you request an opinion as follows:

"The state of Kansas has recently passed a law which prohibits busses and trucks entering the state having more than twenty gallons of gasoline in the fuel tanks.

"The Southwestern Greyhound Lines have had storage tanks in Kansas City and their busses would be refueled there, the storage tanks holding about 150 gallons on trips that led through Kansas to Colorado. The Greyhound Lines has been paying the state tax of 2¢ a gallon on that gasoline and the 1¢ per gallon to Kansas City on the gas which propelled these busses over the roads in Kansas.

"We are in receipt of a claim of \$116.00 for refund on the gasoline tax, from the Southwestern Greyhound Lines. We would like an opinion from your department as to whether this refund is a just claim against the state and whether we can legally pay the Southwestern Greyhound Lines this claim.

"Similar claims to the above will amount to approximately \$50,000 per year."

Section 7794, R.S. Missouri 1929, is as follows:

"For the purpose of providing funds to complete the construction of and for the maintenance of the state highway system of this state as designated by law, there is hereby provided a license tax equal to two cents per gallon of motor vehicle fuels as defined in this article used in motor vehicles on the public highways of this state, which license tax shall apply and become effective January 1, 1925."

Section 7805, R.S. Missouri 1929, is as follows:

"All motor vehicle fuels, as herein defined, distributed or sold in the state of Missouri by any distributor or dealer, shall be deemed to have been sold for use in operating motor vehicles upon the public highways of this state: Provided, however, that any person who shall buy and use any motor vehicle fuels, as defined in this article, for the purpose of operating or propelling stationary gas engines, farm tractors or motor boats, or who shall purchase or use any of such fuels for cleaning, dyeing, or other commercial use of the same, or who shall buy and use such motor vehicle fuels for any purpose whatever, except in motor vehicles operated, or intended to be operated, upon any of the public highways of the state of Missouri, as defined in section 7795, and who shall have paid any license tax required by this article to be paid, either directly or indirectly through the amount of such tax being included in the price of such fuel,

shall be reimbursed and repaid the amount of such tax directly or indirectly paid by him, upon presenting to the inspector an affidavit accompanied by the original invoice showing such purchase, which affidavit shall state the total amount of such fuels so purchased and used by such consumer, other than in motor vehicles operated or intended to be operated upon any of the public highways of the state of Missouri, as hereinbefore defined, and shall state for what purpose used. Upon the receipt of such affidavit and invoice, the inspector shall cause to be repaid the amount of such tax to the consumer aforesaid, by a warrant drawn by said inspector on the state road fund which shall be audited and allowed by the state auditor and shall be paid by the state treasurer: Provided further, that application for refunds, as provided herein, must be filed with the inspector within ninety (90) days from the date of purchase or invoice."

For a proper determination of this question, we think it is necessary to determine whether or not the tax provided for in section 7794, supra, is a charge as compensation for the use of the highways of this state.

In *Schevenell v. Blackwood*, 35 Fed. 2nd 1.c. 425, the court said concerning the fuel tax law of Arkansas on this subject:

"Section 1 of Act No. 606, 1921 (Arkansas), provides:

"That all persons, firms or corporations who shall sell gasoline, kerosene or other products to be used by the purchaser thereof in the propelling of motor vehicles using combustible type engines over the highways of this State, shall collect from such

purchaser, in addition to the usual charge, the sum of one cent (1¢) per gallon for each gallon so sold.'

'In *Standard Oil Co. v. Brodie*, supra, sustaining the tax, the court said (153 Ark. 119, 239 S.W. 754):

'The tax is not imposed on the sale or purchase of gasoline, nor on the gasoline itself, nor even on the use of the gasoline. On the contrary, the final and essential element in the imposition of the tax is that the gasoline purchased must be used in propelling a certain kind of vehicle over the public highways. In the final analysis of this language it comes down to the point that the thing which is really taxed is the use of the vehicle of the character described upon the public highway, and the extent of the use is measured by the quantity of fuel consumed, and the tax is imposed according to the extent of the use as thus measured.

'If it had been intended merely to tax the gasoline or its use, it would have been wholly unnecessary to describe the character of the use or the place where it was to be used, and the fact that the lawmakers incorporated these elements in laying the bases of the taxation shows unmistakably that it was intended to impose a tax upon the use of the public highways by the method described. It is clear that the tax is not imposed on the seller nor upon the gasoline while in his hands, and this of itself makes it manifest that there was no intention to levy a tax upon the sale of gasoline nor upon the gasoline itself."

The Brodie case referred to, supra, is a well reasoned decision and has been cited as authority by the courts in many jurisdictions. The Arkansas act levying the tax is very much similar to Missouri's act in that the tax is placed upon the fuel used in motor vehicles on the highways of the state.

In *State ex rel. v. Hackman*, 314 Mo. 33, 282 S.W. 1007, 1011, a mandamus action to compel respondent, the state auditor, to issue a warrant to pay for certain printing and stationery furnished the State Highway Commission, drawn upon the highway fund. The court, in passing upon this question, determined what character of tax the motor vehicle tax of this state was, and said:

"Whether it is called motor vehicle registration fees, license fees, or a tax (all of which designations are used in Section 44a of Article IV of the Constitution, *Vide Laws of 1921, 1st Ex. Sess. p. 196*), or by any other name, it is a tax levied by the state upon the right of motor vehicles to use the public streets and highways of the state."

The tax on the sale or use of motor vehicle fuels is also mentioned in the constitutional provisions referred to in the Hackman case, supra. We make the preliminary statement concerning this case in order to illustrate that although the court did determine the character of our tax, this was not essential to the determination of the question before them, and for that reason, is obiter dictum. However, it is persuasive upon the question.

It is to be noticed that all through our motor vehicle tax law the tax is restricted to that fuel which is used to propel motor vehicles on our highways, and further, there is a section (7805) which authorizes refunds to purchasers of gasoline who pay the tax thereon, but do not use said fuel in motor vehicles operated upon the highways of the state.

In view of the above it is clear, we think, that the tax on motor vehicle fuels in Missouri is a charge as compensation for the use of our highways. The tax is not imposed on the seller, or the gasoline itself, but is paid by the consumer, and as said in the Brodie case, referred to supra, "it would have been wholly unnecessary to describe the character of the use or the place where it was to be used" if this tax is not a charge for the use of our highways. This conclusion, if there was nothing further to be considered, would seem to indicate that the refund applied for here is allowable. However, we do not think this conclusion in itself decides the question before us. The Oil Inspector is authorized and required by law to collect the two cents per gallon tax. He is only given certain employees or deputies and permitted to collect the tax in the manner prescribed. The tax must be collected on each gallon sold, and then if the gasoline is used for a non-taxable purpose, the purchaser may apply and make affidavit for a refund under Section 7805, R.S. Missouri 1929. This section provides that all gasoline sold in this state "shall be deemed to have been sold for use in operating motor vehicles upon the public highways of this state". It further enumerates in what specific instances a refund will be allowed, and then provides "or who shall buy and use such motor vehicle fuels for any purpose whatever, except in motor vehicles operated, or intended to be operated, upon any of the public highways of the State of Missouri".

We find no precedent upon this question, either in our own courts or the courts of other jurisdictions. Therefore, we must construe the Motor Vehicle Fuel Tax Law to ascertain if the legislative intent as expressed in said act is broad enough in its scope to cover the refund applied for here.

If the Southwestern Greyhound Lines is entitled to a refund, it must be under the above quoted part of Section 7805 or not at all. This section raises the presumption that all motor vehicle fuel sold in this state is used on the highways of this state.

Section 7805, supra, provides a refund for those who purchase gasoline and use it for any purpose except when that use is in motor vehicles operated or intended to be operated on the highways of this state. In other words,

literally speaking, only gasoline used in motor vehicles operated or intended to be operated on the highways of this state is subject to taxation (because when not used for this purpose, the tax collected is refunded).

This section does not contemplate that gasoline purchased in this state, in order to be taxable, must be wholly consumed in a motor vehicle while that vehicle is operating on the highways of this state, but only that it be purchased for use in a motor vehicle which is intended to be operated or is actually operated on said highways, regardless of the amount of fuel consumed.

The fuel purchased by the Southwestern Greyhound Lines was purchased for, and used in, a motor vehicle intended to be and actually operated on the highways of this state, and as such does not fall within the provisions of Section 7805, notwithstanding the fact that all of said fuel was not actually consumed while said vehicle was on our highways.

In State ex rel. v. Gehner, 320 Mo. l.c. 1182, it is said:

"An exemption from taxation must be clear and unambiguous and should not be created by implication." (Scotland County Railroad Co., 65 Mo. l.c. 135; State ex rel. v. Arnold, 136 Mo. l.c. 450.)

* * * * *

"If any doubt arises as to the exemption claimed it must operate most strongly against the party claiming the exemption." (Flitterer v. Crawford, 157 Mo. l.c. 58).

* * * * *

"Such statute and constitutional provisions are construed with strictness and most strongly against those claiming the exemption."

* * * * *

"The policy of our law, constitutional and statutory, is that no property than that enumerated shall be exempt from taxation." (State ex rel. Globe-Democrat Pub. Co. v. Gehner, 294 S.W. 1.c. 1018.)

In Barber Asphalt Paving Co. v. Hayward, 154 S.W. 140, 141 (Mo.), the courts have said:

"Appellants' construction would be bound to result in distress and injury. But the law does not stand puzzle-headed and helpless before such difficulty. The inconvenience arising from such construction of the statute precludes adopting it, provided any other course be open in reason."

In Bragg City Special Road District v. Johnson, 20 S.W. 2nd 22, 23 (Mo.), the court said:

"It has been ruled by this court many times that in the construction of statutes which are not clear in meaning, the results and consequences of any proposed interpretation of the statute may properly be considered as a guide as to the probable intent of the lawmaker from the language used."

In State ex rel. v. St. Louis-San Francisco Ry. Co., 300 S.W. 274, 277 (Mo.), it is said:

"A construction should never be given to a statute * * * * * which would work * * * confusion and mischief unless no other reasonable construction is possible."

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In *Gam v. St. Louis and S.F. Ry. Co.*, 198 S.W. 494, 496 (Mo. App.), it is said:

"We recognize the rule in the construction of statutes that hardships and inconveniences are not to control; but we also recognize that these burdens should not be ignored."

With these rules in mind, as laid down by our courts, it is to be observed that if this refund is allowable under our laws, then it naturally follows that all gasoline purchased by said companies outside our state and transported into this state is subject to taxation. How is the Inspector of Oils to determine these amounts? The legislature has not provided him with ports of entry as in other states, nor a sufficient number of deputies and agents to keep a check on such importation or exportation. To construe the law to permit such a refund would be to attempt to make it apply to an impossible situation, and would place a tremendous burden on those charged with the administration of our Motor Fuel Tax Law. It would result in evil consequences and lay refund appropriations made by the legislature open to be depleted by those who cared to make a false affidavit for a refund, and which the Inspector of Oils would have no way of checking, other than to accept the affidavit as true on its face and trust to the honesty of the person making it, though we do not mean to infer that the claim in question is other than what it purports to be.

We do not think the legislature intended to place the Inspector of Oils in such a helpless position, and would not do so without providing by law a means by which all exporting fuel must comply, so that each such refund might be checked in accordance with such law to ascertain if said refund was correct and allowable in every detail. Exemption from taxation by implication is not favored or permitted, and any doubt must be resolved against the person claiming said exemption.

In *Garfill v. Brocken*, 145 N.E. 1.c. 316 (Ind.), it is said:

"It is complained that persons who buy gasoline in Indiana for the operation of automobiles must pay the tax,

December 2, 1937

although they may drive at once to the state line and cross into another state. But the law does not require such a person to purchase in Indiana more than sufficient gasoline to carry him to the state line. If he prefers, he may reach that point with an empty tank and replenish his supply in the other state without paying the Indiana tax."

The same is true in this instance. The tax in Missouri is a charge for the use of our highways - that charge is measured on fuel purchased for consumption. The person buying said fuel buys the privilege to use our highways to the extent his fuel will permit. If he does not avail himself of this privilege, it is of no concern of this state.

CONCLUSION

Therefore, it is the opinion of this department that the refund applied for in this instance is not such a refund as would be payable under the laws of this state and should not be allowed.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

STATE BOARDS: Right of State Auditor to issue warrants for rent and stenographic help for the following Boards: Nurse Examiners, Optometry, Osteopathy, Barbers, Embalming, Chiropractic Examiners, Dental Examiners, Accountancy and Pharmacy.

December 31, 1937

16
FILED
83

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This office is in receipt of your letter of November 30, 1937, in which you make the following request for an opinion:

"It has been the custom for many years for various Boards to employ a stenographer and pay rent and the appropriation bills have made provisions for the payment of these two items.

"I would like to have an opinion as to whether or not I can legally pay for a stenographer and rent out of the appropriations made to the following State Boards: Nurse Examiners, Optometry, Osteopathy, Barbers, Embalming, Chiropractic Examiners, Dental Examiners, Accountancy and Pharmacy."

In order for you to honor requests for payment for office rent and stenographers of the various Boards mentioned in your letter, two situations must exist, viz: (1) The particular Board requesting such payment must have the authority to rent offices and employ a stenographer, and (2) there must be a fund appropriated for such purposes, against which you can draw your warrants. If either of these situations does not exist, you cannot pay these items.

Since your request for an opinion refers and relates to a large number of Boards, all created by separate legislative acts, we shall look to some general principles of law applicable to the question at hand, and then proceed to discuss each separate Board in the light of the legislative acts creating and governing it.

If the Boards inquired about have the power to rent office rooms and employ stenographers, such power must be bottomed upon the statutes by which they were created and are governed, and such statutes must grant such power, either by express words or necessary implication. In discussing a very similar question, the court in the case of *State ex rel. Bybee v. Hackmann*, 276 Mo., 1.c. 116, said:

"That question simply stated is this: Has the State Board of Equalization authority under the law to employ a stenographer at the expense of the State? If such Board of Equalization (hereinafter for brevity, called simply the board) has any such authority, this authority must be bottomed on some statute. For it is fundamental that no officer in this State can pay out the money of the State except pursuant to statutory authority authorizing and warranting such payment. (*Lamar Twp. v. Lamar*, 261 Mo. 171.) But it is also well settled, if not fundamental law, that whenever a duty or power is conferred by statute upon a public officer, all necessary authority to make such powers fully efficacious, or to render the performance of such duties, effectual, is conferred by implication. (*Hannibal, etc., Railroad v. Marion Co.*, 36 Mo. 303; *Walker v. Linn Co.*, 72 Mo. 650; *Sheidley v. Lynch*, 95 Mo. 487.) So much being true it is urged that since the statute which defines the duties of the board provides that it may 'take all evidence it may deem necessary,' it follows by necessary implication that a stenographer may be employed to take and transcribe the evidence which the board deems necessary to be taken. We think this contention must be sustained."

Again in the case of State ex rel. Bradshaw v. Hackmann, 276 Mo., l.c. 607, the court, in passing on a similar question, quoted with approval a portion of the foregoing paragraph from the Bybee case, supra, and added:

"Under this rule we perforce must look to the statutes which created the office of Warehouse Commissioner and which prescribe his duties for authority to make our writ peremptory. If we find no such authority, either express, or which arises from such necessary implication as is above defined, it is manifest that we are without power to compel respondent to audit relator's expense account, for expenses incurred by him in going to and returning from Washington."

Likewise, in the case of In Re Sanford, 236 Mo., l.c. 692, the court reiterated rules of construction of statutes which will serve us in analyzing the statutes relating to the subject at hand in the following language:

"(c). There is a familiar rule of statutory construction which fits this case like a glove fits the hand, namely, That when a power is given by statute, everything necessary to make it effectual or requisite to attain the end, is necessarily implied. (Citing authorities)."

"It is also a well settled rule of construction, that where a statute contains grants of power, it is to be construed so as to include the authority to do all things necessary to accomplish the object of the grant. (Citing authorities)."

In line with the foregoing rules, the court held in State ex rel. v. Speer, 284 Mo. 45, that where a county is vested by express grant with power to incur an indebtedness to erect a courthouse, such express grant of power by

implication embraces the authority to purchase a site for the building out of the proceeds of such indebtedness; and in the case of *Hudgins v. Consolidated School District*, 312 Mo. 1, the court held that where by express grant a school district, after necessary vote of the people, has the right to erect a school building, it has by necessary implication the right to furnish such school building, since the object of the express grant, to-wit, the erection of a new building, would be defeated if the district could not furnish and equip the building.

The foregoing rules apply more particularly to the first phase of our problem, viz, the determination of whether the particular Boards have power to rent office rooms and employ stenographers.

Approaching the second phase of our problem, viz, whether there has been an appropriation for payment of the particular items inquired about, we must start with the premise that an appropriation by the legislature is necessary before any expenditure can be made of the funds created for these particular Boards. *State ex rel. Kessler v. Hackmann*, 304 Mo. 453.

The rule as to when a claim against the State should be paid was laid down in the case of *State ex rel. Buder v. Hackmann*, 305 Mo., l.c. 351, wherein it was said:

"Before the State can be held liable for the payment of a fee or expense incurred in its behalf, the person or officer claiming such fee or expense must be able to point out the law authorizing such payment."

Appropriation laws are to be construed by the same rules as other legislation. The rule has been stated thus in 59 C.J., para. 401, pages 262-263:

"An appropriation law is to be construed under and by the same rules as other legislation. Where the intention of the legislature is plain and obvious, there is no room for

judicial construction of an appropriation. They are to be construed without liberality towards those who claim their benefits; but are not to be construed so strictly as to defeat their manifest objects. The language is to be presumed to have been used in its natural and ordinary meaning, and not to be given a forced and unnatural construction."

Article X, Section 19, of the Constitution of Missouri, after providing that expenditures can be made only after appropriation by law, provides as follows:

"and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object."

In the case of State ex rel. Buder v. Hackmann, supra, the court had before it the question of whether the assessor should be allowed clerk hire, and the only basis for the claim for such allowance was a statute which provided that the assessor should be allowed his necessary expenses. In denying the claim for clerk hire, the court (l.c. 351) said:

"The words 'he and his deputies shall be entitled to receive their actual necessary expenses incurred in the performance of their duties,' fall far short of constituting clear and satisfactory authority for the payment by the State of clerk hire for assessors."

It must be borne in mind that even though the appropriation acts may in some instances indicate the legislature had in mind some of the expenditures inquired about, yet the language of an appropriation act is not conclusive on the courts as to the power of the legislature to

to appropriate money. State ex rel. Bradshaw v. Hackmann, supra,

Again in the Bradshaw case, supra, the court, after discussing what might be impliedly necessary for the officer under discussion to do in the discharge of his duties, (l.c. 611) said:

"If so it be that the crying exigencies brought about by a World War unforeseen and undreamed of when the act in question was passed had so altered national and domestic conditions when the trips in question were made as to make it absolutely necessary and praiseworthy for the relator to incur the expense in controversy in the first and second counts, we are yet forced, however much the situation may appeal to our personal sympathies, to relegate this phase of the case to the Legislature. Our duty in the premises is done when we are unable to lay our finger on any existing statute which, when construed under the rules laid down, supra, will justify us in adjudging payment."

From the above authorities, we conclude that the Boards inquired about do not have the power to rent office rooms or employ stenographers, unless the statutes creating them and governing them grant such power either by express language or by necessary implication, and that such powers, if not expressly granted, cannot be implied unless it is evident from the language of the statutes that the proper exercising of the powers expressly granted would make certain other powers indispensable and a denial of such other powers (not expressly granted) would render ineffectual the powers expressly granted.

With the foregoing premises before us, we must now look to the statutes creating and governing each particular Board inquired about in order to answer your inquiry specifically.

BOARD OF NURSE EXAMINERS

The statutes creating this Board and governing its activities are found in Chapter 100, R.S. Missouri, 1929. From a careful reading of these statutes, we are unable to find where this Board is by express language directed, required or empowered to rent an office or to hire a stenographer. The next question is, is such power granted this Board by necessary implication? Section 13480 provides that the Board shall meet at such place as it may select, and Section 13481 provides that the Board shall meet twice each year to hold examinations for nurses at such times and places as it may determine. All the duties enjoined upon the Board by Sections 13482 and 13483 could be and probably are discharged at meetings of the Board, which by Sections 13480 and 13481, it may hold at any place and at anytime it may determine. Section 13484, which provides compensation of the Board, merely contemplates that the Board members will perform their duties at irregular times and in different places. None of the duties of the Board necessarily requires a permanent office.

The secretary is required to keep records and registers, make reports and perform all duties customarily incident to such office, and we may assume from reading these statutes that the work of the secretary is extensive.

From reading these statutes, however, we do not believe that it can be said that the objects for which the Board was created would be defeated or its express powers rendered ineffectual unless it could rent offices and employ a stenographer. To be sure, the work of the secretary would be facilitated, no doubt, by having the services of a stenographer at her command, but the legislature has imposed certain prescribed duties upon the secretary and it did not see fit to authorize the employment of a stenographer. Even though performance of the duties prescribed by the legislature for the secretary would work a hardship on her, it is not the province of the judicial branch of the government to read in the statutes what the legislature omitted therefrom. As was said in *State ex rel. Buder v. Hackmann*, supra, 1.c. 351:

"The argument of hardship and that an officer should not be compelled to incur a financial loss, in performing the duties incident to his

office, cannot be considered by the courts in passing upon the rights of relator, as fixed by the statute. Failure to provide a salary or fee for a duty imposed upon an officer by law does not excuse his performance of such duty. (State ex rel. v. Brown, 146 Mo. l.c. 406.) It may be that an assessor actually sustains a financial loss in the performance of his duties under our State Income Tax Law. But such fact is for consideration by the Legislature, and not by the courts."

Therefore, we find no authority in the statute for this Board to rent office room nor do we find any appropriation for rent. There is an appropriation for "general expenses" of this Board, but the constitutional provision above quoted requires appropriation acts to distinctly specify the objects for which the appropriation is made. While the term "general expenses" is rather broad and would include numerous items of expense, which naturally fall under that term if those items were authorized to be incurred by the Board, yet we do not think this term can include office rent in the light of the statutes governing this Board.

Reference to Section 6, page 92, Laws of 1937, of the appropriation act for this Board shows that an item was included for salary of a stenographer, but as heretofore stated, the statutes creating and governing this Board do not authorize the employment of a stenographer. As shown by authorities above quoted, an appropriation act is not conclusive on the courts as to the power of the legislature to appropriate the money. In other words, we understand the rule to be that if the legislature has not granted the power to a Board to do a thing, the act of a subsequent legislature in setting aside a sum for the doing of that thing will not supply the power, otherwise lacking, to do the thing.

It should be observed, however, that this Board is required by statute to hold certain meetings at such places as it may choose, among which meetings are those to conduct examinations of applicants for license and to

hear charges against persons holding licenses. We think that where the law has specifically required the holding of such meetings, the Board by implication has the power to provide places for such meetings and, therefore, could rent rooms temporarily for such purposes. In this particular, we think the appropriation for general expenses would be sufficient to cover rent on rooms rented temporarily for the purpose of holding the meetings required by law.

CONCLUSION

From the foregoing reasoning, we must conclude that you cannot lawfully draw warrants against funds appropriated for the Board of Nurse Examiners to pay for rent for office rooms or for salary of a stenographer, but that you can lawfully draw warrants against such funds to pay for rooms or quarters temporarily rented for the purpose of holding the meetings required by Sections 13480, 13481, and 13482, R.S. Missouri, 1929.

BOARD OF OPTOMETRY

The statutes creating and governing this Board are found in Chapter 101, R.S. Missouri, 1929. There is no express power granted this Board to establish an office, and from reading this chapter we cannot conclude as a matter of law that the work required of this Board would be rendered ineffectual if it could not rent offices. Furthermore, there has been no appropriation made for payment of rent for offices of this Board.

By Section 13500, this Board is required to hold at least four meetings each year, one of which must be held in St. Louis and one in Kansas City. In view of the authorities heretofore cited and following the reasoning outlined in the discussion relative to the Board of Nurse Examiners, we must conclude that the Board of Optometry has the implied power to rent quarters temporarily for such meetings. Otherwise, the power conferred and duty enjoined upon the Board in this regard could not be exercised and performed.

While there is no specific appropriation for rent, yet there is an appropriation for "general expenses (Section 6, page 93, Laws of 1937)", and we think this appropriation sufficient to cover rent of temporary quarters engaged for the meetings of the Board.

It should also be observed that by Section 13498 this Board is granted power to "take testimony in all matters relating to its powers and duties", and by Section 13509, it is required to hold public hearings on various matters. In line with the authorities heretofore cited and especially the authority of the case of State ex rel. Bybee v. Hackmann, supra, we must conclude that this Board has the implied power to employ a stenographer whenever it is deemed necessary and proper by the Board to transcribe testimony in connection with the hearings held by the Board. Examination of the appropriation act for this Board shows that there is an item designated "salary of a stenographer", and in view of what we have said as to the power of the Board in this particular, we think this item of appropriation is sufficient to cover the salary for a temporary employment of a stenographer authorized as aforesaid.

CONCLUSION

In line with the authorities cited and by the same reasoning followed in the discussion relating to the Board of Nurse Examiners, it is the opinion of this department that you cannot legally draw warrants against the funds appropriated for the use of the State Board of Optometry to pay rent of office rooms nor for the salary of a regular stenographer, but that you can draw warrants against said funds to pay for rent of quarters temporarily engaged to hold meetings of the Board, allowed and required by Section 13500, R.S. Missouri, 1929, and that you can draw warrants against such funds to pay for services of a stenographer employed to take testimony at hearings held by the Board.

BOARD OF OSTEOPATHIC REGISTRATION
AND EXAMINATION

The statutes governing this Board are found in Chapter 102, R.S. Missouri, 1929. By Section 13517, this Board is given blanket power to incur "all expenses proper and necessary in the opinion of said Board to discharge its duties under and to enforce the law". It would seem, therefore, that this Board under this broad grant of power would have the right to rent office rooms and to employ a stenographer.

Examination of the appropriation act for this Board (Section 21, page 100, Laws of 1937) shows that no specific appropriation has been made with which to pay rent. This section of the appropriation act does provide as follows:

"D. Operation:

General expense: including communication, printing and binding, travel and other general expense and Material and Supplies: consisting of stationery and office supplies insurance and premiums on bonds. \$1,800.00"

In view of the broad powers granted this Board by Section 13517 to incur expense, we think the appropriation for "general expense" is sufficiently broad to cover rent. The said appropriation act specifically provides for the salary of a stenographer.

CONCLUSION

It is, therefore, the opinion of this department that you can issue warrants against the funds appropriated for the use of the Board of Osteopathic Registration and Examination to pay rent and to pay the salary of a stenographer.

BOARD OF BARBER EXAMINERS

The statutes governing this Board are found in Chapter 103, R.S. Missouri, 1929. Section 13524, as amended (Laws of 1935, page 191) specifically empowers this Board to establish headquarters at such place in the State as it may choose and to employ a stenographer whose salary is limited to \$100.00 per month. Section 13525 directs the State Auditor to issue warrants monthly for the "payment of the salary, office and all other necessary expenses of said Board". Examination of the appropriation act relating to this Board (Section 2, page 90, Laws of 1937) reveals that there has been a definite appropriation for the salary of a stenographer. Said appropriation act also provides as follows:

"D. Operation

General expense; including communication, printing and binding, insurance and premium on bonds, traveling expenses and other general expense, and material and supplies consisting of stationery and office supplies \$14,000.00."

In view of the fact that the statutes governing this Board direct it to establish headquarters at any place in the State it chooses and directs the State Auditor to issue warrants monthly for the "payment of salary, office and other necessary expenses of said Board", we are of the opinion that the appropriations above quoted is sufficiently broad to cover the item of rent.

CONCLUSION

It is, therefore, the opinion of this department that you can issue warrants against the funds appropriated for the use of the Board of Barber Examiners to pay rent and the salary of a stenographer, said salary not to exceed \$100.00 per month.

BOARD OF EMBALMERS

The statutes governing this Board are found in Chapter 104, R.S. Missouri, 1929. By these statutes, this Board is only required to meet once each year. There is nothing in said chapter (104) which would indicate that the Board is given power to rent offices or employ a stenographer. The only expenditures it is allowed to make are for expenses, salary and per diem of members of the Board (Section 13542), and after payment of these expenses, the surplus, if any, must be turned over to the State Treasurer to be credited to the Public School Fund.

CONCLUSION

It is, therefore, the opinion of this department that you cannot issue warrants against funds appropriated for the use of the Board of Embalmers to pay rent or salary of a stenographer.

BOARD OF CHIROPRACTIC EXAMINERS

The statutes governing this Board are found in Chapter 105, R.S. Missouri, 1929. There is no provision in these statutes which authorizes the Board to establish an office or employ a stenographer. In Section 13554 a reference is made to the principal office of the Board, but we do not think this amounts to a grant of power to the Board to establish an office.

However, this Board has power to meet at such places as it may select and must hold hearings on various matters and we must conclude that the Board could temporarily rent quarters for such meetings and hearings.

CONCLUSION

It is, therefore, the opinion of this department that you cannot issue warrants against the funds provided for the use of the Board of Chiropractic Examiners to pay for rent of offices, except rent on quarters temporarily engaged for meetings of the Board, and that you cannot issue warrants against such funds to pay for stenographic help.

BOARD OF DENTAL EXAMINERS

The statutes governing this Board are found in Chapter 106, R.S. Missouri, 1929. From a careful reading of these statutes, we do not find where this Board is empowered or required to establish an office, nor do we find that the appropriation act (Section 10, page 94-95, Laws of 1937) makes any provision for rent. However, this Board is authorized to meet at such places as it may select and is required to hold hearings on certain matters, and by the reasoning heretofore outlined in discussing other Boards, we must conclude that this Board could rent temporary quarters to hold its meetings and hearings.

Section 13568 requires testimony at certain hearings to be preserved and transcribed and Section 13573 authorizes the Board to employ and pay all necessary clerical services when, in their opinion, same is necessary. We think these two sections authorize this Board to employ a stenographer whenever they deem such employment necessary. Reference to the appropriation act relating to this Board shows that there is an item which includes extra stenographic help.

CONCLUSION

It is, therefore, the opinion of this department that you cannot issue warrants against the funds appropriated for the use of this Board to pay rent, except rent for quarters temporarily engaged, to hold meetings and hearings of the Board or members thereof, but that you can issue warrants against such funds to pay for stenographic help.

BOARD OF ACCOUNTANCY

The statutes governing this Board are found in Chapter 110, R.S. Missouri, 1929. There is nothing in these statutes authorizing this Board to rent offices and employ a stenographer. However, Section 13712 requires this Board to hold examinations at least once each year at such times and places as it may determine, and Section 13715 requires the Board to hold hearings before revoking or cancelling any certificate. By similar reasoning used in discussing other Boards, we conclude that this Board can temporarily rent quarters for the purpose of holding examinations and hearings, and we think the appropriation act (Section 49, page 116, Laws of 1937) under the heading of "general expense" would provide the funds to pay the rent on such temporary quarters.

CONCLUSION

It is, therefore, the opinion of this department that you cannot issue warrants against the funds appropriated for the use of the Board of Accountancy to pay rent or the salary of a stenographer, but that you can issue warrants against such funds to pay rent on temporary quarters engaged for the use of the Board in holding examinations and hearings.

BOARD OF PHARMACY

The statutes governing this Board are found in Chapter 94, R.S. Missouri, 1929. From a careful reading of these statutes, we cannot find any requirement for the Board to establish an office, nor can we say that the workings of the Board would be rendered ineffectual without such office. Some items in the appropriation act (Section 4, page 91, Laws of 1937) indicate the legislature of 1937 assumed that the Board would occupy an established office, but as pointed out heretofore, an appropriation act cannot supply power to a Board to do a thing where that power is not granted by the statutes creating and governing such Board. As is true in the cases of other Boards, this Board is required to hold examinations of applicants and hearings on questions involving licenses and we must conclude that this Board has the power to provide quarters for the use of such meetings. The item of a "general expense" in the appropriation act is sufficient to cover this irregular rent. Section 13151c, page 231, Laws of 1937, provides for clerks in the secretary's office. The appropriation act for this Board specifically provides for the salary of a clerk.

CONCLUSION

It is, therefore, the opinion of this department that you cannot issue warrants against the funds appropriated for the use of the Board of Pharmacy to pay rent, except rent on quarters temporarily provided for examinations and hearings conducted by the Board, but that you can issue warrants against such funds to pay for the salary of a clerk.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED by:

J.E. TAYLOR
(Acting) Attorney General

HHK:VAL

TAXATION: Rural Electrification Co-Operative Associations to pay the
SALES : sales tax for electric current and energy purchased from
TAX : the seller of such current.

September 10, 1937.

9-25
FILED
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Mr. Gray Snyder,
Attorney at Law,
Palmyra, Missouri.

Dear Sir:

This department acknowledges receipt of yours of
the 2nd instant which is as follows:

"As City Attorney for the City of Palmyra,
Marion County, Missouri, am asking for
your opinion, as to whether or not, the
City of Palmyra, a municipal corporation,
who has entered into a contract with the
Missouri Rural Electrification Corporation,
for the delivery of electric current and
energy in the County upon the collection
of its monthly rentals or payments for the
current so used is required to collect from
the said Rural Electrification Corporation,
a Sales Tax for such sale. Understand that
upon the delivery on the part of the City
from its municipal plant to this Rural Elec-
trification Corporation, distributed among
its several customers who are the ultimate
consumers thereof, as the City does not deal
with the ultimate consumers, but with the
manager and directors of the Rural Electri-
fication."

Your request involves the question of who is the
purchaser for use and consumption of the electric current
which your City sells or to whom is the retail sale of such
current made.

The term "retail sale" as defined in sub-section
"g" in Section 1 of the 2% Sales Tax Act of Missouri passed
in 1937, is as follows:

"Sale at retail" means any transfer made
by any person engaged in business as de-
fined herein of the ownership of, or
title to, tangible personal property to
the purchaser, for use or consumption and

Not for resale in any form as tangible personal property, for a valuable consideration. Where necessary to conform to the context of this Act and the tax imposed thereby, it shall be construed to embrace:"

The word "purchaser" as defined in said Act in Sub-section "e" of Section 1 thereof, is as follows:

"The word "purchaser" whenever used in this Act means a person who purchases tangible personal property or to whom are rendered services, receipts from which are taxable under Section 2 of this Act."

The word "person" is defined in Sub-section "a" of Section 1 as follows:

"Person" includes any individual, firm, co-partnership, joint adventure, association, corporation, municipal or private, and whether organized for profit or not, state, county, political subdivision, state department, commission, board, bureau or agency (except the State Highway Department,) estate, trust, business trust, receiver, syndicate, or any other group or combination acting as a unit, and the plural as well as the singular number."

In our research upon this question we have examined the Articles and Certificate of Incorporation of the Missouri Rural Electrification Co-Operative Association and we find that it was incorporated under Article 29 of Chapter 87, R. S. Mo. 1929 for the purpose of conducting a business as authorized by Section 12748 R. S. Mo. 1929, which provides as follows:

"Any number of persons, not less than twelve (12), may associate themselves together as a co-operative association, society or exchange, having all the incidents, powers and privileges of corporations, for the purpose of conducting any agricultural or mercantile business on the co-operative plan, including

The buying, selling, manufacturing storage, transportation or other handling or dealing in or with by associations of agriculturists, of agricultural, dairy or similar products, and including the manufacturing transformation of such articles into products derived therefrom, and for the purpose of the purchasing of or selling to all shareholders and other groceries, provisions and all other articles of merchandise."

We find that this Section provides that Co-Operative Associations may sell commodities to others than its members or stockholders, however upon the examination of the Articles and Certificate of Incorporation of the Missouri Rural Electrification Co-Operative Association we find that it shall sell commodities to its members only.

"Even though the statute gives certain powers to a corporation, yet such corporation may restrict its authority by adopting articles or a constitution curtailing the powers authorized by the statute and, in such case, the articles or constitution will gover." 14a, C. J. Section 2095, page 259.

By Section 7 of the 2% Sales Tax Act, the legislature directed the State Auditor to make, promulgate and enforce reasonable rules and regulations for the enforcements of said Act. Pursuant thereto the State Auditor has made Rule 38, which is as follows:

"Private clubs such as country clubs and other such organizations which are not open to the general public, are deemed to be the users or consumers of goods which they purchase and resell to their members, and sellers of supplies of said clubs should collect and remit the tax thereon. If the club is not open to the general public it will not be necessary for them to collect tax on goods which they sell, provided that they have previously paid the tax thereon at the time of purchase.

"However if private concessionaries operate dining rooms, cigar stands, lunch stands, cafes, swimming pools, or if the professional at country clubs sells golf equipment or other sporting goods, such concessionaries or professionals are making sales for use or consumption and are engaged in business and must collect and remit the tax on said sales to the State Auditor, even though the sales are made only to the members or their guests.

"If clubs are open to the general public, they must be treated as any other business and must collect and remit the tax on their sales made."

It is a settled law for the construction given the statute by those charged with the duty of executing it, is always entitled to the most respectful consideration and ought not to be overruled without cogent reason. U. S. vs. Moore, 95 U. S. 760 l. c. 763.

From the foregoing citation we think the said Electrification Association has authority to restrict its activities to its own members or stockholders and since the business operations of this Co-Operative Association are restricted to its own members or stockholders, and since it does not deal with the general public and in view of the fact that the operations of this Association, so far as they apply to its own members and to the general public, are analogous to that of a club or private organization, we think for the current and electric energy which it receives from the City of Palmyra, that it comes within the classification of a club or private organization and that it is the user and consumer of the current and the electric energy sold by said City and that the Sales Tax should be collected by the City of Palmyra from the said Missouri Rural Electrification Co-Operative Association with its monthly bills.

CONCLUSION.

This office is, therefore, of the opinion that the City of Palmyra should collect the 2% sales tax on electric current and energy that it sells to the said Missouri Rural Electrification Co-Operative Association and, that said Association is the user and consumer of such current and energy and is liable for the payment of the tax.

Respectfully submitted,

APPROVED:

TYRE W. BURTON
Assistant Attorney General.

J. E. TAYLOR.

AMENDMENT No. 4: (1) The amendment does not empower the Conservation Commission to make its own laws independent of the Legislature. (2) A statute enacted by the Legislature empowering the Conservation Commission to make its own laws would not be valid. (3) Amendment does not authorize Commission to determine who shall buy licenses to hunt, etc. And four other questions.

February 5, 1937

Mr. Sydney Stephens, President
Restoration and Conservation Federation
Columbia, Missouri



Dear Mr. Stephens:

In your letter of January 29th, you submitted a number of questions relating to constitutional amendment No. 4, adopted at the last November election.

In rendering you an opinion, we shall attempt to answer each question in its numerical order. The first question is as follows:

I.

"Does the amendment transfer from the legislature to the commission the regulatory functions pertaining to the control, management, restoration, conservation and regulation of the bird, game, fish, forestry and all wildlife resources of the state?"

The first sentence of Amendment No. 4 creates a Conservation Commission and is as follows:

"The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wild life resources of the State, including hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of the same, and the administration of the laws now or hereafter pertaining thereto, shall be vested in a commission to be known as the CONSERVATION COMMISSION, to consist of four members to be appointed

by the Governor, not more than two of whom shall be members of the same political party."

Prior to the enactment of Amendment No. 4 and to the effective date, July 1, 1937, the game and fish laws of Missouri have been, and will continue to be, administered by the Game and Fish Commissioner, as provided in Section 8204, R. S. Mo. 1929. Under Section 8209, R. S. Mo. 1929, entitled, "The duties of Game Commissioner", it is the duty of said commissioner to "enforce all laws now enacted and which may be enacted for the protection, preservation and propagation of game, animals, birds and fish of this state, and to prosecute, or cause to be prosecuted, all persons who violate such laws".

Your attention is called to the fact that under Section 8209, the rights and duties of the Fish and Game Commissioner are almost identical with the wording of Amendment No. 4 in the following:

" * * * in the administration of the laws now and hereafter pertaining thereto".

In short, your question is to the effect, does Amendment No. 4 permit the Conservation Commission to make its own laws relative to the control, management, restoration, conservation and regulation of fish, game and wild life of the State of Missouri? We think not. By the plain wording of the Amendment itself, quoted supra, the Conservation Commission accepts the laws as they now exist and administers the same, not through a Fish and Game Commissioner, but by a Conservation Commission, the members of which are appointed by the Governor and the Amendment sets forth the qualifications, terms of office and compensation. The laws, which the Conservation Commission are to enforce and accept are Sections 8204 to 8315, R. S. Mo. 1929, inclusive.

The acts, which the Fish and Game Commissioner now performs with reference to the fish and game laws of the state, will be superseded by the Conservation Commission. And, when the acts of the Fish and Game Commissioner conflict, as enumerated in the Revised Statutes, from Sections 8204 to 8315, Amendment No. 4 repeals the same.

By a careful consideration of the wording of the Amendment, itself, and in interpreting the words in their ordinary meaning, we can not discern wherein the people of the state, by passing such an amendment, have delegated to the Commission the authority and right to make laws independent of our legislative branch of government governing the control, management, restoration, conservation and regulation of the fish and game of the state,

"including hatcheries, sanctuaries, refuges, reservations and all other property now owned, or used for said purposes, or hereafter acquired for said purposes and the acquisition and establishment of the same,"

This, we think, refers to the hatcheries, sanctuaries, etc., which are now in existence and the control, management, regulation and conservation of which is now governed by Sections 8204 to 8315, inclusive.

Section 1, of Article IV, of the Constitution of Missouri, is as follows:

"The legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'The General Assembly of the State of Missouri.'"

We recognize that the will of the people is supreme and that we are dealing with an amendment which was initiated by the people themselves, yet we can not interpret the amendment as disregarding the Section, quoted, supra, and taking away from the Legislature the power to make laws and delegating such a power to the Conservation Commission. Our government is divided into three branches, the legislative, executive and judicial. The Conservation Commission, in carrying out its duties under the amendment and the laws of the state, functions under the executive branch of our government. The Constitution in providing the duties of each branch of the government guards zealously the right of any branch to encroach upon the rights of any other branch.

It may be that the authors in framing Constitutional Amendment No. 4 had in mind that said amendment would be self-executing and needed no enabling acts and it must be admitted that portions of the Act are self-executing, but we think in the instant point under discussion, Cooley on Constitutional Limitations, Vol. I, page 167, gives a general rule with reference to self-executing, and provides as follows:

"A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, and the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law".

Applying that principle to your question, the amendment by its terms, places the enforcement, conservation, etc., of our fish, game and wild life of the state in the hands of the Conservation Commission by "merely indicates principles, without laying down rules by means of which those principles may be given the force of law".

Conceding for the sake of argument that Amendment No. 4 is a complete act within itself, wholly independent of the Legislature, or any laws now in existence, would it be possible for the Commission to enforce any law relating to the control, management, etc., of the fish, game and wild life of the State of Missouri, when the amendment itself does not provide for any penalties or prosecutions for violation of the terms of the amendment? Thus, it will be noted that if such a situation existed, the Conservation Commission would be powerless to prosecute or punish anyone violating any law it might see fit to enact. Cooley on taxation illustrates the above principle as follows:

"Thus, a constitution may very clearly require county and town government; but if it fails to indicate its range, and to provide proper machinery, it is not in this particular self-executing, and legislation is essential. Rights in such a case may lie dormant until statutes shall provide for them, though in so far as any distinct provision is made which by itself is capable of enforcement, it is law, and all supplementary legislation must be in harmony with it."

Another argument which we deem is effective is the fact that the Amendment contains the following:

"The general assembly may enact any laws in aid of but not inconsistent with the provisions of this amendment and all existing laws inconsistent herewith shall no longer remain in force or effect."

Thereby conceding that the Legislature had the power to enact laws in aid of the amendment and that the amendment itself is not self-enforcing in its entirety and was not independent of and empowered to enact its own laws. We think if the amendment undertook to give the Conservation Commission the power to make laws governing the wild life of the state, that the laws should have been set forth and contained in the amendment itself. In other words, enumerated definitely. We deem the second paragraph of the amendment relating to the right of eminent domain and the manner in which it is to be exercised, to be self-executing.

The question whether an amendment is self-executing in its entirety is discussed in the case of State vs. Kyle, 166 Mo. 1. c. 302, as follows:

"There are a number of provisions in the Constitution of this State, that are unquestionably self-executing, and require no legislation to put them in operation. The test in such cases is, can the Constitution as amended be enforced without the aid of legislation? The question in every case is whether the language of a constitutional provision is addressed to the courts or the Legislature; does it indicate that it was intended as a present enactment, complete in itself as definite legislation, or does it contemplate subsequent legislation to carry it into effect? This is to be determined from a consideration both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed are fixed by the provision itself, so that they can be determined by the examination and con-

struction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts!".

In discussing the Constitutional Amendments 44 and 44a and the Legislature's right to enact laws in aid thereof, the Supreme Court, in the case of Fahey vs. Hackmann, 291 Mo. l. c. 378, said:

"This is a grant of power to the General Assembly not theretofore possessed by it, under the limitations in the Constitution as it stood before this amendment. The amendment is quite long, but all other provisions therein are self-enforcing. The amendment might have directed the issuance and sale of these bonds through some other agency of the State, and thus made the whole amendment self-enforcing. It might have made the amount of the issue definite, and interest rate definite, and the time of payment definite, and then authorized the Board of Fund Commissioners to issue, register and sell the bonds, and the State Treasurer to pay to the proper parties. The framers, however, did not do this, but left it to the General Assembly to accomplish the purpose of the amendment by a legislative act. By this amendment, or rather by the portion quoted above, which is found in the first sixteen lines thereof, legislative discretion was left (1) as to the amount of the bonds issued, subject of course to the limitation of fifteen millions, (2) as to the rate of interest, subject to a limitation of five per cent, and (3) the time of payment, subject to the limitation of twenty years. It required a legislative act before these bonds could be issued or sold. But it is urged that the material portions of the amendment are self-enforcing, and that the whole is but a mandate from the framers to the General Assembly to give effect to the amendment. In this connection it will be noted that in the middle of the amendment appears this sentence: 'The Legislature shall enact such laws as may be necessary to carry into effect this amendment.'"

We are, therefore, of the opinion that Amendment No. 4 itself does not confer upon the Conservation Commission the right to make laws governing control, management, restoration, conservation and regulation of fish, game and other wild life of this state.

II.

"Would a statute enacted by the legislature which undertook to provide such regulations be valid under the constitution as now amended?"

The above question must be considered from the standpoint of the Legislature delegating powers to make laws to a commission. In the decision of *Merchants Exchange vs. Knott*, 212 Mo. 617, the court makes this statement:

"The General Assembly cannot delegate legislative power. The law-making power must remain where the Constitution places it".

Cooley on taxation, Vol. I, page 224, also enunciates this principle in the following language:

"One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for these to which alone the people have seen fit to confide this sovereign trust."

We are, therefore, of the opinion that such a statute, as mentioned in your question, would not be valid.

III.

"Does the amendment authorize the commission to determine who shall buy licenses to hunt, fish, trap or otherwise take and retain wildlife?"

The above question is closely related to question II, answered supra, and in R. S. Mo. 1929, with amendments now contained in the law with reference to licenses. The right to delegate the making of such laws to boards and commissions is discussed by Cooley on taxation in Volume I, page 231, as follows:

"Boards and commissions now play an important part in the administration of our laws. The great social and industrial evolution of the past century, and the many demands made upon our legislatures by the increasing complexity of human activities, have made essential the creation of these administrative bodies and the delegation to them of certain powers. Though legislative power can not be delegated to boards and commission, the legislature may delegate to them administrative functions in carrying out the purposes of a statute and various governmental powers for the more efficient administration of the laws."

In this connection, we are of the opinion that the Legislature could empower the Conservation Commission to make all reasonable rules and regulations in the administration and enforcement of the law relating to licenses.

IV.

"Under the terms of the amendment will the legislature or the commission determine and fix the amount of fees for such licenses?"

In view of our conclusions relating to your Questions I, II and III, this question must again be treated from the standpoint as to whether or not the Legislature can delegate such a power to the Commission. Having heretofore held that the amendment itself did not give the Commission power to make its own laws, it would naturally include fixing the fees, but having held in question III that the Legislature could empower the Commission to make reasonable rules and regulations, we must further consider this question from the standpoint as to whether or not the "determining and fixing

the amounts of fees for such licenses", is a rule, regulation or a law. The following principle of law governing the power of the Legislature to delegate which we think distinguishes between delegating the power to make a law and the power to determine facts is quoted approvingly in the case of *Field vs. Clark*, 143 U. S. 649:

"The Legislature can not delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action independent. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which can not be known to the lawmaking power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

In the decision of *Wyatt vs. Board of Health*, 200 Mass. 474, the power of the Legislature delegating authority to administrative boards to change a general law is discussed as follows:

"The legislature can not delegate authority to an administrative board to change a general law for all the people of the commonwealth, where it has no local or special reason for seeking the aid of such a board."

In the decision of *Wichita Railway Company vs. Public Utilities Commission*, 260 U. S. 48, the court decides to the effect that the delegation of power to a board must be confined to determine finding of facts:

"In creating an administrative board to apply to the details of rate schedules the regulatory police power of the state, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. If the board is required, as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding."

In the decision of *Merchants Exchange vs. Knott*, 212 Mo. 1. c. 640, the Supreme Court of Missouri discussed and distinguishes between a law and a rule as follows:

"Legislative power in Missouri is, therefore, lodged with the General Assembly and not elsewhere except as to such of it as may be delegated under the provisions of that instrument--for instance to cities in matters of local concern. Briefly, legislative power is the power to make laws. What is a law? 'Municipal law,' says Chancellor Kent, 'is a rule of civil conduct prescribed by the supreme power of a State.' (1 Kent Com. (14 Ed.), 447.) That definition is part of Sir William Blackstone's, which adds, 'commanding what is right and prohibiting what is wrong.' In his notes to Blackstone (1 Sharswood's Blk. Comm., p. 44) Judge Sharswood defines a law to be: 'A rule of civil conduct prescribed by the supreme power in a State, commanding what is to be done, and prohibiting the contrary. * * * * * Measured by the foregoing definition of law, can the statute stand? We think not. We are of opinion that the power to bind and loose, to inaugurate or suspend the operation of the law, to say when and where it is law is of necessity an inherent and integral part of the law-making power, not to be delegated to, and wielded by, any commission. True, the act was passed by the General Assembly, approved by the Chief Executive and stands published as authenticated law, but to all intents and purposes it is only a barren ideality, having such life as is thereafter breathed into it from an unconstitutional source. No Missourian may know whether it applies to him or his concerns, as a rule of civil conduct, or will ever apply until in the opinion of the commissioners it 'may be' considered necessary'.

"The General Assembly may not clip itself of one iota of its lawmaking power by a voluntary delegation of any element of it--by putting its constitutional prerogatives, its conscience and wisdom, 'into commission.' On this point Judge Cooley says in an oft quoted passage (Cooley's Const. Lim. (6Ed.), 137): 'One of the settled maxims in constitutional law is, that the power conferred upon the Legislature to make laws can not be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted can not relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.'"

We think the decision in the Knott case is further applicable to the point under discussion, l. c. 644, as follows:

"Again, it is argued by the Attorney General that a class of cases holding that, while a Legislature cannot delegate its power to make a law, yet it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend, sustains the constitutionality of the present statute.

Many cases attest the soundness of the proposition that the Legislature in making a law can delegate a power such

as just indicated. For instance, *Crowley v. Christenac*, 137 U. S. 86; *Locke's Appeal*, 72 Pa. St. 491; *Land & Stock Co. v. Miller*, 170 Mo. 253. See, also, authorities cited, supra, in this paragraph. But the power delegated to the commission by the Act of 1907 is not the power to determine a fact. It is the wholesale, unregulated power to say, in effect, there shall be an operating law or no law, to any where the law shall operate, on whom and when. This phase of the case, having been heretofore fully developed, needs no further attention, beyond saying that no man in Missouri holds his property or rights, subject to the unregulated discretion of any other man."

We are of the opinion that the amendment does not now give the power to the Conservation Commission to determine and fix the amount of fees for licenses (such fees are now fixed by the Legislature, under Section 8254, R. S. Mo. 1929); that the legislature could not delegate to the Commission power to fix the amount of fees, as this would exceed delegating to a board or commission the power to make rules and regulations and would delegate to such board the power to make a law. In some instances, boards are empowered to fix fees, but there must be a regulated power and not an unregulated power. To permit the Conservation Commission to fix the fees without limitation or without regulation would be to grant the Conservation Commission a roving commission to determine who shall or shall not be liable to purchase licenses; to place a greater license fee on one section of the state than on another; in fact, to place exorbitant license fees. This, we think, the amendment has not done and the Legislature could not do.

V.

"Does the amendment dedicate to the ex-

clusive use of the commission for the purposes for which it was created the fees, monies and funds arising from the collections of such fees and from the transactions of the commission? If it does, will it be necessary for the legislature to appropriate such fees to the use of the commission?"

The next to the last paragraph of Amendment No. 4 relates to the fees and funds arising from the operation and enforcement of the fish and game laws under the Conservation Commission. The paragraph is as follows:

"The fees, monies, or funds arising from the operation and transactions of said Commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wild life resources of the State and from the sale of property used for said purposes, shall be expended and used by said Commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wild life resources of the State, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto and for no other purpose."

This portion of the amendment we construe as a mandate to the Conservation Commission to apply and use all fees, monies or funds coming into its hands for the control, management, restoration, etc., of the fish, game, forestry and all wild life resources of the state, the same not to be used for any other purpose. In 1933, the Legislature, Laws of 1933, page 415, passed an Act to the effect that:

"All fees, funds and moneys from whatever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or

regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer."

Section 8304, R. S. Mo. 1929, relates to the disposition of the fees under the fish and game laws as now in force, said section being in part as follows:

"All moneys sent to the state treasurer in payment of licenses issued under the provisions of this article, shall be set aside by the state treasurer, and shall constitute a fund known as 'the state game protection fund,' for the payment of salary of the state game and fish commissioner, and his office and other necessary expenses. For the payment of deputy game and fish commissioners, and their necessary expenses; also the buying, shipping, keeping, propagating, and preserving of game and fish. The liability of the state for per diem, salaries and expenses, of deputy game commissioners appointed under this chapter or otherwise, and for all other services and expenses incurred for any purpose, or in consequence of this chapter shall be limited to the amount of moneys in the state game protection fund, and in no event shall the state pay out any such salaries or expenses,

or be liable in any way therefor, except to the extent of such game protection fund and any contract, express or implied, of the state game and fish commissioner to the contrary notwithstanding. * * * *".

. We think that the paragraph in Amendment No. 4, quoted supra, relating to the fees, the fees should be paid into the state treasury and appropriations made by the Legislature as is the usual custom because the paragraph quoted supra does not state that the funds shall remain in the hands of the Conservation Commission, nor does it state that the fund shall stand appropriated without any action by the Legislature. In other words, that portion of the amendment relating to fees and monies does not conflict with Section 1 of the Laws of 1933, page 415, nor is not in direct conflict with Section 8304, quoted supra.

VI.

"Would it be valid under the constitution as now amended for the legislature to enact a law declaring that the amendment, the statutes remaining in force as not being inconsistent with the amendment and the regulations promulgated by the commission shall be the law of the state relating to the control, management and regulation of the bird, fish, game, forestry and wildlife resources, and that any violation thereof will be a misdemeanor and punishable as such?"

In view of our opinion regarding the first four questions which you have submitted, we are of the opinion that it would be valid for the Legislature to declare that the amendment, the statutes now in force not inconsistent with the amendment and the regulations promulgated by the Commission not arbitrary, or exceeding the power given to the Conservation Commission by the amendment to be the laws of the state relating to the control, management and regulation of the fish, game and wild life resources. In fact, we think that that situation now exists even though no such statute be passed by the Legislature.

VII.

"Would such a statute in your opinion provide the commission with authority to carry out its functions as provided in the amendment?"

Mr. E. Sydney Stephens

- 16 -

February 5, 1937

We think a statute, as mentioned in your question No. 6 would provide the Commission with authority to carry out its duties as provided in the amendment. In view of our answer to your question No. 6, a mere omnibus statute containing the matters contained in question No. 6 would not increase or diminish the powers of the Conservation Commission which it would have irrespective of such a statute.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

ON:RT

SUPERVISOR/OF BUILDING AND LOAN ASSOCIATIONS:

- (1). A person appointed by the Governor to fill vacancy in office of Supervisor of Building and Loan Associations has authority to discharge the duties of Supervisor prior to confirmation by the Senate.
- (2). Removal of supervisor disqualifies him to act as Receiver. Supervisor appointed to fill vacancy should proceed to have himself appointed receiver in all cases pending in court and court should appoint him as such receiver.

February 20, 1937

Honorable Lloyd C. Stark
Governor of Missouri
Jefferson City, Missouri



Dear Governor Stark:

This will acknowledge receipt of your letter of recent date requesting an opinion from this Department, which reads as follows:

"I have this day removed Ira A. McBride as Supervisor of the Bureau of the Building & Loan Supervision and have appointed J. W. McCammon to take charge of the affairs of the Bureau as Supervisor.

"Mr. McBride, is, by virtue of his position as Supervisor of the Bureau of Building & Loan Supervision, Receiver in a number of cases involving Building & Loan Associations in Jackson County, Missouri. These cases are pending in the Circuit Court of Jackson County and it is my understanding that all of them are in Judge Albert Ridge's Division, with the possible exception of one case in Judge Ray Cowan's Division. I will appreciate your giving me an opinion covering the following points:

- "1. Does the removal of Mr. McBride as Supervisor automatically constitute a disqualification of him

to act as Receiver in these cases?

- "2. Does the appointment of Mr. McCammon as Supervisor, prior to confirmation by the Senate, authorize him to act and discharge the duties as Supervisor of the Bureau of Building & Loan Supervision?
- "3. Can the Judge before whom these receivership matters are pending refuse to appoint Mr. McCammon in his capacity as Supervisor, as Receiver in the cases in which McBride is now acting as Receiver?"

We will answer your second question first.

Under the provisions of Section 5577, Revised Statutes of Missouri 1929; the Supervisor of Building and Loan Associations holds his office at the pleasure of the Governor. Said section reads as follows:

"The supervisor of building and loan associations shall be appointed by the governor, by and with the advice and consent of the senate, and shall hold his office at the pleasure of the governor."

Section 361, Chapter 15, Throop's Public Officers, provides, in part:

"The law, relating to the power to remove without cause, has already been incidentally considered in discussing the question, who has the power of removal. The

general rule is thus stated, in a case decided by the Supreme Court of Pennsylvania: 'Where an appointment is during pleasure, or the power of removal is entirely discretionary, there the will of the appointing or removing power is without control, and no reason can be asked for, nor is it necessary that any cause should be assigned.' "

In view of the above, there can be no doubt of the Governor's authority to remove the Supervisor of Building and Loan Associations at any time. Having done so a vacancy exists in the office of Supervisor of Building and Loan Associations.

Section 327, Chapter 15, Throop's Public Officers, states the law as follows:

"An officer holds over, only where he has served to the end of his term, not where he has been adjudged to have forfeited his office; for such a judgment produces an immediate vacancy. So it has been held, that an officer, who has resigned or has been removed, does not hold over, for the same reason, namely, that the office becomes vacant by the resignation or removal."

Under the provisions of Section 5577, supra, the Supervisor of Building and Loan Associations is appointed by the Governor, by and with the advice and consent of the Senate. As we have stated above, however, a vacancy has been created in the office of Supervisor of Building and Loan Associations by reason of the discharge of Ira A. McBride. It is a fundamental principle that the law abhors vacancy in public

office and great precautions are taken to guard against their occurrence.

Section 11 of Article V of the Constitution of Missouri provides as follows:

"When any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed and qualified according to law."

It is plain from the above that the Governor has the constitutional authority, unless it is otherwise provided by law, to appoint a person to fill a vacancy in any office and that such person continues in office until a successor shall have been duly elected or appointed and qualified. We find no other provision for the appointment of a person to fill a vacancy in the office of Supervisor of Building and Loan Associations.

It is, therefore, the opinion of this Department that the Governor has authority to appoint a person to fill a vacancy in the office of Supervisor of Building and Loan Associations created by his removal of the Supervisor, and that such person appointed to fill the vacancy has the power to carry out all the duties of such office until his successor is appointed and qualified according to law; that is, until the office is filled by a person appointed by the Governor, by and with the advice and consent of the Senate, who has duly subscribed to the oath and given the bond required by law.

Your questions numbered one and three being related, we will treat them together.

Section 5627, Laws of Missouri 1931, pages 163, 164, 165, provides, in part, that

"The supervisor may at any time after he takes charge of the assets and the affairs of an association, institute proceedings in the circuit court in the city or county in which said association has its principal office, and have himself appointed temporary receiver, until it is determined whether or not such association can resume business; or appointed receiver for the purpose of winding up its affairs, and the court shall upon such application, appoint the supervisor such receiver; * * * "

Section 5628, Laws of Missouri 1931, page 165, provides that such proceedings shall be conducted by the Attorney General of the State, in the name of the State of Missouri as plaintiff, at the relation of said Supervisor.

The above sections, together with other sections found in Chapter 35, Laws of Missouri 1931, pages 141 to 165, provide a complete scheme for liquidating and winding up the affairs of building and loan associations.

It is plain from a reading of Section 5627, supra, that the supervisor is appointed by the court as receiver, by virtue of the fact that he is supervisor.

Section 295 of the Second Edition of Thompson on Building Associations, provides, in part:

"When the legislature provides a complete scheme for winding up an association through some executive officer and the attorney-general, it may become a question whether or not the remedy as provided is an exclusive one. The supreme court of Indiana has held

that when the legislature provided that the auditor of the state should enforce any liability for loss occasioned by the misconduct of trustees of a savings bank, the remedy thus provided was exclusive of all others. The principles governing that case would seem to control the application for a receiver when the statute determines the method of winding up insolvent associations. The policy of the law would seem to be the placing of these institutions under the surveillance of an executive officer of the state for all purposes. To hold otherwise would expose the association to attacks from every disgruntled shareholder - a position that might weaken it in public confidence and be very expensive to it in defending against assaults. * * * *

See also Section 1226, page 1372, Braver on Liquidation of Financial Institutions.

The supervisor having been appointed receiver, under the statute, by reason of the fact that he was Supervisor of Building and Loan Associations, it would necessarily follow, we think, that upon his discharge as supervisor he would no longer have authority to act as receiver.

As pointed out above, the supervisor appointed to fill the vacancy created by the removal of Ira A. McBride has the authority and it is his duty to carry out the duties imposed upon the supervisor by law. A part of these duties is to have himself appointed receiver by the court when the affairs of a building and loan association have been taken over by the

February 20, 1937

supervisor, and it is also made the duty of the court to appoint the supervisor such receiver.

It is, therefore, the opinion of this Department that the removal of Ira A. McBride as Supervisor of Building and Loan Associations, disqualifies him to act as receiver in cases now pending in court in which he has been appointed receiver by virtue of the fact that he was Supervisor of Building and Loan Associations.

It is our further opinion that it is the duty of Mr. McCammon, who has succeeded Mr. McBride as Supervisor, to institute proceedings in the circuit court in which such receiverships are now pending to have himself, as supervisor, substituted as receiver in place of Mr. McBride, and, it is our further opinion that the Circuit Judge before whom said cases are pending should, upon proper application, remove Ira A. McBride as receiver and substitute the new supervisor in his place.

Respectfully submitted,

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J. E. TAYLOR
(Acting) Attorney General

JET:LC

RE: MOTOR VEHICLE: Commissioner of Motor Vehicles may show tonnage capacity on license plates for commercial vehicles.

4-8
April 5, 1937.

Mr. V. H. Steward,
Commissioner of Motor Vehicles,
Jefferson City, Missouri.



Dear Sir:

This Department is in receipt of your request for an opinion as to the following:

"Does the State Motor Vehicle Commissioner have authority or would have authority under the law to show or place upon license plates issued for commercial motor vehicles, the authorized tonnage capacity of the commercial vehicle for which the license plate is purchased?"

Article I, Chapter 41 of the Revised Statutes of Missouri, as amended, entitled "Motor Vehicles - Regulations and License Fees" is a revenue measure. The Supreme Court in the case of State ex rel v. Becker, 233 S. W. 54, in speaking of this Act, said:

"It is therefore avowedly a revenue measure. The owner of such vehicle may operate it on his own premises without being subject to the payment of the registration fee imposed by the statute. In such case he will pay the general property tax. The state maintains roads and bridges at great expense and exacts a license fee for the privilege of driving or operating these high-powered vehicles thereon. It is clear, therefore, that the registration fee is not a tax on the vehicle but upon the privilege of operating it on the highways of the state."

The intention of the Legislature in enacting Section 7770, Laws of Missouri 1933, page 297, must necessarily be developed from a consideration of the purpose of the whole Article, in this case the collection of revenue. If, as alleged, the showing of the authorized tonnage capacity of commercial vehicles on the license plates of such vehicles will result in increased revenue to the State by reducing evasion of registration fees provided for in Section 7761, Laws of Missouri (Extra Session) 1933-1934 P. 99, then certainly the necessary authority

to require such showing should be construed from Section 7770 if possible to do so without doing violence to the express wording of the Section.

However, this Section of our laws is so clear and unambiguous as not to require, in our minds at least, any legal interpretation. Two sentences of said section specifically authorize the Commissioner of Motor Vehicles to make this showing of the authorized tonnage capacity of commercial vehicles on the license plates.

The first sentence of said Section provides as follows:

"The commissioner shall, without expense to the owner, issue and deliver to him such number plates bearing the name or the abbreviated name of the state and the number assigned as may be necessary to properly carry out the provisions of this article."

It will be noticed that while this sentence requires the name of the state or an abbreviation thereof and the number assigned, it does not require these to the exclusion of other indicia. The main purpose of the sentence is to require the issuance "of such number plates ***** as may be necessary to properly carry out the provisions of this article". We take it that in a revenue measure the efficient collection of the revenue is "necessary to properly carry out the provisions" of the measure.

In addition to this legislative sanction of the proposed plan, however, we have the following express authorization found in the last sentence of Section 7770, sub-section (a), as follows:

"The commissioner may provide for the arrangement of such numbers in groups, or otherwise, and for other distinguishing marks on such plates."

CONCLUSION

In view of the foregoing, it is the opinion of this Department that the Commissioner of Motor Vehicles is authorized by Section 7770, Laws of Missouri 1935, page 297, to require that license plates issued for commercial motor vehicles show the authorized tonnage capacity of the vehicle for which the license is purchased.

Respectfully submitted,

JOHN W. HOFFMAN, JR., Assistant
Attorney General.

APPROVED:

(Acting) Attorney General.
JWH:EG

GOVERNOR: Senate Bill No. 5 which attempts to create
a Revision Commission is unconstitutional
for four reasons

April 29, 1937



Honorable Lloyd C. Stark
The Governor of Missouri
Executive Office
Jefferson City, Missouri

Dear Governor Stark:

This will acknowledge receipt of your letter
of recent date requesting an opinion from this Depart-
ment. Your letter reads as follows:

"Some members of the General
Assembly have raised the ques-
tion of whether or not members
of the House and Senate are
eligible, under the State
Constitution, to serve under
Senate Bill No. 5 as members
of the Commission to revise
the statutes of the State.
Will you please advise me as
soon as practicable.

"Senate Bill No. 5 has passed
both Houses of the General
Assembly and is before me for
signature."

Section 1 of Senate Bill No. 5 provides:

"That a Statute Revision Com-
mission, to consist of sixteen
(16) members is hereby created;
seven (7) of whom shall be ap-
pointed by the President Pro
Tem of the Senate, and seven
(7) of whom shall be appointed
by the Speaker of the House;

providing that not more than five (5) of each seven (7), shall belong to the same political party, together with the President pro tem of the Senate and the Speaker of the House."

The first question we desire to discuss is; did the present legislature have the power to legislate on the subject matter of revising the statute laws of the State.

Section 41, Article IV, of the Constitution of Missouri, as amended at the election of November 8, 1932, and appearing at page 479 of the Session Acts of 1933, provides:

"In the year 1939 and every ten years thereafter all the statute laws of a general nature, both civil and criminal, shall be revised, digested and promulgated in such manner as the General Assembly shall direct. Provided, that after the expiration of 70 days of such revision sessions no measure other than appropriation bills and such bills as the General Assembly may determine by an express statement therein contained to be revision bills shall be considered by the General Assembly, except such as may be recommended by special message to its consideration by the Governor. Provided, further, that all revision bills shall take effect and be otherwise considered as are other bills."

It is certain that the passage of the constitutional amendment at the November election, 1932,

vested in the Legislature of 1939 the sole power to revise, digest and promulgate the statute laws in such a manner as the General Assembly of 1939 directs. The 59th General Assembly has no power whatever to direct the manner in which the revision of the statute laws shall be made. The constitutional amendment prohibits any General Assembly other than the Sixtieth General Assembly, and every ten years thereafter, to direct, in any manner, the revising, digesting and promulgating of the statute laws. The language of the amendment is clear and unambiguous and does not permit any construction other than that the 1939 General Assembly shall direct the manner in which the statute laws shall be revised. To construe the language of the amendment to mean that the Fifty-ninth General Assembly shall have the power to direct the manner in which the laws are to be revised is to distort the plain meaning of the words contained in the amendment. The fact that Senate Bill No. 5 limits the power of the Commission to preparing and submitting Bills to the Sixtieth General Assembly in the form of proposed legislative enactments condensing the Revised Statutes by eliminating duplicate, obsolete, conflicting, unconstitutional and ambiguous statutes and to harmonizing and revising the statutes, is not sufficient to escape the Constitutional inhibition for the reason that the Fifty-ninth General Assembly has no power to create a Statute Revision Commission nor to vest said Commission with any duties pertaining to the revision of the statutes of Missouri. The duty of revising the statutes is vested in the legislature to be assembled "in the year 1939 and every ten years thereafter."

Therefore, we are of the opinion that Senate Bill No. 5, creating a Revision Commission, is contrary to and conflicts with Section 41, of Article IV, of the Constitution of Missouri, and, therefore, is unconstitutional.

The next question we shall consider is; whether or not members of the proposed revision commission are officers within the meaning of Section 12, of Article IV, of the Constitution of Missouri. Many

definitions of "public office" are found in the textbooks and decisions of the courts. A generally accepted definition is found in Meecham on Public Offices, pages 1 and 2, paragraph 1, wherein it is said:

"A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer."

And, further, in Section 4, it is said:

"The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of the government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive or judicial, attaches for the time being, to be exercised for the public benefit."

The above definitions have been accepted by the courts of this State in many decisions. State v. Truman, 64 S. W. (2d) page 105.

In order to determine whether or not members of the proposed Revision Commission are officers it is necessary to examine the provisions of Senate Bill No. 5. Said Bill creates a Revision Commission to consist of sixteen (16) members; their powers are designated and their duties defined by the Act; they are appointed for a definite term and their compensation is fixed by the Act; they are to exercise a share of the powers of the civil government and are required to take an oath of office, which is the same oath required of the members of the General Assembly. The oath reads:

"I do solemnly swear, or affirm, that I will support the Constitution of the United States and of the State of Missouri, and faithfully perform the duties of my office; and that I will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law."

We think that it is apparent from the Act that it was the intention of the Legislature to make the members of the proposed Commission civil officers. If, however, it is contended that it was not the intention of the Legislature to create offices and that the text of the Bill is not clear and unambiguous as to the intention of the Legislature, then we may consider the title of the Bill which clearly establishes that it was the intention of the General Assembly to create the offices of commissioners.

In the case of *In re Graves*, 30 S.W. (2d) 129, the court, en banc, in an opinion by Judge Atwood, l. c. 152, said:

"When the language of a statute is ambiguous, recourse may be had to the title in order to ascertain the true meaning of

the act. 25 R. C. L. p. 1031,
sec. 267; Straughan v. Meyers,
268 Mo. 580, 588, 187 S. W.
1159; Strottman v. Railroad,
211 Mo. 227, 252, 109 S. W.
769; State ex rel. v. Fort,
210 Mo. 512, 527, 109 S.W.
737. "

In the title of Senate Bill No. 5 it is stated:

"To provide for the tenure
of office of said Commis-
sion."

The title shows beyond peradventure that the
legislative intent was to create offices.

The act in question provides that the President
pro tem of the Senate and the Speaker of the House
are to be members of the proposed Commission, and
that the Speaker is to appoint seven (7) members and
the President pro tem of the Senate seven (7) members.

If the Commissioners that are to be appointed
under the Bill are civil officers, then, answering
the question of whether or not members of the legisla-
ture can hold such offices, we are of the opinion
that they can not for the reason that it would be a
violation of Section 12, of Article IV, of the
Constitution of the State of Missouri, which pro-
vides:

"No senator or representa-
tive shall, during the term
for which he shall have been
elected, be appointed to
any office under this State,
or any municipality thereof;"

By reason of the above Constitutional inhibition no senator or representative, during the term for which he has been elected, shall be appointed to any office.

In the case of State v. Clausen, 182 Pac.610, the Supreme Court of Washington had before it the constitutionality of a law which provided that the Governor shall appoint a Commission of five citizens of the State, one of whom shall be a member of the Senate and one a member of the House of Representatives, to be known as the "Industrial Code Commission; " the pay of each commissioner was fixed at ten dollars (\$10.00) per day while actually employed in the work of the commission and necessary expenses incurred in the performance of his duties. It was the duty of the Commission to investigate the evils existing in industrial life and the means and methods of remedying the same and to prepare and present to the Legislature a proposed act or acts upon such subjects.

Section 13, of Article II, of the Washington Constitution was as follows:

"No member of the Legislature during the term for which he is elected shall be appointed or elected to any civil office in the state which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected."

The members of the General Assembly appointed contended that their appointment did not contravene the above section of the Constitution, in that it was not an appointment to a civil office but rather was a mere employment. The court, in holding that the appointment of members of the Legislature to such Commission was invalid, said, l. c. 613:

"Section 12, art. 2, of the Constitution does not prohibit a member of the Legislature during the term for which he was elected from being appointed or elected to office, generally, in the state. The preclusion extends only to any office which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected. Of course, the purpose of the rule is obvious. It is, as was stated in *Fyfe v. Mosher*, 149 Mich. 349, 112 N. W. 725, in construing a similar constitutional provision, as follows:

" 'The purpose of these provisions is "to preserve a pure public policy," or, as we said in *Ellis v. Lennon*, 86 Mich. 468, 49 N.W. 308, speaking through Justice McGrath, "to prevent officers from using their official position in the creation of offices for themselves or for the appointment of themselves to place. " '

"The commission is created by, and the members derive their powers from, an act of the Legislature. The term of service is fixed. It uses the process of the state to compel the attendance of witnesses and the production of books and papers. Its members administer oaths. It has at its disposal \$25,000 of the state's money for carrying out the purposes of the act. On behalf of the state, of its own independent motion and will, it makes investigations and holds hearings within the state, when, where, and for whatever length of time it pleases. It defined duties are under the direction and control of no superior; and each

member, in addition to his expenses, receives compensation for each day's actual service."

In the case of *People v. Tremaine*, 168 N.E. 817, the Court of Appeals of New York had before it the question of whether the designation of the chairman of the Senate finance committee and the chairman of the assembly ways and means committee to approve the segregation of lump sum appropriations, amounted to the making of civil appointments by the Legislature. The court, at l. c. 821, said:

"The words 'any civil appointment' as thus used are very broad, and include any placing in civil office or public trust, pertaining to the exercise of the powers and authority of the civil government of the state, not reasonably incidental to the performance of duties of a member of the Legislature, as distinguished from a military office or a mere employment or hiring in contract, express or implied."

And, further, at l. c. 821 it was held:

"That the designation of the chairman of the Senate finance committee and the chairman of the Assembly ways and means committee to approve the segregation of lump sum appropriations amounts to the making of civil appointments by the Legislature cannot be seriously disputed. The positions are created and filled by the Legislature; the incumbents possess governmental

powers; the powers and duties of the positions are defined by the Legislature; such powers and duties are performed independently; the positions have some degree of permanency and continuity. Their power is not exhausted by a single act, but is a general supervisory power over a large group of appropriations, amounting to nearly \$9,000,000, to be exercised whenever the occasion arises. Unless the oath of a member of the Legislature is sufficient, the appointee should take the constitutional oath of office. Const. art. 13, sec. 1. Their appointment was on behalf of the government in a station of public trust not merely transient, occasional, or incidental. It was 'a continuing power to be exercised whenever occasion shall arise.'

In the case of State ex rel. Attorney General v. Valle, 41 Mo. 29, the defendant, during the time that he was a member of the House of Representatives, was appointed as a member of the board of water commission for the City of St. Louis, which commission was created by the legislature during the time the defendant was a member. The Supreme Court held that the appointment was in violation of Section 12, Article IV of the Constitution of Missouri, for the reason that the water commission was a civil office in this state and a Representative is ineligible to be appointed to any civil office.

In view of the above, it is our opinion that the proposed members of the Statute Revision Commission are officers, and that Senate Bill No. 5 which attempts to designate the President pro tem of the Senate and the Speaker of the House members of said Commission is unconstitutional and void for the reason that Section 12, Article IV of the Constitution, supra, prohibits

the appointment of any senator or representative to any office during the term for which he is elected.

From another Constitutional standpoint we believe that the Act in question is unconstitutional; Article III of the Constitution provides:

"The powers of government shall be divided into three distinct departments - the legislative, executive and judicial - each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted."

In the case of State ex inf. Hadley v. Washburn, 166 Mo. 680, 1. c. 692, the Supreme Court said:

"A public officer exercising a function of the state government is an agent or servant of the sovereign people of the State, and must derive his authority either by election by the people or appointment by that tribune to whom the people have confided the power of appointment."

It is, therefore, necessary that he should trace his title to the office to the department of the state government to which, under Article III * * * * the power to confer title to such an office is committed."

The court, in passing upon the right of the Legislature to require the Governor to appoint members of the board of election commissioners for Kansas City from lists of eligible citizens named by the central city committees of political parties to which they belong, at l. c. 692, said:

"But we are concerned now with the question of the power of the Legislature to compel the Governor to make the appointment from one of the three named by the committee and we are asked to say that the Governor, by force of this act, can not do otherwise than register the will of the committee.

"If that is the law, then, in reality, what would be the source of an appointment under it?"

"We are referred to section 9 of article 14 of the Constitution which is: 'the appointment of all officers not otherwise directed by this Constitution shall be made in such manner as may be prescribed by law.' And it is contended that that section confers authority on the General Assembly for this act. That section expressly authorizes the General Assembly, acting within its legitimate capacity, to pass a law prescribing the manner in which an appointment shall be made, but it does not authorize the General Assembly to make the appointment itself nor to authorize any one unconnected with the government to do so. To provide by law the manner in which an appointment shall be made is one thing, to make the appointment is another; the one is in its nature legislative, the other is essentially executive. The Constitution authorizes the Legislature to do the one, but not the other."

In passing upon a similar question the Court of Appeals of New York, in the case of *People v. Tremaine*, 168 N. E. 817, supra, at l. c. 822, said:

"The Legislature has not only made a law - i. e., an appropriation - but has made two of its members ex officio its executive agents to carry out the law; i. e., to act on the segregation of the appropriation. This is a clear and conspicuous instance

of an attempt by the Legislature to confer administrative power upon two of its own members. It may not engraft executive duties upon a legislative office and thus usurp the executive power by indirection. *Springer v. Philippine Islands*, 277 U. S. 189, 48 S. Ct. 480, 72 L. Ed. 845. "

The Legislature, under the provisions of Senate Bill No. 5, attempts to create a commission whose members are civil officers and then appoints the Speaker of the House and the President pro tem of the Senate as members of the Commission, and, under the above authorities, it is clear that the Legislature is attempting to exercise the executive power of appointing civil officers, in violation of Article III of the Constitution, supra, which prohibits the Legislature from exercising executive functions.

If it is contended that Senate Bill No. 5 creating the Commission is not a creation of civil offices and the commissioners are not officers but are only employees or agents of the Fifty-ninth General Assembly to assist the Sixtieth General Assembly in revising the statutes, nevertheless, we believe that the act would be unconstitutional. We concede that the General Assembly has the power and authority to appoint such officers or agents or employees that are necessary to carry out the functions of the Legislature; it is a necessary and inherent power to preserve the independence of the legislative policy. There can be no question that the legislature possesses the requisite power to appoint such employees and officers within the limitations of the Constitution. However, even if the members of the proposed commission be considered officers or employees of the legislature, Senate Bill No. 5 would violate Section 16 of Article IV

of the Constitution, which provides, in part:

"* * *and no allowance or emolument, for any purpose whatever, shall ever be paid to any officer, agent, servant or employee of either house of the General Assembly, or of any committee thereof, except such per diem as may be provided for by law, not to exceed five dollars."

Section 9 of Senate Bill No. 5 provides:

"Each member of the commission shall receive compensation at the rate of ten dollars per diem * * * and an allowance not to exceed five dollars per diem while actually engaged in performing the duties prescribed for such commission on account of traveling and subsistence expenses, payable in monthly installments. * * *"

The above provision of the Act is clearly contrary to the express limitation of Section 16 of Article IV of the Constitution as to the compensation that officers and agents and employees of the Legislature may receive per diem.

CONCLUSION

In view of all the above, it is the opinion of this office that Senate Bill No. 5 is unconstitutional and void, for the reasons:

1. That the provisions of Section 41, Article IV of the Constitution, as amended by the people at the November election, 1932, vested in the General Assembly of 1939 the sole and exclusive power to revise, digest and promulgate the statute laws of this State in such manner as the General Assembly of 1939 shall direct, and, therefore, the present General Assembly has no authority to create a Revision Commission to assist in the revision of the statute laws.

2. That the members of the Statute Revision Commission are officers and that said Bill, which attempts to appoint the President pro tem of the Senate and the Speaker of the House members of the Commission, is in violation of Section 12, of Article IV, which prohibits the appointment of any Senator or Representative to any office during the term for which he is elected.

3. That the appointment by the General Assembly of two of its members as members of the Revision Commission is an attempt on the part of the Legislature to exercise the executive power of appointment, which is a violation of Article III of the Constitution which prohibits the Legislature from exercising any executive functions.

4. If the members of the proposed Commission are officers or employees of the Legislature, the Act is in conflict with Section 16 of Article IV of the Constitution which limits the compensation

Honorable Lloyd G. Stark

-17-

April 29, 1937

of officers, agents and employees of the Legislature
to five dollars per diem.

Respectfully submitted,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JET:LC

BUILDING & LOAN: Proposed merger of Benefit with North American Association approved.

May 18, 1937.



Governor Lloyd G. Stark
Executive Offices
Jefferson City, Missouri

Dear Governor Stark:

This is to advise you that we have examined the proposed merger of the Benefit Building and Loan Association with the North American Savings and Loan Association, both located in Kansas City, and are of the opinion that the merger is legal and complies with the statutes, and will be effective if and when approved by the Circuit Court of Jackson County.

It is our further opinion, after considerable investigation and inquiry as to the merits of the merger, that the shareholders' interests will be protected and a benefit to them if consummated.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General



JLH/R

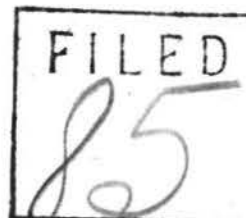
BOARD OF PERMANENT SEAT OF GOVERNMENT:

May hang in the Capitol plaster cast models of Victor Holm's Missouri Monument in the Vicksburg National Park, one panel showing the Union Army in battle and one showing the Confederate Army in battle, if said panels harmonize with the uses, style and construction of the State Capitol.

May 25, 1937

5-26

Honorable Lloyd C. Stark
Governor of the State of Missouri
Jefferson City, Missouri



Dear Governor Stark:

In reply to your letter of April 28, wherein you enclose a letter from Dr. A. C. Burrill, Curator, Missouri Resources Museum, I assume the opinion requested is relative to what officer or board is vested with the authority to determine if certain Plaster Paris Cast models of Victor Holm's Missouri Monument in the Vicksburg National Park, one panel of the Union Army in battle and the other of the Confederate Army in battle, should be placed in the Capitol Building at Jefferson City, Missouri, and if this be decided in the affirmative, where shall they be placed.

The 49th General Assembly created what is known as the Capitol Decoration Committee found in the laws of 1917, pp. 424 and 425 and 426, whose duty was to provide plans for suitable decoration of the new Capitol Building by means of painting and sculpture, historical, scenic, or allegorical, illustrative of the history and resources of the state, and the genius of its people. This Committee continued to function until 1928, when it made its final report.

Section 9135, Revised Statutes Missouri 1929, gives full authority and supervision of all property of the State of Missouri at the seat of government in Jefferson City, Missouri, to the Board of Permanent Seat of Government. This same section further provides that the Board of Permanent Seat of Government shall appoint a Commissioner of the Permanent Seat of Government, who shall in all things he is given control of, hold such power subject to the direction of the Board of Permanent Seat of Government.

"There is hereby created a board to be known as the Board of Permanent Seat of Government, to consist of the governor, secretary of state, state auditor, state treasurer and attorney-general, which shall have general supervision and charge of the public property of the state at the seat of government. This board shall have power to appoint a commissioner of the permanent seat of government, who shall hold his office, at the pleasure of the board, and shall receive twenty-five hundred dollars per annum which shall be in full for all services rendered the state. Said commissioner shall in all things where he is in this chapter given charge or control, hold such power subject to the direction of the board of permanent seat of government."

Section 14316, Laws of 1933, p. 410, places the Missouri Resources Museum, the Missouri Soldiers' and Sailors' Memorial Hall and the Conservational and Historical Museum under the management and control of the Board of Permanent Seat of Government. Said section reads:

"The 'Missouri Resources Museum,' the 'Missouri Soldiers' and Sailors' Memorial hall' and the conservational and historical museum created and designated by this article shall be under the management and control of the board of Permanent seat of government, as now or hereafter constituted by law. Where the word 'commission' is used in this article it shall be construed to mean the board of permanent seat of government."

In State v. Ehr, 204 N. W. 867, l. c. 870, the court, in defining the word "control," said:

"In general to have 'control' of a place is to have the authority to manage, direct, superintend, restrict or regulate."

Section 14318, Revised Statutes Missouri 1929, provides that products of the state shall be included in the exhibits, and even go so far as to place the duty upon the Commissioner of designing and installing necessary cases, racks, tables and other equipment desirable to the purposes of said exhibit.

"It shall be the duty of the commission to collect and display an exhibit of such products of the mines, mills, fields and forests of the state of Missouri and such other articles and products which it may deem appropriate, as will display the natural resources of the state of Missouri and their utilization. The commission shall also be charged with the duty of designing and installing necessary cases, racks, tables and other equipment desirable to the purpose of said exhibit."

Section 14317, Revised Statutes Missouri 1929, designates where exhibits shall be assembled, and also the place same shall be located in the Capitol Building.

"The west central corridor or wing on the first floor of the state capitol building is hereby designated and known as the 'Missouri resources museum.' The east central corridor or wing on the first floor of the state

capitol building is hereby designated and known as the 'Missouri soldiers' and sailors' memorial hall.' The second floor galleries of these two corridors shall be developed in accordance with the desire of the original capitol commission respectively as conservational and historical museums, and such other unoccupied wall and corridor space as may be necessary for said museums, which may be in harmony with the uses, style, and construction of the State Capitol building. These museums, galleries, and wall space are hereby designated for short as the 'Missouri state museum.' In this connection, it shall be the duty of the adjutant general to collect and compile all war matter and records of Missouri soldiers, sailors and marines serving in the war against Germany and in all other wars, including such inscriptions and tablets as may be necessary, and it shall be the duty of the commission to observe the policies of the original appropriation act in Laws of 1919, p. 80, of the 50th General Assembly."

We especially call your attention to the part underlined in the above section which leads us to believe the Legislature concluded that more appropriate space would be required, and therefore this provision was included.

Said section also requires the Commission, now the Board of Permanent Seat of Government, to observe the policies of the original Appropriation Act in Laws of 1919, p. 80, of the 50th General Assembly, and further provides that the Adjutant General is required to collect and compile certain records and matters

pertaining to wars where Missouri soldiers, sailors and marines served and participated in any war. It will be noted that this provision previous to being amended required the Adjutant General to do more than collect and compile this material.

Section 4 of the Appropriation Act by the 50th General Assembly referred to, required the Adjutant General to equip and arrange such Memorial Hall in the manner necessary and appropriate to carry out the purpose of this Section.

"The east wing or corridor on the first floor of the state capitol building designated and known as the historical museum, including the gallery thereof on the second floor, shall be hereafter designated as the Missouri soldiers' and sailors' memorial hall, and the same shall be set apart and dedicated to the purpose of preserving and displaying the flags, banners and standards carried by Missouri troops in all wars in which the citizen-soldiers of this state have participated, and all war relics, trophies, pictures and records of Missouri soldiers, sailors and marines serving in the war against Germany and in all other wars. The adjutant general shall have charge of such memorial hall and it shall be his duty to collect and compile such records, to arrange for the preserving, repair, casing and display of such flags, pictures, trophies and relics, including such inscriptions and tablets as may be necessary, and generally to equip and arrange such memorial hall in the manner necessary and appropriate to carry out the purposes of this section."

May 25, 1937

Webster's International Dictionary defines "war" as follows:

"The state or fact of exerting violence or force against another, now only against a state or other politically organized body; esp., a contest by force between two or more nations or states; carried on for any purpose; armed conflict of sovereign powers; declared and open hostilities. * * When between a state and a part of it in rebellion it is a civil war."

Under the above definition a conflict between the states would be classed as a war.

There are many provisions in the present law giving the Board of Permanent Seat of Government and the Commissioners appointed by the Board, full and complete power to superintend and control the property of the state located in Jefferson City, Missouri.

Section 9139 provides the Commissioner shall have charge and control of the Capitol.

Section 9139 further provides the Commissioner shall superintend all repairs.

On the walls in the Soldiers' and Sailors' Museum may now be found lunettes portraying the Battle of Wilson Creek and the Battle of Westport, which show the conflict between the states, and tend to lead us to believe that it was part of the plan of the old Decoration Committee to include such conflicts between the states along with other matter pertaining to wars in which our soldiers, sailors and marines participated.

Therefore, it is the opinion of this department that the Board of Permanent Seat of Government has full

May 25, 1937

control and supervision of all state property located at the State Capitol; also, that it is the duty of the Adjutant General of this state to collect and compile all war matter and records of Missouri soldiers, sailors and marines serving in any war; furthermore, the duty that was formerly that of the Adjutant General to equip and arrange the museum hall was transferred to the Missouri Resources Museum Commission, and, when the Legislature abolished this Commission, the duty of equipping and arranging memorial hall was placed in the Board of Permanent Seat of Government.

In conclusion, it is our opinion that the Board of Permanent Seat of Government may hang these models within the State Capitol, provided they can harmonize them with the uses, style and construction of the building, as required in Section 14317, supra, and the Board should always keep in mind and observe the policies of the original appropriation act, Laws of 1919, page 80, of the 50th General Assembly.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

ARH:LC

DRAINAGE DISTRICTS: Collection of costs in suits for delinquent drainage taxes.

July 3, 1937.



Mr. A. F. Stanley, Sheriff,
New Madrid County,
New Madrid, Missouri.

Dear Sir:

This Department is in receipt of your letter of June 21st requesting an opinion as to the following:

"Am writing in request for an opinion from your office in regard to sale of land by Sheriff under Special Execution from Circuit Court for delinquent drainage taxes.

In this particular case, the St. John Levee and Drainage District of Missouri, a corporation, was plaintiff and a Mr. R. F. Baynes is their attorney. The land sold for the sum of two hundred (200) dollars and the total costs were two hundred and sixty five (265) dollars. Of the total costs, the attorney fee was two hundred and forty five (245) dollars. Should the Sheriff pay the attorney the full amount of two hundred forty five dollars as stated on back of Execution or a commission on the bid? Of course, in this instance the attorney fee is more than the bid but ordinarily if the fee is smaller than the bid, together with the costs, shall the attorney be paid the full amount of fee as stated on the Execution or not?

To whom shall the check be made out to if there is a surplus after all costs are paid? "

I.

We assume that your question pertains to a proceeding instituted by virtue of Section 11020 R. S. Mo. 1929 authorizing Drainage Districts to purchase lands offered for sale for their own taxes or assessments due thereon. Section 10326 R. S. Mo. 1929 relating to costs in all suits for the collection of delinquent drainage taxes provides, in part, as follows:

"The suit shall be brought by the attorney for the drainage district in the name of, and to the use of, the collector of the revenue, of the county wherein the land lies, against the land or other property, on which such drainage tax has not been paid. The pleadings, process, proceedings, practice and sales, in cases arising under this article, shall except as herein provided, be the same as in an action for the enforcement of the state's lien for delinquent general taxes upon real estate. ***** In all suits for the collection of delinquent taxes, the judgment for said delinquent taxes and penalty shall also include all costs of suit and a reasonable attorney's fee to be fixed by the court, recoverable the same as the delinquent tax and in the same suit."

In the case of Chilton et al v. Drainage District, 63 S. W. (2) 421, it was held that all costs, in delinquent drainage tax suits, must be collected out of the sale proceeds and that such costs may not be collected by separate action against the drainage district. Specifically, the Court said:

"The costs must be recovered and collected out of the proceeds from the sale of the property and are entitled to priority out of said proceeds over the claim of the state, county or drainage district."

If, therefore, the property sold under special execution on a judgment in favor of the drainage district did not bring enough to pay the costs and attorney fee in the case, the court officers and attorney have no alternative but to prorate the proceeds as their respective interests may appear.

In answer to your last question as to the disposition of the surplus after the payment of all costs, Section 10629, R. S. Mo. 1929 specifically provides for the immediate payment of the proceeds realized by the institution of these suits to the county treasurer to be accounted for by him in the same manner as drainage taxes.

Respectfully submitted,

JOHN W. HOFFMAN, JR., Assistant
Attorney General.

JWH:EG

APPROVED

(Acting) Attorney General.

AND REVENUE:
SALES TAX:

Consular officers and their employees, nationals of other foreign governments, not liable for payment of a sales tax.

July 15, 1937.

7-16



Hon. Lloyd C. Stark,
Governor of Missouri,
Jefferson City,
Missouri.

Dear Governor:

This will acknowledge your request of recent date, wherein you submitted a letter received from Reinold Freytag, German Consul, concerning the liability of Consular officers and employees for the payment of a sales tax in view of the Treaty executed between the United States and Germany, which was signed at Washington December 8, 1923, and proclaimed October 14, 1925.

Your attention is respectfully directed to Article XIX of the Treaty above mentioned, which is set forth in hec verba United States Statutes At Large, Vol. 44, p. 2132, 2149, which reads as follows: ✓

"Consular officers, including employees in a consulate, nationals of the State by which they are appointed other than those engaged in private occupations for gain within the State where they exercise their functions shall be exempt from all taxes, National, State, Provincial and Municipal, levied upon their persons or upon their property, except taxes levied on account of the possession or ownership of immovable property situated in, or income derived from property of any kind situated or belonging within the terri-

tories of the State within which they exercise their functions. All consular officers and employees, nationals of the State appointing them shall be exempt from the payment of taxes on the salary, fees or wages received by them in compensation for their consular services."

Article VI, Subdivision 2 of the Constitution of the United States reads, in part, as follows:

"* * * and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

In 63 Corpus Juris, p. 827, par. 3, this general statement is to be found:

"A treaty is in its nature primarily a contract between different nations, and not a legislative act; and, as a contract between nations, a treaty depends for its observance and performance upon the interest and the honor of the nations which are parties to it, and for its enforcement in case of infraction upon international negotiations and reclamations, or, ultimately, war. In the United States, however, a treaty is more than a contract between nations; by force of the provision of the federal constitution that this constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United

States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding,* * *."

And again at Page 844, Sec. 29, it is stated:

"In view of the provision of the federal constitution constituting treaties the supreme law of the land, a treaty is superior to a state law, including, of course, statutes otherwise within the legislative power of the state, or, as sometimes stated, the treaty power is independent of, and superior to, the legislative power of the states, and a state cannot by legislative act interfere with the proper observation of treaties nor destroy rights created by treaties. In view of the foregoing rules when the provisions of a state statute and a treaty conflict the latter will control, the application of the statute as to the subject matter covered by the treaty will be held in abeyance during the existence of the treaty,* * *."

In the case of *In re Ostrowski's Estate*, 290 New York Supplement, the court, in construing a state statute which conflicted with the treaty executed between the United States and a foreign government, at page 174, said:

"Since under the United States Constitution the power to make treaties with foreign governments is vested solely in the federal government (article 2, par. 2) and such treaties, when made

July 15, 1937.

are the supreme law of land (article 6, cl. 2), it follows that any conflicting law of a state must yield thereto. Hauenstein v. Lynham, 100 U.S. 483, 489, 25 L.Ed. 628; De Geofroy v. Riggs, 133 U.S. 258, 266, 10 S.Ct. 295, 33 L.Ed. 642; State of Missouri v. Holland, 252 U.S. 416, 434, 40 S.Ct. 382, 64 L.Ed. 641, 11 A.L.R. 984; Sullivan v. Kidd, 254 U.S. 433, 440, 41 S.Ct. 158, 65 L.Ed. 344; Asskura v. Seattle, 265 U.S. 332, 343, 44 S.Ct. 515, 68 L.Ed. 1041; Todok v. Union State Bank, 281 U.S. 449, 453, 50 S.Ct. 363, 74 L.Ed. 956; Matter of Anderson's Estate, 154 Misc.132, 134, 276 N.W.S. 966."

It has come to the attention of the writer that the State Auditor will issue certificates of exemption from the payment of a sales tax to persons entitled thereto.

CONCLUSION

From the above considerations, we are of the opinion that Consular officers, including employees in a consulate, nationals of the State by which they are appointed, when exercising their functions for their government, shall be exempted from the payment of a sales tax.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS/LD

Probate and Probate Judge
SALARIES AND FEES: OFFICERS: ~~Collector's~~ compensation is based on fees collected rather than on fees earned.

July 26, 1937.

8-11
FILED
85

Hon. George S. Starrett,
Judge of Probate Court,
Columbia, Missouri.

Dear Sir:

We have received your inquiry which is as follows:

"Pursuant to my conversation with you yesterday, may I now kindly ask you to render to me an opinion as to whether the office of Probate Judge is operated on a yearly collection basis or on yearly earned or accrued basis.

"The particular question before me is as follows: In the year 1935, my office collected fees from all sources, the sum of \$5736.01 and paid out of that sum the following, Clerk hire \$2157.50, Docket printing \$68.78, Judge's Salary or compensation \$3500.00 and turned in to the County the excess of \$9.73.

"In the above total sum collected was \$1604.83 of fees earned or accrued in 1934, which auditors say I cannot use to apply on salary and expenses of 1935, and must now remit this sum to the County. This would result in me receiving only \$1895.17, compensation for the year 1935.

"In view of the fact that I would like your opinion before the audit is finally prepared and filed which will probably be within two or three weeks, may I kindly and most respectfully ask that you give me your opinion as soon as possible."

July 26, 1937.

We construe your question to be this: During the year 1935 you officially collected \$5736.01, out of which you paid the reasonable costs of the office, clerk hire and your salary, the latter being \$3500.00, and turned over to the County the excess. Of the above \$5736.01, \$1604.83 accrued or was earned in the year 1934. In other words, are you entitled to consider the funds officially collected by you in 1935 regardless of whether they be earned in one year or another?

Replying thereto, Section 11782, R. S. Mo. 1929, defines the salary of the probate judge, the pertinent part of which, for the purpose of your inquiry, being as follows:

"Provided further, that whenever, after deducting all reasonable and necessary expenses for clerk hire, the amount of fees collected in any one calendar year by or for any one probate judge in any county in this state, during his term of office, and irrespective of the date of accrual of such fees, shall exceed," etc., he shall pay the excess, etc., as therein provided; " and whenever at any time after the expiration of the term of office of any probate judge the amount of fees collected by or for him, irrespective of the date of accrual, shall exceed the sum equal to the aforesaid annual compensation provided for a judge of the circuit court having jurisdiction in such county, it shall be the duty of such probate judge to pay such excess, and all fees thereafter collected by or for him on account of fees accrued to him as such probate judge," etc.

Said section further provides that the probate judge shall, each year of his term of office, file with the circuit clerk a verified statement containing a full account of all fees collected and amounts expended for clerk hire, by or for the probate judge, during such year, giving the details thereof.

It will be noted that the above section speaks of the amount of fees collected, and when more than enough to pay the clerk hire, reasonable expenses and salary is collected, the excess shall be paid over. It is entirely silent as to the fees earned or accrued. Likewise, that part of the section

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having to do with the amount collected after the expiration of the term of office does not speak of the date when it was earned or when it accrued, but bases it on the time of collection. And along the same line, that further part of the section requiring the probate judge, after the expiration of a given year, to file a verified statement, provides that it shall contain "a full account of all fees collected."

Webster's New International Dictionary, among other definitions of the word "collect", gives the following:

"To demand and obtain payment of,
as an account or other indebtedness;
as, to collect taxes."

In the Kentucky case of Anderson v. Richards' Ex'rs., 37 S. W. 62, 99 Ky. 661, it is stated that the Dictionary defines the word "accrue" as "to increase; to augment. * * * Interest accrues to principal."

In the New York case of Strasser v. Staats, 13 N. Y. Supp. 167, 168, 59 Hun, 143, the opinion holds that the words "accrue weekly," as used in the by-laws of a mutual benefit insurance association, providing that the dues of members shall "accrue weekly," means that the dues are to be established or measured weekly, and does not mean payable weekly.

In the Iowa case of Gudgel v. Southerland, 90 N. W. 623, 624, 117 Iowa, 309, it is stated that in a statute providing that the executor of a tenant for life who leases real estate so held, and dies on or before the day on which the rent is payable, may recover the proportion of rent which had "accrued" at the time of his death, the word "accrued" must be construed to mean an apportionment of the rent between the executor and reversioner pro rata as to time, because, if accrued is held to mean "due", then the statute is deprived of all vitality.

In the case of Hannibal Trust Co. v. Elzea, 286 S. W. 371, 377, the court said:

"In the interpretation of statutes, words in common use are to be construed in their natural, plain and ordinary signification."

July 26, 1937

Bearing the above in mind, it is noted that the statute under consideration, defining the salary of the probate judge of your county and the funds to be considered with respect thereto, in no way mentions any classification thereof with reference to when they accrue, but in each instance speaks of how the money is collected. We see no reason why any extraordinary or unusual meaning should be given to the word "collected", as used in this statute, and as stated in the Elzea case, supra, statutes are to be construed in their plain, natural and ordinary signification. We are unable to give the same meaning to the word "accrued" that should be given to the word "collected." It appears that the Legislature meant to base the probate judge's compensation on the amount collected rather than on the amount earned or accrued. Other statutes in Missouri dealing with the compensation of other offices are of slight assistance in arriving at the meaning of the given statute under consideration because of the different wording of those statutes.

To hold that the compensation of the probate judge, under this statute, should be based on the amount of fees accrued would be doing unjustified violence to the plain expression in plain words of the legislative intent, and of course a cardinal rule of statutory construction is to arrive at the meaning and intent of the Legislature.

CONCLUSION

It is our opinion that for the purpose of arriving at the amount of salary or compensation to which the probate judge is entitled in a given year, the fees officially collected by him within the given calendar year are to be considered, and that is true regardless of the amount of fees that accrue within the given year.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

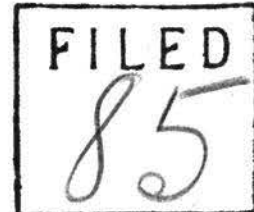
DW:HR

MOTOR VEHICLES: Non-residents who purchase motor vehicles in Missouri may be issued certificate of ownership.

July 30, 1937

8-2

Honorable V. H. Steward
Commissioner of Motor Vehicles
Office of Secretary of State
Jefferson City, Missouri



Dear Sir:

This Department is in receipt of your request for an opinion which reads as follows:

"We request that you furnish this department at your earliest convenience a written opinion concerning the following matter:

"The Motor Vehicle Departments of some of the States, especially Illinois, require that a resident of their State who purchases a new car from a Missouri dealer, either have a Missouri title for the car or else pay a \$15.00 inspection fee to his State. The question arises, does this department have authority to issue, or should it issue, certificate of title to residents of other States for new motor vehicles when the unit is to be registered in such other State.

"Further, the State of California refuses to accept assigned or re-assigned Missouri certificates of title where the same have been assigned or re-assigned unto residents of that State and who desire to register the unit in Cal-

July 30, 1937

ifornia, and advise the California purchaser that he first obtain Missouri title. Does this department have authority to issue, or should it issue, Missouri certificate of title to residents of California under these circumstances and for the main purpose of registering the car in that State."

Section 7774-c R. S. Mo. 1929 provides for the issuance of a certificate of ownership to the owner of a motor vehicle or trailer. The statute requires application to be made to the Commissioner of Motor Vehicles and certain facts to be given, and a fee of one dollar to be paid. The statute is lengthy, and to quote such verbatim would avail nothing in this opinion.

Perhaps the most fundamental rule of statutory construction is that the intention of the Legislature should be ascertained and given effect. *Tooker vs. Missouri Power & Light Co.*, 80 S. W. (2d) 691, 336 Mo. 592; *O'Malley vs. Continental Life Ins. Co.* 75 S. W. (2d) 837, 335 Mo. 1115.

The purpose of Section 7774, *supra*, is given in *State ex rel. Insurance Company vs. Cox*, 268 S. W. 87, 306 Mo. 537, as follows:

"This law was passed as a general welfare safeguard to prevent the trafficking in stolen cars, and, in order to prevent that evil which had become prevalent, the Legislature saw fit to require that parties dealing in motor cars comply with certain regulations. The statute is not only a statute for the general welfare, but incidentally is one for the raising of revenue, *****."

The Section at no place makes the requirement

July 30, 1937

that the applicant for certificate of ownership must be a resident of Missouri. It will be seen that the issuance of certificates of ownership to non-residents who purchase cars in Missouri will fulfill the purpose for which the law was passed. It enables the state to have a record of such automobile in the case of theft or loss, and also provides revenue for the state. To deny the right to issue such titles would be to defeat the stated purpose of law. We believe it is a reasonable construction of Section 7774 to hold that the Commissioner of Motor Vehicles may issue a certificate of ownership to a non-resident who purchases a motor vehicle or trailer in the State of Missouri.

CONCLUSION

It is therefore the opinion of this Department that non-residents who purchase motor vehicles or trailers in the State of Missouri may apply and have issued to them certificates of ownership by the Commissioner of Motor Vehicles upon meeting the requirements of the statute.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(acting) Attorney General

AO'K:R

BOARD OF PHARMACY: If April examination is declared void, applicants found guilty of no wrong should be given opportunity to retake examination prior to September 6th, 1937.

August 27, 1937



Honorable Lloyd C. Stark
Governor of Missouri
Jefferson City, Missouri

Dear Governor Stark:

This will acknowledge receipt of your letter requesting an opinion from this department, which reads as follows:

"Please advise me if applicants, who took the Board of Pharmacy examination last April and were not reported as cheating, should be re-examined before September 6, 1937."

Under date of June 21, 1937, W. H. Ellis, President Missouri State Board of Pharmacy, requested an opinion on the question of the right of the Missouri State Board of Pharmacy to void an examination held in St. Louis, Missouri, on April 25th and 26th, 1937, because of alleged wide spread cheating of the candidates taking the examination. In answering this opinion request under date of June 21, 1937, we reached the following conclusion:

"From the foregoing, we are of the opinion that the question of whether a candidate has passed a 'satisfactory examination' is within the sound discretion of the Board of Pharmacy, who may exercise its judgment whether it shall void the examination held in St. Louis, Missouri, on April 25th and 26th because of the charge of wide spread cheating, or whether it shall order a

new examination to allow all persons the privilege of taking the examination for assistant and registered pharmacist under the existing law."

However, in the course of our opinion, we made the following observation:

"In passing on your questions it occurs to us that if the Board of Pharmacy can actually determine from the group taking the examination the individuals who conducted themselves in a proper manner and were not guilty of any cheating, and further made a satisfactory grade so as to be eligible for a license, it would be most unfair to void the examination and require them to submit to a new examination. We must necessarily, however, restrict ourselves to applying the law to the facts as presented in your letter."

The writer is not advised whether or not the examination held last April has been voided by the Board of Pharmacy. If it has not been, we are still of the opinion that if it can be determined that any applicant conducted himself in the proper manner and made a satisfactory grade, he would be entitled to be licensed as a pharmacist or assistant pharmacist as the case may be.

If the examination is declared void, your question, as we understand it, is whether or not the applicants taking the examination, and not reported as cheating, should be given an opportunity to again take the examination before September 6, 1937, which is the effective date of the new law relating to the qualifications of pharmacists, which also provides that no further licenses shall be issued for assistant registered pharmacists.

Under the provisions of Section 13142, R. S. Mo. 1929, which remains in effect until September 6, 1937, any person

twenty one years of age, who had been licensed as assistant pharmacist for not less than two years prior to his application, who had four years experience in pharmacy under instruction of a licensed pharmacist and who passed a satisfactory examination by or under the direction of the Board of Pharmacy, was entitled to be licensed as a pharmacist.

The qualifications for a license as an assistant pharmacist under said section were that he be eighteen years of age and have a special preliminary general education and not less than two years experience in pharmacy under the instructions of a licensed pharmacist, and that he pass a satisfactory examination by or under the direction of the Board of Pharmacy.

After September 6th, under the provisions of Section 13151, Laws of Missouri 1937, page 230, an applicant for examination for a license to practice pharmacy must be twenty one years of age and have attended high school for four years or its equivalent and have had one year of practical experience in a retail drug store under the supervision of a registered pharmacist, and must also be a graduate of a school or college of pharmacy, whose requirements for graduation are satisfactory to the Board of Pharmacy. Said section further provides that no further licenses or examinations shall be issued or given by the State Board of Pharmacy for assistant registered pharmacists.

Undoubtedly, many of the applicants who took the examination in St. Louis last April do not have sufficient qualifications to take the examination after the effective date of the new Act, which is September 6th. Also, undoubtedly, many of the applicants at the last examination have not been convicted of cheating or improper conduct. To declare said examination void without giving these applicants an opportunity to retake the examination prior to the effective date of the new Act would be manifestly unfair in that it would deprive certain applicants, convicted of no wrong, from ever becoming pharmacists, although they had the qualifications necessary at the time they took the examination and received satisfactory grades. Many of these applicants have been working to become pharmacists for a number of years and now on the threshold of their ambitions they will be deprived of the opportunity of doing so, due to the increased qualifications, unless they are permitted to retake this examination prior to September 6th.

August 27, 1937

As one applicant stated to the writer, speaking for himself and others similarly situated:

"Our whole future may be ruined"

In conclusion, we point out the provisions of Section 13142, R. S. Mo. 1929, that the Board of Pharmacy may prior to September 6, 1937, hold an examination for the purpose of licensing pharmacists and assistant pharmacists and that anyone, who has the qualifications specified in said section, is entitled to take the examination either as a pharmacist or as assistant pharmacist and upon passing a satisfactory examination is entitled to be licensed as such. After September 6, 1937, under the provisions of Section 13151, Laws of Missouri, 1937, page 230, all applicants for licenses to practice pharmacy must have the qualifications specified in said section and no further licenses or examinations can be issued or given by the Board of Pharmacy for assistant registered pharmacists.

It is, therefore, our opinion that it would be most unfair if the April examination is declared void, not to allow applicants, who had the proper qualifications and took the examination at that time and who were found guilty of no misconduct, an opportunity to retake the examination prior to the effective date of the new Act increasing the qualifications of applicants to take the examination to practice pharmacy in this state.

Respectfully yours,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

ROY McKITTICK
Attorney General
JET:rt



AMENDMENT NUMBER FOUR:
CONSERVATION COMMISSION:

All counties now having in force the provisions of Section 8246, relating to a closed season on quail will continue to have closed season until the expiration of the time as mentioned in said section

September 9, 1937

Honorable E. Sydney Stephens
Chairman
The Conservation Commission
Columbia, Missouri



Dear Sir:

This Department is in receipt of your letter of September 7, wherein you request an opinion regarding the power of the Conservation Commission relative to closed seasons, as follows:

"May I have, for the information of the Conservation Commission, your opinion concerning the following matter:

"The statutes of Missouri provide that under certain conditions elections may be held in any county to consider whether the season for the shooting of quail shall be closed. There are several counties in the state which, under this law, now have closed seasons. The Commission will appreciate your opinion as to whether, under Amendment No. 4, the seasons in these counties are now open.

"Could the Commission declare that the statute providing for such county elections is a regulation of the Commission and therefore one of the laws of the state?

"There will be a meeting of the Conservation Commission on Monday, September 13, and it will be quite

September 9, 1937

helpful if we may have your opinion
by that time."

Section 8246, Revised Statutes Missouri 1929,
relates to the question of "closed season" on quail.
The pertinent part is as follows:

"* * * * *

Provided, that upon the filing of
a petition signed by one hundred
or more householders of any county
and presented to the county court
at any regular term or special
term thereof more than thirty days
before any general election to be
had and held in said county, it
shall be the duty of the county
court to order the question as to
whether or not there should be a
closed season upon quail for the
next two years in their said county
submitted to the qualified voters,
to be voted on by them at the next
election. Upon the receiving of
such petition it shall be the duty
of the county court to make the order
as herein recited, and the county
clerk shall see that there is printed
upon all the ballots to be voted at
the next election the following:

For a closed season upon quail

Yes.

No.

Erase the word you do not wish to
vote.

"The returns of said election upon
said subject shall be opened can-
vassed and certified, as the returns
for general elections. If the majority
of the votes cast upon such subject
be in favor of the closed season upon
quail, then it shall be unlawful to
take, capture or kill any quail or

bobwhite within such county for the period of two years thereafter following the announcement of the result of said election, and the county court shall spread the result of such election upon its records and give notice thereof by publication in some newspaper printed and published in such county, and such law shall become operative and effective from the time such publication is made. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor."

Referring to certain portions of the Amendment, the full contents of which you are no doubt thoroughly familiar, we construe, as we have in an original opinion to you construing the entire effect of Amendment Number Four, that the Conservation Commission accepts the laws and the administration of the law

"now or hereafter pertaining thereto."

The one exception being as contained in the Amendment

"The general assembly may enact any laws in aid of but not inconsistent with the provisions of this Amendment, and all existing laws inconsistent therewith shall no longer remain in force or effect."

From a reading of Section 8246, we find no provision or no portion of the section which conflicts with the powers and duties of the Conservation Commission.

Therefore, we are of the opinion that it is not necessary that the Commission declare that the statute providing for county elections for determining the question of a closed season on quail to be a regulation of the Commission, but that the same will

Honorable E. Sydney Stephens -4- September 9, 1937

remain in force and be effective as a law of the State to be recognized by the Conservation Commission, and that all counties having exercised their rights under Section 8246 continue to have a closed season on quail until the expiration of two years from the time the returns of such election were made official.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN LC

GOVERNOR: The Governor of the State of Missouri cannot sign and enter into a compact with other states without legislative authority

September 22, 1937



To His Excellency
Honorable Lloyd C. Stark
The Governor of the State of Missouri
Jefferson City, Missouri

Dear Governor Stark:

You have recently requested of this department that you be advised of your authority to sign a compact sponsored by the Interstate Commission on Crime. A letter addressed to you on September 14, 1937, by Honorable Richard Hartshorne, Chairman of the Executive Committee, contains the following paragraph:

"I am enclosing the formal Interstate Compact for the supervision of Parolees and Probationers. You will note that the instrument consists of the Compact and 30 signature pages. We have sent exactly similar instruments to all of the other 29 states whose legislatures have authorized the instrument and have requested the Governors to sign each of the 30 pages, have them attested and sealed and delivered back to me at the Hotel Phillips in an enclosed envelope, similar to the one enclosed herewith, on or before September 23."

The authority of states to enter into a compact with another or other states is contained in Section 10 of Article I, of the Constitution of the United States:

"No State shall, without the consent of the Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or

September 22, 1937

with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

The form of compact which has been submitted to you contains the provision that the Congress of the United States, effective June 6, 1934, grants to two or more states authority to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes. Referring to Mr. Hartshorne's letter of September 14, again, we call your attention to the statement "We have sent exactly similar instruments to all of the other 29 states whose legislatures have authorized the instrument." The Fifty-ninth General Assembly of Missouri had a bill of similar nature before it for consideration. The Legislative Journals show that it failed of passage. It would, therefore, appear that Missouri is not one of the 29 states "whose legislatures have authorized the instrument."

The question for determination is whether or not you, as Governor, have the authority to sign and enter into such a compact on behalf of the State of Missouri.

Section 1 of Article V, of the Constitution of the State of Missouri, provides for the executive officers of the State, consisting of the Governor, Lieutenant-Governor, Secretary of State, etc., and contains the provision, "and shall perform such duties as may be prescribed by law."

Section 4 of the same Article is as follows:

"The supreme executive power shall be vested in a chief magistrate, who shall be styled 'The Governor of the State of Missouri. ' "

Section 6 of the same Article is as follows:

"The Governor shall take care that the laws are distributed and faithfully executed; and he shall be a conservator of the peace throughout the State."

It must be conceded that in the State of Missouri the powers and duties of the office of Governor are authorized and controlled by the Constitution and the statutes. The general rule is tersely set forth in 59 Corpus Juris, page 114, paragraph 130:

"The governor has no prerogative powers, but possesses only such as are vested in him by constitutional or statutory grant. The legislature may require the governor to perform other duties than those specified in the constitution, and the extent and exercise of the governor's powers under statute will depend upon the particular provisions thereof."

In a decision by the Court of West Virginia, *Bridges v. Shallcorss*, 6 W. V. A. 562, 1. c. 575, the court makes the statement:

"Powers or duties not specifically conferred upon the Governor by the constitution, the executive cannot exercise or assume any such powers except by legislative authority."

Again, in the case of *Richardson v. Young*, 125 S. W. 664:

"All sovereign power, under our form of government, is vested in the people. The Chief Executive has no prerogative powers as in monarchical governments."

The Supreme Court of the State of Missouri, in State ex rel. Major v. Shields, 272 Mo. 342, 1. c. 346, enunciates and sets forth succinctly the office to be performed by the three departments of our government, in the following language:

"It will suffice to say that the germinal idea of a government of three coordinate branches is first found recorded in Aristotle's Politics where it is said that 'in every polity there are three departments: first, the assembly; second, the officers, including their powers and appointment; and third, the judging or judicial department.' The wisdom of this classification and its appropriate application in the framing of the laws of a free government has been illustrated by its incorporation into our national organic law and subsequently into the constitutions of the several states. The central idea in the creation of a government of this form is that the powers created shall be coordinate in their relations toward each other; and while supreme within their respective orbits they shall so move as not to invade the plane of activity of the others. Thus regulated, friction in the conduct of public affairs is avoided and that harmony promoted which is most conducive to the stability of government and, as a consequence, to the welfare of the people."

From an examination of the foregoing authorities, it is apparent that the Governor has only such authority

September 22, 1937

as is vested in him by constitutional or statutory grant. A search of the constitution and statutes fails to disclose any power given the Governor which would authorize him to sign the proposed compact. In fact, as pointed out above, the last General Assembly refused to confer such authority.

It appears that the purpose of the compact is commendable and would facilitate the control and rehabilitation of persons on parole or probation. Many of the provisions are for cooperative efforts and mutual assistance in the prevention of crime and for the welfare of the people, and we regret that, under the law, Missouri is unable to become one of the parties to this meritorious compact, but before Missouri can enjoy the benefits, rights and privileges contained in the compact it will be necessary for the Legislature to authorize the Governor, on behalf of Missouri, to enter into such compact.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

OWN LC

COUNTY TREASURER:

The County is not liable for the compensation of the county treasurer prior to his appointment by the Governor.

October 28, 1937.

10-29
FILED
85

Honorable William E. Stewart
Prosecuting Attorney
Knox County
Edina, Missouri

Dear Mr. Stewart:

On October 16th you submitted the following question and facts to this Department for our opinion:

"In 1935 the legislature abolished the office of County Treasurer and at the same time made the County Collector the Ex-officio treasurer in Counties of less than 40,000, not having Township organizations, which our county comes under. At that time Thomas O'Rourke was the county treasurer and M. M. Breese was the county collector. Mr. Breese retained O'Rourke in his office at \$70.00 per month. This law was repealed by the last legislature and became effective Sept. 6, 1937. The Governor appointed Thomas O'Rourke treasurer on the 27th day of September. Breese claims that he was legislated out of office on Sept. 6, and that he does not owe O'Rourke from that date, because he was then working for the county. My contention is that the county did not become obligated until the 27th of September. Does Breese owe O'Rourke or the County or does O'Rourke stand to lose his time from September 6th to the 27th? Breese held the county funds and could not turn them over until his successor was appointed and

qualified and if O'Rourke had not been working for him he would have had to do the work himself, is my opinion. Had the Governor appointed someone else there is no doubt that the county would not owe O'Rourke anything. The County Court and Breese agree that O'Rourke should be paid for these twenty-one days and the County is willing to pay if it can legally do so."

The 57th General Assembly by Section 12132a, Laws of Missouri, 1933, page 338, in effect abolished the county treasurer's office in counties having a population of less than 40,000 inhabitants and made it the duty of the county collector to perform any and all such duties of such county treasurer. The effective date was January 1, 1937. Accordingly, the county collector of your county took over the duties of the county treasurer.

The 59th General Assembly repealed the former sections passed by the 57th General Assembly, and especially Section 12132a, and reenacted Sections 12130 to 12138, inclusive, Laws of Missouri, 1937, page 424. Section 12130, page 425, is as follows:

"There is hereby created in the several counties of this State, now or hereafter having a population of less than 40,000 inhabitants according to the last Decennial United States Census, a county treasurer, to be appointed by the Governor, and to take office immediately after the effective date of this Act and who shall enter upon the discharge of the duties of his office after his said appointment and qualification and who shall hold his office for a term ending on the first day of January, 1939, and until his successor is elected and qualified, unless sooner removed from office. Provided, that nothing in this section shall apply to counties under township organization."

The Act was approved June 30, 1937, the emergency clause being vetoed. Therefore, it required ninety days after the adjournment of the Legislature before the Act became effective, which in the instant case was on September 6, 1937. With this

Oct. 28, 1937.

history in mind, we think your question does not present a difficult or intricate problem.

You state in your letter that Mr. O'Rourke was appointed on the 27th day of September. On that day he became a county officer and was entitled to receive the emoluments of his office in the future. Prior to the 27th day of September he was not county treasurer, and it is elemental that he could receive no salary before he was appointed, commissioned and qualified either on the contention that he was a de facto or a de jure officer. You state that he was employed by Mr. Breese, the County Collector, prior to that time. He was holding his appointment or employment under Mr. Breese solely at the option and discretion of Mr. Breese. As long as he remained in the employ of Mr. Breese he could look to no other person for his compensation. For the sake of argument, we will assume that he was a deputy collector.

46 Corpus Juris, p. 462, states as follows:

"Deputy, for whom the law fixes no compensation, must be paid by the officer employing him, and not out of the public treasury."

The collector's compensation consists of fees and commission. His deputies are appointed by him and compensated by him.

Therefore, if Mr. O'Rourke remained in the employment of Mr. Breese after the 6th of September, 1937, and if he is to receive any compensation between the period of September 6, 1937 to September 27, 1937, he must receive the same from Mr. Breese and not from Knox County.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

OWN:EG

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

MOTOR VEHICLES - Commissioner of Motor Vehicles may, in his discretion, with the approval of the State Highway Engineer, issue overweight permits in accordance with the terms of the statute.

November 24, 1937

Honorable V. H. Steward, Commissioner
Motor Vehicle Department
Secretary of State's Office
Jefferson City, Missouri



Dear Sir:

This is to acknowledge receipt of your request for an opinion reading as follows:

"For a number of years it has been the practice of this office, upon proper application, to grant overweight permits over certain designated highways, permitting motor carriers to operate vehicles exceeding the maximum weights provided for general application over all highways and roads of the State. These permits have been issued by myself and my predecessors with the approval of the State Highway Engineer, the overweight permits being limited to use of certain definitely specified highways. At times it is necessary to move exceptionally heavy articles of machinery, heavy tanks and things of that character, which call for permits for single trips. Another type of permit is one issued to motor vehicle passenger carriers, whose weights vary from time to time according to the number of passengers. This type of permit has been issued for a definite period, and in no event beyond the date of expiration of the vehicle's registration. These permits have been issued under authority of section 7776, paragraph "E" R. S. Mo. 1929 as amended. These permits to motor passenger carriers have never been issued to a maximum weight of more than 28,000 pounds gross, or an axle weight of 18,000 pounds, nor have they been issued at any time

November 24, 1937

when the maximum weight per inch width of tire concentrated on the surface would exceed the statutory maximum of 600 pounds per inch.

"Some confusion has arisen pertaining to this matter, and I am writing your office for an opinion as to my authority to issue overweight permits over certain definitely prescribed highways for single trips, definite periods, or a period not beyond the date of expiration of the vehicle's registration, by and with the written approval of the State Highway Engineer, and shall appreciate your early advice in this matter."

At the outset of this opinion we observe that the Legislature has seen fit to regulate the use of the highways of this state by providing that no motor vehicle shall be operated which exceeds the limits of size, length and weight, specified by statute. Laws Mo. 1931, page 265, Sections 7776, 7788 of R. S. Mo. 1929.

Regulations concerning the use of our highways have challenged the attention of our courts. In the case of Park Transportation Company vs. Missouri State Highway Commission, 60 S. W. (2d) 388, 389, the Supreme Court quoted approvingly from an opinion in the case of Schwartzman Service vs. Stahl, 60 Fed. (2d) 1034, wherein the constitutionality of a statute regulating the use of our highways was challenged as being discriminatory. The court said:

"The state has the right to regulate and control the movements of motor vehicles over its highways and may exercise it in the interest of public convenience and safety and for the protection of the highways."

To the same effect is the ruling in the case of State vs. Dixon, 335 Mo. 478, 481. It was realized by the Legislature, however, that the inhibitions regarding sizes and weights of motor vehicles must neces-

sarily give away to the exigencies that may arise, and the Legislature provided by the enactment of Subdivision (e) of Section 7776, supra, that:

"(e) The commissioner may, with the written approval of the state highway engineer, in his discretion issue special permits for the operation of vehicles whose sizes and weights exceed the limits prescribed under this section, but such permits shall be issued only for a single trip or for a definite period, not beyond the date of expiration of the vehicle registration, and shall designate the highways and bridges which may be used under the authority of such permit: *** "

The reason underlying the enactment of the above statute, which is plain and unequivocal in its terms and needs no construction, is obvious. The statute places a discretion in the Commissioner of Motor Vehicles to determine whether a special permit should be issued for the operation of such vehicles whose sizes and weights exceed the statutory limits. Thus, the Commissioner is to determine the necessity for such a permit. So that no abuse of such discretion will arise, the approval of the State Highway Engineer must necessarily be obtained. The reason for this requirement is also apparent in view of the technical knowledge which the Highway Engineer has concerning the construction of our highways, and whether or not, in his opinion, an overweight vehicle may injure the highway.

CONCLUSION

In view of the above, it is the opinion of this department that the Commissioner of Motor Vehicles, with the approval of the State Highway Engineer, may issue special permits for the operation of vehicles whose weights exceed the statutory inhibition, but that such permits may be issued only for a single trip or for a definite period, not be-

Hon. V. H. Steward

-4-

November 24, 1937

yond date of expiration of the vehicle registration,
which permit shall also designate the highways and
the bridges over which such vehicle is to be operated.

Yours very truly,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS:FE

MOTOR VEHICLES: What constitutes "public" or "common carrier" within the meaning of Section 5, Laws of 1937, page 372. Taxi, taxicab.

December 16, 1937

12/18
FILED
85

Hon. V.H. Steward, Commissioner
Motor Vehicle Department
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your opinion request of December 8, 1937, which is as follows:

"On October 6, 1937, you furnished us at our request, an opinion submitted by your Mr. Medling, regarding the issuance of Chauffeur's license and especially with reference to the age limit of Chauffeurs who operate school busses and/or motor vehicles used as a public or common carrier - Section 7765 R.S. 1929 - Driver's license law page 370 of 1937 laws.

"We now find that we are in need of further information in this connection as follows:

"The full meaning or definition of a Common or Public Carrier as applied to this matter and whether or not this age limit applies to Chauffeurs who drive or operate a taxi or taxi cab."

Section 5 of the Laws of 1937, page 372, is as follows:

"No person who is under the age of twenty-one (21) years shall drive any motor vehicle while in use as a school bus for the transportation -

of pupils to or from school, nor any motor vehicle while in use as a public or common carrier of persons or property, nor in either event until he has been licensed as a chauffeur or as a registered operator."

Section 1, Laws of 1937, page 371, defines "chauffeur" and "registered operator" as follows:

"'Chauffeur'. An operator (a) who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare or (b) who as owner or employe operates a motor vehicle carrying passengers or property for hire."

"'Registered operator'. An operator, other than a chauffeur, who regularly operates a motor vehicle of another person in the course of, or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle."

Section 5 of this act repeals the provisions of Sections 7765 and 7766, R.S. Missouri 1929, insofar as these sections fix the age which a person must be to obtain a chauffeur's or registered operator's license when that person desires the license to operate a public or common carrier. This act substitutes in lieu of the age 18, the age 21. It is so ruled in the opinion of this department, mentioned in your request, to Hon. Dwight H. Brown, on October 6, 1937.

With these preliminaries disposed of, we now proceed to determine what is included within the provision in Section 5, supra, that no person under 21 years of age shall drive any motor vehicle while in use as a "public or common carrier of persons or property", nor in any event until he has obtained a license as a chauffeur or registered operator.

Whether or not a person is engaged in a business which constitutes that of a public or common carrier depends largely upon a question of fact which must be determined from the conditions and circumstances surrounding that person's operations. We shall set forth here the general rules to be followed in determining this fact, and all who fall within the rules enunciated must, of course, comply with the provisions of the Driver's License Law.

"Common carrier" is defined in Words and Phrases, Vol. 1, Fourth Series, page 455 and 456, as follows:

"'Common carrier' is one whose occupation is transportation of persons or things from place to place for hire and reward, and who holds himself out to world as ready and willing to serve public indifferently in particular line or department in which he is engaged. Independent Truck Co. v. Wright, 275 P. 726, 727, 151 Wash. 372."

* * * * *

"'Common carrier' is one who undertakes, for hire, to transport from place to place the goods or persons of such as choose to employ him. Cummings v. Great American Casualty Co., 235 N.W. 617, 183 Minn. 112."

* * * * *

"One who follows carrying for livelihood, or who gives out to world in any intelligible way that he will take goods, persons, or chattels for transportation or hire is 'common carrier,' even though he has no fixed schedule of charges, does not operate over definite route, does not always

load his vehicle to capacity, and refuses on occasion to accept freight or passengers whether vehicle is engaged or not. Stoner v. Underseeth, 277 P. 437, 441, 85 Mont. 11."

"Public carrier" is defined in Words and Phrases, Vol. 6, Third Series, page 345, as follows:

"Whether carrier is a 'public carrier' must be determined by business actually carried on, and not by secret intention or mental reservation of owners or operators. Test of 'public carrier' is whether he holds himself out as being ready and willing for hire to carry particular classes of goods for all who may desire transportation between places between which he professes to carry.
* * * * * State v. Washington Tug & Barge Co., 250 P. 49, 50, 140 Wash. 613.

"A common carrier of passengers is one who undertakes for hire to carry all persons indifferently so long as there is room and there is no legal excuse for refusing. A 'public common carrier' is distinguished from private carriers by the franchises conferred upon it, and the obligations, restrictions, and liabilities with which it is charged, all flowing from considerations of public policy. It must carry all alike, for reasonable compensation, furnish reasonable accommodations, must continuously operate its line, and must submit to reasonable regulations. Under the definition thus given, steam railroads are common carriers of

passengers as to those accepted by them as such, as are street railways, steamboats, and steamships engaged in passenger traffic, and proprietors of ferries, stage coaches, and hackney coaches. City of New Orleans v. Le Blanc, 71 So. 248, 253, 139 La. 113."

"Public carrier" is also defined in Words and Phrases, Vol. 3, Fourth Series, page 252, as follows:

"Term 'public carrier' contemplates payment of compensation for transportation offered to the public. Organization operating ambulance gratuitously for members, although expecting contributions to ambulance fund, held 'public carrier'. Leete v. Griswold Post No. 79, American Legion, 158 A. 919, 923, 114 Conn. 400."

In 10 C.J., page 607, it is said that "a public carrier of passengers may be defined as 'one who undertakes for hire to carry all persons, indifferently, who may apply for passage' as long as there is room and there is no legal excuse for refusing."

In State ex rel. v. Witthaus, 102 S.W. 2nd 99 (Mo.), the Supreme Court passed upon and determined what were the essential features of a common carrier. The court said at l.c. 101, 102:

"The fundamental characteristic of a public calling is indiscriminate dealing with the general public. As Baron Alderson said in the leading case: 'Everybody who undertakes to carry for any one who asks him is a common carrier. The criterion is whether he carries for particular persons only, or whether he carries for every one. If a man holds himself out to do it for

December 16, 1937

every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is a matter of special contract.' This regular course of public service without respect of persons makes out a plain case of public profession by reason of the inevitable inference which the general public will put upon it. 'One transporting goods from place to place for hire, for such as see fit to employ him, whether usually or occasionally, whether as a principal or an incidental occupation, is a common carrier.'"

* * * * *

"We express a doctrine universally sanctioned when we say that anyone who holds himself out to the public as ready to undertake for hire or reward the transportation of goods from place to place, and so invites custom of the public, is in the estimation of the law a common carrier."

* * * * *

"The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite or unrestricted quality that gives it its public character."

The general understanding or conception of a definition of the words "taxi" or "taxicab" is that it is a vehicle for hire which will convey the public, upon request, from place to place. The actual manner in which the taxicab conducts its business and its operations, of course, determines whether or not it is acting in the capacity of a public or common carrier. Under the above definition as to what is generally referred to as a taxi or taxicab, it is clear that such a vehicle is a public or common carrier.

CONCLUSION

Therefore, it is the opinion of this department that an applicant for a chauffeur's or registered operator's license, when desired to authorize that person to operate a public or common carrier, in order to receive the same, must be twenty-one years of age. That only persons holding such license may operate vehicles used as public or common carriers.

The determination of the character of a carrier's operations, with reference to it being a private, public or common carrier, rests upon the business actually carried on, and must be determined from the facts and circumstances surrounding the actual conduct of said business in the final analysis. The controlling factor in determining this is the holding out to the public as being ready to undertake, for hire or reward, the transportation of person or property from place to place, and so inviting the trade of the public. This, we think, taxi or taxicab operators do, and so, are public or common carriers within the meaning of the law as laid down by the courts. A secret intention or mental reservation of the carrier as to its operations does not affect the character of its business when it otherwise falls within the rules we have set forth.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED BY:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

STATE INSTITUTION INSURANCE

Insurance may be carried on properties of state institutions if authorized by statute and if legislature makes appropriations for payment of premiums.

December 29, 1937

16
FILED
85

Honorable Lloyd C. Stark,
The Governor,
Jefferson City, Mo.

My dear Governor:

This will acknowledge receipt of your letter dated December 8, 1937, requesting an opinion from this office which reads as follows:

"Is the State of Missouri supposed to carry insurance on the steam boilers in the various State Institutions?

I would also like to have your opinion on fire insurance on the various Institutions."

As the authority and duties of the state and its agencies to carry boiler insurance are the same as those which apply to fire insurance, we will include the answer to both of these classes of insurance in one opinion.

We are assuming that your request applies to the insurance on the properties of eleemosynary, penal and educational institutions of the state.

Article IV, Section 48 of the Constitution of Missouri provides as follows:

"The General Assembly shall have no power to grant, or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay nor authorize the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or

contracts shall be null and void."

Article X, Section 19 of the Constitution of Missouri provides as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

In order to carry insurance on the properties of the above named institutions, the officials managing such institutions must have authority by statute to make contracts for insurance and the legislature must have made an appropriation for the payment of the premiums for such insurance. Section 11421 R.S. Mo. 1929 provides as follows:

"No warrant shall be drawn by the auditor or paid by the treasurer, unless the money has been previously appropriated by law; nor shall the whole amount drawn for or paid, under any one head, ever exceed the amount appropriated by law for that purpose."

We will, therefore, have to look to the statute creating the boards which manage, control and operate these institutions to ascertain by what authority that they may make such contracts, and look to the appropriation acts for these institutions to determine whether or not the appropriation has included the item of insurance.

In the case of State ex rel. v. Hackman, 282 S.W. 1007, 1.c. 1013, the court in discussing an appropriation which was made in payment of a claim which was not authorized by law, said:

"And it might be said in passing that the Legislature could not now pass a valid act appropriating money out of which relator's claim could be paid, because his claim is based upon a contract entered into without authority of law, and section 48 of article 4 of the Constitution expressly prohibits the General Assembly from authorizing the payment of any claim hereafter created against the state under any agreement or contract made without express authority of law, and that all such authorized contracts shall be null and void."

In 59 Corpus Juris, Section 390, pages 250, 251, it is said:

"In some states, there are constitutional provisions requiring a distinct statement of the purpose of an appropriation in the bill making such appropriation; and, according to some authorities, a requirement of specific appropriation has been held to be of equivalent force in requiring a definite statement of the purpose of appropriation *****."

In construing appropriation measures, the courts have held that such appropriation must be strictly construed. Meyer v. Kansas City et al. 18 S.W. (2d) 900.

In regard to the authority of the board of managers of the eleemosynary institutions to make contracts for insurance, we look to the statutes creating this board and setting out its duties.

Section 8565 R.S. Mo. 1929, reads as follows:

"The board of each institution shall have authority to make all necessary

rules, regulations and bylaws for the government, discipline and management of such institution not inconsistent with the laws of this state, and such rules, regulations and by-laws, when so made and adopted by the board, shall be binding upon all officers and employes of the institution, and shall remain in force and effect until changed or annulled by the board by an order entered upon the records of such institution."

And Section 8566 R.S. Mo. 1929, reads as follows:

"The board of managers herein provided for shall make, through their proper officers, to the general assembly, on or before the second Monday of each session thereof, biennial reports, under oath, containing a classified statement of all the actual expenditures of their respective institutions, showing the disbursements of all funds appropriated by the general assembly, or received from other sources, for the maintenance of the same, together with a statement of all money used for repairs and buildings and other improvements, together with a list of all officers and employes, the nature of their employment and the compensation allowed to each, before there shall be any money appropriated out of the state treasury for their support and maintenance; said reports shall be printed in sufficient numbers for the information of the general assembly and for their respective institutions. The cost of such printing shall not be greater than the rate agreed upon with the state printer, and shall be paid out of the appropriations made for the support of said institutions."

While Section 8565 supra does not specifically state that the board of managers shall have authority to maintain the buildings of the eleemosynary institutions, yet the legislature, in Section 8566 supra, directed the board to report any disbursements they may have made for maintenance of these buildings. Having requir-

ed such a report, we may assume that the law makers intended that the board of managers were authorized to maintain the buildings.

On the question of the powers and duties which are incidental to maintenance, we find the rule to be stated in the following authorities and cases.

In Encyclopedia of Insurance Law, Couch, Volume I, Section 226, it is said:

"And if a city charter empower it to maintain public buildings, the city acquires, as incidental to the power thus granted the right to contract for insurance against their loss or destruction."

In the case of Clark School Township v. Home and Insurance Trust Company, 51 N.E. 107, 109, the court said:

"We are of the opinion that, under the statutory provision placed upon the trustee the duty of caring for and managing the school property, he has such implied authorities that, in the exercise of his discretion, he may make reasonable expenditures from the special school revenue, by way of procuring insurance on such property against fire."

In the case of Walker v. Linn County, 72 Mo. 650, the court held that county courts have power to enter into contracts for insurance of county buildings against fire or lightning.

And in 59 Federal, page 741, the rule is stated that:

"Where a power is given by a statute, the courts should as a rule hold that anything necessary to make it effectual is given by implication."

Following the foregoing authorities and cases, it would seem that the board of managers of the eleemosynary institutions have the authority to enter into contracts of insurance on the properties belonging to the state at such institutions provided the legislature makes an appropriation for the payment of the premiums for such insurance.

December 29, 1937

Looking to the appropriation acts of 1937, 1937 Session Acts beginning at page 50, we find that the appropriations were made for the eleemosynary institutions under sub-division D of the appropriations for each one of these institutions, under the item "operation" are listed:

"Hospital No. 1--

State Revenue fund

Sub-division D. Operation:

General expense, materials and supplies
..... 51,200.00

State Hospital No. 1--

Fund

Sub-division D. Operation:

General expense, and material and supplies
..... 544,000.00

Hospital No. 2--

State Revenue fund

Sub-division D. Operation:

General expense, materials and supplies
..... 50,800.00

Hospital No. 2--

Fund

Sub-division D. Operation:

General expense, material and supplies
..... 743,051.00

Hospital No. 3--

State Revenue fund

Sub-division D. Operation:

General expense, materials and supplies
..... 17,200.00

Hospital No. 3--

Fund

Sub-division D. Operation:

General expense, material and supplies
..... 453,390.00

Hospital No. 4--

State Revenue fund

Sub-division D. Operation:

General expense, materials and supplies
..... 25,600.00

Hospital No. 4--

Fund

Sub-division D. Operation:

General expense, and material and supplies
..... 326,608.00

December 29, 1937

Missouri State School at Marshall--
FundSub-division D. Operation:
General expense: material and supplies
..... 230,000.00Missouri State School at Marshall--
FundSub-division D. Operation:
General expense, material and supplies
..... 245,000.00Missouri State Sanatorium at Mt. Vernon--
State Revenue fundSub-division D. Operation:
General expense: Material and supplies
..... 255,000.00Missouri State Sanatorium--
FundSub-division D. Operation:
General expense: Material and supplies
..... 115,580.00

The foregoing is the way in which the appropriations were made under the item for "operation" for the various institutions of the eleemosynary institutions.

The only sub-division out of which the premiums for the insurance on these institutions could be paid is listed as "operations." We are of the opinion, however, that the foregoing clauses of the appropriation act are not broad enough and specific enough to permit the board of managers of the eleemosynary institutions to take out of the fund appropriated for operations the money in payment of the premiums for the insurance.

The general rule is that where general words are followed by particular words, the general words would be restricted and confined to the particular words used. This rule has been applied in the construction of appropriation acts. In case of State ex rel. Dierks, 214 Mo. 278, the court had for consideration an appropriation under the St. Louis Charter. The words in that appropriation in which the relator relied upon were:

"Other expenses of the house of delegates."

The court in discussing this question at l.c. 591, said:

"Relator contends that the words 'other expenses of the house of delegates,' are sufficient to authorize the payment of this money out of the unexpended balance

December 29, 1937

in that fund. The whole clause of the ordinance reads:

'Publishing proceedings, printing, stationery, office supplies, furniture, rent of telephone and other expenses of the house of delegates,'

To our mind the rule of ejusdem generis fully applies here. The term 'other expenses' means expenses of the character theretofore mentioned in that clause of the appropriation act and does not include an appropriation for work of the character performed by the relator."

Following the above rulings, we are of the opinion that the moneys appropriated by the legislature under the foregoing clauses for the eleemosynary institutions can only be used for the purposes enumerated such as materials and supplies. We do not believe that the insurance premiums are similar enough to materials and supplies to bring them within the provisions of the aforesaid clause of the appropriation acts for these institutions.

The failure of the legislature to appropriate money for the payment of insurance premiums evidences an intention on the part of the law makers that they desire that the state carry its own insurance on these buildings. We are, therefore, of the opinion that the legislature having failed to make appropriations for the payment of the premiums for the insurance on the buildings of the eleemosynary institutions intended that the state carry its own insurance on such buildings.

In determining whether the commissioner of the department of penal institutions have authority to contract for insurance, we refer to Section 8316, page 327, Session Acts of Missouri, 1933, which is as follows:

"There is hereby created and established a department to be known as the Department of Penal Institutions, by which name it shall have perpetual succession, with the right to complain and defend in all courts; and to adopt and use a common seal and alter the same at pleasure. The department of Penal Institutions shall be under the control and management of a Commission

composed of three members, not more than two of whom shall belong to the same political party, who shall be known as Commissioners of the Department of Penal Institutions, and who shall have and exercise the powers, and perform the duties and functions in this article provided, and as otherwise authorized by law. The commissioners of the department of penal institutions shall reside in Jefferson City and devote their entire time to the duties of their respective offices. Said department of penal institutions shall have and exercise control and jurisdiction over all penal institutions in this state supported in whole or in part by the direct appropriation of money out of the state treasury, and more particularly over the Missouri reformatory at Booneville, the state industrial home for girls at Chillicothe, the state industrial home for negro girls at Tipton, the intermediate reformatory at Jefferson City and the state penitentiary and prison at Jefferson City, together with all real estate, buildings, machinery and personal property belonging to or used by, or in connection with, said penal institutions, or any thereof."

Section 8329 R.S. Mo. 1929, provides that the penitentiary shall be maintained at Jefferson City, Missouri.

Section 8345 R.S. Mo. 1929, provides that the training school for boys shall be located and maintained at Booneville.

Section 8362 R.S. Mo. 1929, provides that the State Industrial Home for Girls be maintained at Chillicothe, Missouri.

Section 8375 R.S. Mo. 1929, provides that the State Industrial Home for negro girls shall be maintained at Tipton, Missouri.

Following the authorities and cases cited in this opinion relating to the powers and duties which are incidental to maintaining the properties of the eleemosynary institutions, this department is of the opinion that the commissioners of the department of penal institutions being authorized by statute to maintain the properties of the penal institutions above named, as incidental to the maintenance of such institutions

December 29, 1937

are authorized to enter into insurance contracts for the protection of the properties. Upon an examination of the appropriation acts of 1937, we find that the legislature included in the appropriation for the penal institutions an item for the payment of insurance premiums.

CONCLUSION

This office is, therefore, of the opinion that the commissioner of the department of penal institutions may enter into contracts for insurance and pay out of the respective appropriations the premiums for insurance on the properties of the penal institutions herein above named.

As to the educational institutions we find that this office on January 26, 1937, rendered an opinion covering the question of insurance on buildings of the educational institutions. This opinion seems to cover the subject of your inquiry as to such institutions and we are enclosing a copy of it for your use.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:DA

✓
MOTOR VEHICLES: If plates are lost or destroyed by seizure or otherwise duplicates must be issued.

April 9, 1937

4-10



Miss Gertrude H. Stokely
Automobile Department
Secretary of State's Office
Jefferson City, Missouri

Dear Miss Stokely:

This is to acknowledge your letter dated April 7, 1937, and supplement thereto, as follows:

"It is a law in the State of California, that when a car from another state enters their state and is resold to an individual, the person owning the car must relinquish their plates and buy California plates before the sale is made. The original license plates, which are not California plates, are destroyed by the authorities of California.

Recently we have had quite a few people, both individuals and dealers, apply for duplicate sets of plates, carrying the same number as the destroyed plates. As you know, there are a great many dealers who take automobiles into the State of California for re-sale. There are often ten or more automobiles transported at the same time and these same dealers often make two or three trips during the year. As stated before, all of these Missouri plates are destroyed and the question is, should duplicate plates be issued or should we require our citizens and dealers to buy a new set of plates?

May we have an opinion on this at once as we have some correspondence being held?"

April 9, 1937

"SUPPLEMENT"

"The Missouri Dealers that sell used cars in the State of California, buy individual plates as the State of California does not honor dealers plates."

We understand from your letter that licensed Missouri dealers register automobiles in their own name and take said cars to the State of California for the purpose of selling them. Under the statutes of California when a registered and licensed automobile in another state is sold in California the foreign license plate must be surrendered to the authorities of California. Subsequent thereafter said original foreign license plates are destroyed.

You inquire if duplicate plates may be issued for those surrendered to the authorities in California. We invite your attention to the fact that it is the automobile that is registered. Section 7761, Laws of Missouri 1933, Extra Session, page 99.

When an automobile is registered Section 7770, Laws of Missouri 1935, page 297, the commissioner of motor vehicles shall without expense to the owner issue and deliver number plates.

Section 7774 R. S. Missouri 1929, provides:

"Upon the transfer of ownership of any motor vehicle***its certificate of registration and the right to use the number plates shall expire, and the number plates shall be removed at the time of the transfer of possession***The buyer shall remove such number plates at the expiration of said five days, and return them to the previous owner of the motor vehicle, and it shall be unlawful for the buyer, or any person other than the person to whom such number plates were originally issued, to have the same in

his possession after the expiration of such five days, whether in use or not; Provided, however, that in the case of a transfer of ownership the original owner may register another motor vehicle under the same number, upon the payment of a fee of \$2.00, if such motor vehicle is of horse power or tonnage not in excess of that originally registered;*****

You will note from the reading of Section 7774 supra, that the duty is placed upon the owner to recover his license plates if he sells his registered automobile. However, if he cannot do so by operation of law he cannot be penalized. If his license plates are taken from him by the authorities of another state then such are lost so far as he is concerned.

Section 7771 R. S. Missouri 1929, reads as follows:

"In the event of the loss, mutilation or destruction of any certificate of registration, certificate of ownership, number plate or badge issued by the commissioner, the lawful holder thereof may, upon filing with the commissioner an affidavit showing such fact, and on the payment of a fee of \$1.00 obtain a duplicate of such plate, certificate or badge."

Said section is unambiguous and provides that in the event of loss, mutilation or destruction of any number plate a duplicate will be given upon payment of a fee of One Dollar.

Corpus Juris, Vol. 38, page 244, defines "loss" as follows:

"A generic and relative term. 'Loss' is not a word of limited, hard and fast meaning. It may mean either the act of losing, or the thing lost. In some instances 'loss'

April 9, 1937

may mean that which can never be recovered, and in others that which is simply withheld or that of which a party is dispossessed."

Words and Phrases, Second Series, Vol. 3, page 185, has the following to say as to the word "loss":

"'Loss' is a relative term. A failure to keep that which one has is 'loss'. *Foehrenbach v. German-American Title & Trust Co.*, 66 Atl. 561, 563, 217 Pa. 331, 12 L.R.A. (N.S.) 465, 118 Am. St. Rep. 916."

In view of Section 7771 supra, if a person makes an affidavit showing that his license plates have been lost to him by virtue of the action of the authorities of the State of California, then in our opinion duplicates of such plates should be given to him by the motor vehicle department upon the payment of the required fee. As we read Section 7771 supra, it does not attempt to define the word "loss" in any particular sense. Consequently, giving the word "loss" the meaning that license plates are not in the possession of the owner but withheld to the extent that he is dispossessed from same or the use of same, brings such owner within the terms of Section 7771, and thus makes him eligible for a duplicate, in our opinion.

Yours very truly,

James L. HornBostel,
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General

JLH:MM

COUNTY SURVEYOR: If surveyor refuses or neglects to give bond within the time prescribed in section 11572, then, by the terms of section 11574, a vacancy may be declared and filled by the Governor under section 10216.

May 7, 1937

5-13

Honorable Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri



Dear Sir:

This Department is in receipt of your letter of March 2, wherein you request an opinion based on the following facts:

"The County Surveyor of Marion County, who was elected at the last general election, has failed to qualify for said office under section 11573, R. S. Mo., 1929. He is now employed by the Works Progress Administration and spends five days a week in this work outside of Marion County. He, however, maintains his legal residence in this County.

"

"I have advised the County Court that a vacancy exists and that they should declare said vacancy by an appropriate order of Court, and that the vacancy should be filled by the Governor.

"Several emergencies now exist and it is necessary that I be advised by your office immediately if you concur with me in my opinion to the County Court."

May 7, 1937

The pertinent part of Section 11573, Revised Statutes Missouri 1929, is as follows:

"Every county surveyor shall, within sixty days after receiving his commission, and before entering upon the duties of his office, take the oath prescribed by the Constitution, and enter into bond to the state of Missouri, in a sum not less than one thousand nor more than five thousand dollars, to be determined by the county court, conditioned that he will faithfully perform all the duties of the office of county surveyor, and that at the expiration of his term of office he, or in case of his death, his executors or administrators, will immediately deliver to the recorder of deeds of the county all the records, books and papers appertaining to his office; * * * "

Section 11574, Revised Statutes Missouri 1929, refers to the failure to give bond and is as follows:

"If any county surveyor fail to give such bond in the time prescribed in the preceding section, his office shall be vacant."

In determining whether or not there is a vacancy the question arises as to the person now in office. If the surveyor-elect was supposed to succeed

himself, then the question of vacancy must be treated from that standpoint. If he was supposed to succeed another person who has not vacated the office or relinquished it at the end of his term, then the question of vacancy must be considered from that standpoint.

If the latter situation exists, then the decision in the case of Langston v. Howell County, 79 S. W. (2d) 99, would govern. The court, at l. c. 102, said:

"Our Constitution, (section 5, Art. 14) provides that: 'In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified,' and section 11196 R.S. 1929 (section 9168, R.S. 1919), Mo. St. Ann. sec. 11196, p. 6141, reads: 'All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified.' We find no constitutional or statutory provision which either expressly or by implication excludes the county highway engineer, or the office of county highway engineer, from the operation and effect of the foregoing constitutional and statutory rule so that since there is no 'contrary provision' the rule so prescribed must be applied. It is said in 46 C. J. p. 968: 'The general trend of decisions in this country is that, in the absence of an express or implied constitutional or statutory provision to the contrary an officer is entitled to hold his office until his successor is ap-

pointed or chosen and has qualified.' Langston's official term was fixed at one year, but upon the expiration thereof, no successor having been appointed, his right to hold such office, and his title thereto, continued until the right of a duly appointed and qualified successor attached. His right to hold over and his continuance in the office was of course contingent and defeasible subject to be terminated at any time by the appointment and qualification of his successor. During the time an officer so holds over, under the provisions of the constitutional and statutory provisions, supra, he holds the office as a de jure officer (46 C.J. p. 969) and by the same tenure, after the prescribed term, until the right of his duly chosen and qualified successor attaches. It therefore appears that the trial court was in error as to the applicable rule of law, and in holding that Langston was not entitled to hold over and continue in office after the expiration of the term prescribed by the order of appointment."

But we assume that no one is acting or attempting to act as Surveyor of Marion County unless it be the person concerning whom your letter relates. Bearing in mind the terms of Section 11574, quoted supra, the question arises is said statute directory or mandatory in its terms. The various authorities relating to vacancies in office as a result of the officer-elect failing to give bond, is reviewed at length in the case of Bank of Mt. Moriah v. Mt. Moriah, 226 Mo. App. 1. c. 1231:

"The main question in dispute between the parties is whether this section of the statute, requiring a bond of the treasurer of the village, is directory or

mandatory, it being conceded by the defendant that, if it is mandatory, Downey never became treasurer of the village and was not entitled to possession of its funds.

"If a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory. The rule thus stated is in harmony with that other well-recognized canon that statutes directing the mode of proceedings by public officers are to be held to be directory and are not to be regarded as essential to the validity of a proceeding unless it be so declared by law. (State v. Cook, 14 Barb. 259.) By this we mean that if a fair consideration of the statute shows that unless the Legislature intended compliance with the proviso to be essential to the validity of the proceeding, which nowhere appears, then it is to be regarded as merely directory.' (State ex inf. Frank W. McAllister v. Bird et al. 295 Mo. 344, 351, 352.)

"In State ex rel. v. Churchhill, 41 Mo. 41, the provision of a statute requiring the county treasurer to give bond within ten days after his appointment or election was held to be merely directory, it being said that the matter of time was not essential to the validity of the bond nor a condition precedent to the party's title to the office. In State ex rel. v. Findley,

101 Mo. 368, it was held that the statute forbidding county courts from accepting an official bond with the name of a judge of the court as a surety thereon was directory only.

" 'In the absence of a statute so providing, it is generally held that a failure to qualify, although it affords cause for forfeiture of the office, does not create a vacancy, and even though it is irregular and improper to induct one into office, without giving the required bond, such a one is legally in office, and so remains until removed by judicial process, and if the oath is taken or the bond filed at any time before proceedings are taken to declare a vacancy, it is sufficient.' (46 C. J., pp. 962,963.)

"The case of United States v. Bradley, 10 Peters, 343, involved an act of Congress providing that 'all officers of the pay, commissary and quartermaster's department shall, previous to entering on the duties of their respective offices, give bond and sufficient bonds to the United States, fully to account for all moneys and public property which they may receive, in such sums as the secretary of war shall direct.' It was held that the giving of such a bond was a mere ministerial act, and not a condition precedent to the officer's authority to act as pay master; that the appointment was complete, when made by the president and confirmed by the senate. A similar ruling was made in the cases of U. S. v. Eaton, 169 U. S.

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331, 346; Glavey v. U. S. 182 U.S. 595; State ex rel. v. Carroll, 57 Wash. 202; Board of Commissioners v. Johnson, 124 Ind. 145; Pickering v. Day, 95 Am. Decisions, 291. The following cases involve statutes making the giving of a bond mandatory and a condition precedent to qualifying for the office. (Rounds v. Bangor, 46 Me. 541; 543; Andrews v. Covington, 69 Miss. 740; State ex rel. v. Tucker, 54 Ala. 205; Advisory Opinion to Governor, 65 Fla. 434; G.N.O. & T. R. Co. v. Cundiff, 166 Ky. 594; Patterson v. State of Nebraska, 92 Neb. 729.)

"Section 7155 is not similar to the statutes construed in the cases last cited but more like those in the cases heretofore cited.

"Some statutes provide that the failure to give bond shall work a vacancy or a forfeiture of the office, but it is usually held that, under these statutes, the officer continues to be a de jure officer until a vacancy or forfeiture is declared. (See State ex rel. v. Ely, 43 Ala. 568; State ex rel. v. Callow, 78 Mont. 308; People ex rel. v. Thomas, 80 Mich. 265; People ex rel. v. Watts, 26 N. Y.S. 280.) In the case last cited the court quoted approvingly (page 282) from Dill. Mun. Corp. (4 Ed.) as follows:

" ' Statutes requiring an oath of office and bond are usually directory in their nature; and unless the failure to take the oath or give the bond by the time prescribed is expressly declared, ipso facto, to

Honorable Walter G. Stillwell -8- May 7, 1937

vacate the office, the oath may
be taken or the bond given after-
wards, if no vacancy has been
declared. ' "

CONCLUSION

We are of the opinion that due to the provisions
of Section 11574 prescribing the result of failure of the
officer-elect to give bond in the specified time, that
the county court now has the power to declare a vacancy
or a forfeiture, and, as stated in your letter, the vacancy
may be filled by the Governor in accordance with the pro-
visions of Section 10216, Revised Statutes Missouri 1929.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

TAXATION: County Collector unauthorized to collect delinquent real estate taxes due cities of the fourth class, is without authority to sell property to enforce such collections, and is entitled to no commission on any such taxes collected.

May 8, 1937

5-10



Hon. Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Mr. Stillwell:

We are in receipt of your communication of recent date wherein you ask the three following questions:

- "1. Was it mandatory upon the Collector of Revenue of this County to collect all delinquent city taxes and assessments certified to him by the Collector of the City of Palmyra as being delinquent and unpaid?
2. If, in your opinion, question number one is answered in the affirmative, was it proper for said collector, under the provisions of the Jones-Munger law to sell this property because of delinquent city taxes?
3. Could commissions, penalties, etc., collected by the county collector on delinquent city taxes be retained by him as a non-accountable commission?"

We will answer your inquiries in the order in which they are made.

I.

County Collector may not collect
delinquent real estate taxes due
city of the fourth class.

On August 8, 1933, this office rendered an opinion to the State Tax Commission, wherein it considered the duties of the city and county collectors under the provisions of Senate Bill 94. In respect to the collection of delinquent real estate taxes due cities of the fourth class the following conclusion was reached in that opinion:

"It is therefore the opinion of the office that Senate Bill 94 is applicable to Cities of the Third and Fourth Classes in so far as it is prescribing the method and manner of the collection and enforcement of the payment of the taxes, but any proceedings had relating thereto are to be conducted by the city collector consistent with the requirements of Articles 4 and 5 of Chapter 38, 1929 Revision."

We herewith enclose to you a portion of that opinion dealing with the duties of the various city collectors and refer you particularly to that part of the opinion found on the next to the last page and the preceding page, which deals with the duties respecting the collection of delinquent real estate taxes in cities of the fourth class. From this you will readily see that the county collector of revenue has nothing whatsoever to do with the collection of such taxes, but that it is the duty of the city collector of the respective cities to proceed to collect the same at the same time and in the same manner as the county collector collects delinquent state and county taxes.

II.

County Collector may not sell
property for delinquent city taxes
due cities of the fourth class.

By virtue of our conclusion under part one of this opinion it is quite certain that if the county collector has no authority to collect delinquent real estate taxes due cities of the fourth class he likewise has no authority to proceed to sell the property on account of such delinquencies. The enforcement of such delinquent taxes rests with the collector of such municipality and it is his duty to proceed to sell the same pursuant to the terms of the Jones-Munger law.

III.

County Collector not entitled to
commission for collecting delin-
quent real estate taxes due cities
of the fourth class.

By virtue of our conclusion reached under part one of this opinion, to-wit, the county collector is not authorized to collect delinquent real estate taxes due cities of the fourth class, it necessarily follows that he would be unable to retain any commission for such collections if such collections were made. It is a recognized rule of law that public officers cannot receive any compensation other than that provided by statute.

In the case of King vs. Riverland Levee District, 218 Mo. App. 490, 279 S. W. 195, the following statement is to be found at page 493 (Mo. App.):

"It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. State ex rel. Evans vs. Gordon, 245 Mo. 12, 1. c. 27, 149 S.W. 468; Sanderson vs. Pike County, 195 Mo. 598, 93 S.W. 942; State ex rel. Troll vs. Brown, 146 Mo. 401, 47 S. W. 504. Furthermore our Supreme

Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking vs. McCracken, 60 Mo. App. l. c. 565, to the effect that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same. State ex rel. Evans vs. Gordon, supra."

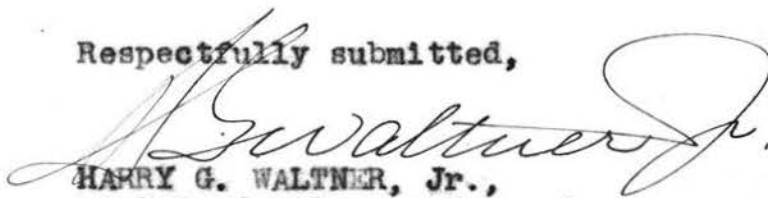
No authority in the law can be found for paying the County Collector for performing these duties, therefore he may not retain any commissions.

This statement embodies the established law of this state on this subject. In view of this rule, to hold that the county collector could receive any commission for making such collections would be to entirely ignore the established law on the subject.

CONCLUSION.

In view of the foregoing it is the opinion of this office that the County Collector is without authority to proceed with the collection of delinquent real estate taxes due cities of the fourth class; that he is wholly without authority to make any sales of property to enforce the collection of delinquent real estate taxes due cities of the fourth class and that the county collector is entitled to no commission whatsoever for the collection of any delinquent real estate taxes due cities of the fourth class in the event he should make such collections.

Respectfully submitted,


HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HGW:MM
Enclosure.

MOTOR VEHICLES: All operators of motor vehicles being operated within this state, whose height, width and length exceeds the inhibitions of the statute by reason of the use of clearance lights and rear vision mirrors, must obtain special permits therefor.

June 29, 1937

7-15



Mr. Louis V. Stigall, Chief Counsel
Missouri State Highway Department
Jefferson City, Missouri

Dear Mr. Stigall:

This is to acknowledge receipt of your recent request for an opinion reading as follows:

"The matter of the use of clearance lights and rear view mirrors by common carriers operating over the highways of this State, the use of which devices increases the dimensions of such carrier vehicles beyond the statutory limit, has been referred to the Highway Department in connection with the existence of over-dimension permits.

Restrictions as to size and weight of motor vehicles are contained in Section 7776, R. S. Mo. 1929, which also provides for the issuance of permits when deemed necessary for the operation of vehicles whose sizes and weights exceed the limits prescribed under that Section. These permits have been issued in cases where deemed necessary by our Maintenance Department, therefore, the matter was referred to this department for consideration.

On April 20, 1937, our Maintenance Department was advised by the Secretary of the Public Service Commission of the importance as a safety measure of equipping busses and trucks with clearance lights and rear view mirrors, stating that the Interstate Commerce Commission and other regulatory bodies had prescribed clearance

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lights and rear view mirrors in practically all states. Practically all the common carriers in Missouri are now using clearance lights and rear view mirrors, and in many cases it is the installation of such clearance lights, which are very small, and rear view mirrors which increases the dimension of the vehicle slightly beyond that provided for by statute. Our Maintenance Department is asking whether it is necessary that it issue overdimension permits in the case of every carrier for each trip for the use of such clearance lights and rear view mirrors when the same increases the dimension of the vehicle slightly beyond the statute, or whether a permit is necessary at all since both the lights and mirrors are necessary items for public safety and do not seem to be such an increase beyond the statutory limit as the Legislature had in mind when it passed the statute prohibiting widths beyond a certain distance.

I would very much appreciate an opinion from you as to whether it is necessary for us to issue permits to the many carriers operating in this State to cover the use of such clearance lights and rear view mirrors."

Your attention is directed to Section 7776, R. S. Mo. 1929, subdivision (a) which reads:

"No motor vehicle shall be operated on the highways of this state whose width, including load, is greater than 108 inches, or a greater height than 15 feet, or a greater length than 30 feet, and no combination of vehicles coupled together shall be so operated whose total length, including load, shall be

greater than 85 feet, except in specific cases when vehicles which exceed the foregoing may be operated under permits granted as hereinafter provided."

In determining your request for an opinion, it is necessary to consider Section 7787, R. S. Mo. 1929, as amended, Laws of Missouri, 1931, at page 265, which reads in part as follows:

"No motor drawn or propelled vehicle shall be operated on the highways of this state the width of which, including load, is greater than 96 inches, or the height of which, including load, is greater than 12½ feet; or the length of which, including load, is greater than 33 feet, and no combination of such vehicles coupled together of a total or combined length, including coupling, in excess of 40 feet shall be operated on said highways, and not to exceed two vehicles shall be operated in combination."

It is obvious from the above sections that the restrictions imposed upon the width, height and length of motor vehicles that may be operated on our highways are inconsistent with one another and being so, we shall attempt to harmonize them so as to give effect to each. State ex inf. Major vs. Amick 152 S. W. 591. In so doing, we have considered Section 7791, as amended, Laws of Mo. 1933, page 283, which reads as follows:

"The provisions of sections 7787 to 7792 inclusive except the provisions of section 7787 regulating the length of motor vehicles shall not apply to motor vehicles operating exclusively within the corporate limits of cities now or hereafter containing 75,000 inhabitants or more and/or within two miles of the corporate limits of such

June 29, 1937

cities: Provided, however, the maximum size, width and weight, including load limits of such motor vehicles operating exclusively within the corporate limits of such cities, and/or within two miles of the corporate limits of such cities, shall in no case exceed the limits prescribed in paragraphs (a) and (b) of section 7776 of this article."

From these considerations, it will be noted that the restriction imposed by Section 7776 shall, in no case, exceed the limitations provided for in subdivision (a) whether operated within or without the corporate limits of a city having 75,000 inhabitants or more. However, the length of the motor vehicle is not to be governed by this subdivision of the statute, thus, section 7787, supra, would apply to all motor vehicles operated beyond a two mile limit of any incorporated city having a population of 75,000 inhabitants or more. Although repeals by implication are not favored by the courts, it will be noted that as relates to the length of motor vehicles, the Legislature intended by Section 7791, supra, to make the restriction imposed by Section 7787, relative to length, to be exclusive. State vs. Taylor 18 S. W. (2nd) 474. Lajoie vs. Central West Casualty Co. 71 S. W. (2nd) 803.

With these observations before us, we proceed to determine your request for an opinion. From reading Sections 7776 and 7787, supra, you will note that its provisions are plain and without ambiguity and where the words of the statute are plain or unambiguous, there is no need for construction. State ex rel Jacobsmeier vs. Thatcher 92 S. W. (2nd) 640. Note the inhibition:

"No motor * * * * vehicle shall be
operated upon the highways of this
state * * * *"

The words heretofore used of themselves bespeak a mandate and in construing the word "shall" as used in the statutes under consideration, your attention is respectfully directed to State ex rel Stevens vs. Wurdeman 246 S. W. 189 wherein the court in speaking of the word "shall" said:

" * * * the use of the word 'shall'

indicates a mandate"

As further evidence of the mandatory character of these sections of the statute, it will be noted that should any violations occur relative to the height, width and length of motor vehicles as imposed, a penalty is provided under the provisions of Section 7786 R. S. Mo. 1929, subdivision (d).

As you have probably noted from Section 7787, supra:

" * * * the state highway commission may, when in its opinion the public safety so justifies, issue special permits for the temporary operation of a vehicle or combination of vehicles which, including load, shall be greater than the lengths herein specified for transporting property the nature of which will not permit of such limitation of length, but such permit shall be issued only for a single trip or for a definite period of not to exceed 60 days, and shall designate the highways and bridges which may be used under the authority of such permit."

and the exceptions provided for in Section 7776, supra, reading:

" * * * in specific cases when vehicles which exceed the foregoing may be operated under permits granted as hereinafter provided"

and subdivision (e) reading in part as follows:

"The commissioner may, with the written approval of the state highway engineer,

in his discretion issue special permits for the operation of vehicles whose sizes and weights exceed the limits prescribed under this section, but such permits shall be issued only for a single trip or for a definite period, not beyond the date of expiration of the vehicle registration, and shall designate the highways and bridges which may be used under the authority of such permit: Provided, however, such permits may be issued by the officer in charge of maintenance of streets of any municipality for the use of the streets by such vehicles within the limits of such municipalities."

In reaching our conclusion, we are not unmindful of the provisions of Section 7778, R. S. Mo. 1929, relating to lights and Section 7779, subdivision (d) of R. S. Mo. 1929.

CONCLUSION

In view of the above, it is the opinion of this department that no motor vehicle shall be operated upon the highways of this State which exceeds the limitations specified under the provisions of Section 7776 R. S. Mo. 1929 and Section 7787, Laws of Missouri 1931, page 265, and that the use of clearance lights and rear vision mirrors which cause the dimensions specified in the statute to be exceeded are unlawful.

We further rule that the Commissioner of Motor Vehicles, with the written approval of the State Highway Engineer, may in his discretion issue special permits for the operation of vehicles whose sizes exceed the inhibitions specified, subject to the period of time for which such permits must be issued; excepting as to the length of motor vehicles, special permits

Mr. Louis V. Stigall

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June 29, 1937

must be issued, if issued by the State Highway Commission when, in its opinion, the public safety so justifies, subject also to the period of time mentioned in Section 7787, supra.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS:RT

CIRCUIT CLERKS-
Fees & Salaries:

CLERK OF JUVENILE COURT
Salary:

HOUSE BILL 177:

1. Emergency clause not effective under H.B. 177.
2. Clerk permitted change from fee basis to salary, during term, without violating Sec. 8, Art. XIV, Mo. Const.
3. Clerk of Juvenile Court entitled to salary during his present term.

August 6, 1937.

Honorable Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri



Dear Mr. Stillwell:

This is to acknowledge receipt of your letter of recent date in which you request the opinion of this Department relative to House Bill No. 177, passed by the 59th General Assembly, pertaining to the salaries of the clerks of the circuit courts, and the salary and compensation of the clerks of the juvenile courts, in counties of less than 50,000 inhabitants.

Since this Department has received several requests for opinions relative to House Bill No. 177, we shall consider the various questions raised in these requests and consider all of them in this opinion.

The three questions which seem to be important, and which appear in several of the requests, may be stated as follows:

- 1st. Is the emergency clause attached to said bill sufficient to make said act effective from the date of its signing by the Governor, or will it become effective ninety days after the adjournment of the General Assembly, namely, September 6, 1937?
- 2d. After the effective date of the act will the circuit clerks now in office and during the present term receive out of the county treasury the maximum amount of fees allowed to be retained under the law as enacted in 1933, Laws of Missouri, 1933, page 369 et seq.?

3rd. Are the circuit clerks now in office and during their present term entitled to be paid for their services as clerks of the juvenile courts as provided under Section 11814a, House Bill No. 177?

We shall take up these questions in the above order.

I.

We do not think that the emergency clause attached to House Bill No. 177 makes said act effective from the date of its signing by the Governor under the repeated holdings of the Supreme Court of Missouri.

The emergency clause attached to this bill does not meet the requirements of our Constitution. The mere declaration in an act that it is an emergency measure does not of itself make it such; the emergency must appear upon the face of the bill itself to bring it within the terms of the Constitution and thereby put same into immediate effect from the date of the signing of same by the Governor.

In the case of State ex rel. Harvey v. Linville et al., 318 Mo. 698, 300 S. W. 1066, in which the court had before it the effective date of an act of the Legislature, had this ~~the~~ to say (l. c. 1068):

"Two sections of the Constitution apply to the taking effect of the law, and the effectiveness of an emergency clause. Section 36, art. 4, of the Constitution is as follows:

"Sec. 36. Laws Take Effect, When--
Emergency, Vote Required.--No law passed by the General Assembly, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency (which emergency must be expressed in the preamble or in the body of the act), the General Assembly

shall, by a vote of two-thirds of all the members elected to each house, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journal.'

"That portion of section 57, art. 4, of the Constitution which was later adopted in connection with the referendum, contains this clause applicable to this case:

"The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety and laws making appropriations for the current expenses of the state government, for the maintenance of the state institutions and for the support of public schools) either by the petitions signed,' etc.

"It was held in the case of State v. Sullivan, 283 Mo. 546, 224 S. W. 327, that these two sections of the Constitution must be construed together; that a declaration in a bill that it was an emergency measure within the meaning of the Constitution, did not make it so; that the emergency must appear in fact upon the face of the bill to be within the terms of the Constitution, authorizing an emergency clause which would put the act into immediate effect.

"The respondent claims the act of 1919 did not go into effect for 90 days under section 36, art. 4, because it was one subject to the referendum, under the exception mentioned in section 57 of this article:

"Except as to laws necessary for the immediate preservation of the public peace, health or safety and laws making appropriations for the current expenses

of the state government, for the maintenance of the state institutions and for the support of public schools.'

"Plainly the emergency clause in the act does not state a condition to which the emergency provision of the Constitution could apply."

The above case was followed and reaffirmed in *Hollowell v. Schuyler County*, 322 Mo. 1230, 18 S. W. (2d) 498.

The effect of an emergency clause on an act was discussed at great length in the case of *State ex rel. Westhues v. Sullivan*, 283 Mo. 546, 224 S. W. 327, wherein the court held that the Legislature cannot, by declaring an emergency, prevent referendum of the statute in coming within the classes enumerated; its power in such instances not being conclusive as its power to declare an emergency under Article IV, Section 36, so as to have an act go into effect immediately. The emergency clause in House Bill No. 177 does not seem to fall within the exceptions contained in the following clause of Section 57, Article IV, of the Constitution:

"The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety and laws making appropriations for the current expenses of the state government, for the maintenance of the state institutions and for the support of public schools) either by the petitions signed, etc."

From the above and foregoing, and the interpretations of the law by our Supreme Court, it is our opinion that the emergency clause attached to this bill is not sufficient under the Constitution and therefore said law will not go into effect until ninety days after the adjournment of the General Assembly, namely, September 6, 1937.

II.

Coming now to the second question as stated above.

House Bill No. 177, enacted by the 59th General Assembly, repealed Sections 11786, 11812 and 11814 adopted by Laws of 1933, at pages 369 et seq., and enacted in lieu thereof five new sections to be numbered 11786, 11812, 11813, 11814 and 11814a. Under Section 11786, Laws of Missouri, 1933, page 369, the clerks were on a fee basis and were allowed to retain fees earned by their office and were limited as to the amounts they were allowed to retain according to the population of their respective counties, and if their office did not earn the maximum amount permitted under the statute they were limited to the amount earned.

Section 11786, as re-enacted by House Bill No. 177, raises the maximum amounts as provided under Laws of 1933 under the population brackets provided therein, and provides:

"The Clerks of the Circuit Courts of this State shall receive for their services annually the following sum: In counties having a population of less than seven thousand five hundred persons, the sum of twelve hundred (\$1200) dollars; in counties having a population of seven thousand five hundred persons and less than ten thousand persons, the sum of fifteen hundred (\$1500) dollars; in counties having a population of ten thousand persons and less than fifteen thousand persons, the sum of seventeen hundred (\$1700) dollars; in counties having a population of fifteen thousand persons and less than seventeen thousand five hundred persons, the sum of nineteen hundred (\$1900) dollars; in counties having a population of seventeen thousand five hundred persons and less than twenty thousand persons, the sum of twenty-one hundred (\$2100) dollars; in counties having a population of twenty thousand persons and less than twenty-five thousand persons, the sum of twenty-three hundred (\$2300) dollars; in counties having a population of twenty-five thousand persons and less than fifty thousand persons, the sum of twenty-five hundred (\$2500) dollars; in counties having a population of fifty thousand persons and less than seventy-five thousand persons, the sum of thirty-

six hundred (\$3600) dollars; in counties having a population of seventy-five thousand persons and less than one hundred fifty thousand persons, the sum of four thousand (\$4000) dollars; in counties having a population of one hundred fifty thousand persons and less than four hundred thousand persons, the sum of five thousand (\$5000) dollars; Provided, that in any county wherein the Clerk of the Circuit Court is ex-officio Recorder of Deeds, said offices shall be considered as one for the purpose of this Section; Provided, it shall be the duty of the Circuit Clerk, who is ex-officio Recorder of Deeds, to charge and collect for the county in all cases every fee accruing to his office as such Recorder of Deeds and to which he may be entitled under the provisions of Section 11804 or any other statute, such Clerk and ex-officio Recorder shall, at the end of each month, file with the County Clerk a report of all fees charged and accruing to his office during such month, together with the names of persons paying such fees. It shall be the duty of such Circuit Clerk and ex-officio Recorder of Deeds, upon the filing of said report, to forthwith pay over to the County Treasurer, all moneys collected by him during the month and required to be shown in such monthly report as hereinabove provided, taking duplicate receipt therefor, one of which shall be filed with the County Clerk, and every such Circuit Clerk and ex-officio Recorder of Deeds shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the County treasury as herein provided; Provided, further, that the Clerks of the Circuit Courts shall be allowed to retain in addition to the sums allowed in this Section, all fees earned by him in cases of change of venue from other counties; Provided, further, that until the expiration of their present term of office, the persons holding the office of Circuit Clerk shall be paid the maximum amount as now provided by law, in the manner provided by this Act."

It will be seen from this section that the clerks are placed back on a salary basis and that the persons holding the office of circuit clerk shall be paid as salary the maximum amount as now provided by law.

Section 11813, R. S. Mo. 1929, repealed by Laws of Missouri, 1933, page 369, was re-enacted verbatim by House Bill No. 177, and is as follows:

"The salary of the Clerk, and that of his deputies and assistants, shall be paid out of the county treasury, in monthly installments, at the end of each month. The accounts of all deputies and assistants shall be stated in their names, respectively, and the correctness thereof shall be certified by the officers, respectively, in whose employment they are. The Clerk and his deputies and assistants shall present their accounts to the County Court, and said court shall draw its warrant therefor upon the County Treasurer, to be paid out of any money available in the treasury."

It will, therefore, be seen that it was the intention of the Legislature to pay the circuit clerks a salary out of the county treasury, in monthly installments at the end of each month and that they are to receive the maximum amounts they were permitted to retain under the law of 1933, page 369.

The question then arises whether or not the circuit clerks now in office are to be paid the maximum salary out of the county treasury or are they prohibited from accepting the maximum salary permitted under this act by reason of any constitutional inhibition?

Section 8, Article XIV, Constitution of Missouri, should be considered in connection with this opinion, and provides as follows:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

It may be true that in some counties the circuit clerks will receive more compensation under the new law than they are receiving under the 1933 law, and those clerks whose offices earned an amount equal to or greater than the maximum amounts allowed will not be affected as to the amount of the compensation received but only in the manner of receiving same. Under the 1933 statute (11786, Laws of 1933, p. 369) they were entitled to retain the maximum amount and under the 1937 law they shall be paid the maximum amount as now provided by law in the manner provided by this act.

The almost identical question was before the Supreme Court involving the compensation of the circuit clerks in a similar situation in State ex rel. Emmons v. Farmer, 271 Mo. 306, and evidently the Legislature had before it this case when House Bill No. 177 was introduced, and attempted to meet and comply with the principles as announced in this case. It is a very similar situation and in substance the court held that the fixing of the salaries of circuit clerks at the same amounts they were permitted to retain in any one year from the fees collected by them, is not violative of the constitutional provision declaring that "the compensation of no state, county or municipal officer shall be increased during his term of office." Even though the fees in some counties in prior years did not equal the amount they were permitted to retain, yet if the act fixes their salaries at the maximum amounts they were permitted to retain at the time they were inducted into office, it does not increase their compensation under the rule announced in the Farmer case, supra. This case, to our mind, is on all fours with the question under consideration.

It is, therefore, our opinion that the clerks now in office and during their present term are entitled to receive out of the county treasury in monthly installments at the end of each month the maximum amounts which they were permitted to retain according to their population bracket under the Laws of 1933, and that it is not such an increase in compensation, if increase there may be, as prohibited by Section 8, Article XIV of the Constitution.

III.

The next question to be determined is whether the circuit clerks now in office, and during their present terms, may receive the compensation provided for them for acting as

clerks of the juvenile courts under the provisions of Section 11814a of House Bill No. 177, which provides:

"For their services as Clerks of the Juvenile Courts, also known or designated as the Juvenile Division of the Circuit Court, the Clerks of the Circuit Courts in all counties containing less than fifty thousand inhabitants shall receive and be paid an annual compensation as follows: In counties of less than seventy-five hundred inhabitants, \$100.00; in counties having a population of seventy-five hundred and less than ten thousand inhabitants, \$200.00; in counties having a population of ten thousand and less than fifteen thousand inhabitants, \$300.00; in counties having a population of fifteen thousand and less than seventeen thousand five hundred inhabitants, \$400.00; and in counties having a population of seventeen thousand five hundred and less than fifty thousand inhabitants, \$500.00, payable out of the county treasury at the end of each month in equal monthly installments in the same manner as salaries of such Circuit Clerks as provided under this Act; provided, however, the compensation provided for in this Act for Clerks of the Juvenile Courts shall be in addition to the salary allowed them by law for their services as Clerks for the Circuit Courts and shall be paid to and received by such Clerks in full compensation for all services now or hereafter required of or rendered by them as Clerks of the Juvenile Courts or as Clerks of the Juvenile Division of the Circuit Courts."

What has been known as the "Juvenile Court Law" operative in counties having a population of less than 50,000 inhabitants, now Article 8, Chapter 124, R. S. Mo. 1929, was first adopted by the 49th General Assembly, Laws of Missouri, 1917, page 195.

That part of Section 14162, R. S. Mo. 1929, which is pertinent to the question under consideration, provides:

"The Cape Girardeau Court of Common Pleas and all circuit courts in counties of less than 50,000 population shall have original jurisdiction of all cases coming within the terms of this article. The proceedings of the court in such cases shall be entered in a book or books kept for that purpose and known as the Juvenile Records, and the courts shall be known as the Cape Girardeau Court of Common Pleas and the Circuit Court, and may for convenience be called the Juvenile Court. The Clerk of the Cape Girardeau Court of Common Pleas and the clerk of the Circuit Court in such counties shall act as the clerk of the Juvenile Court. * * * * *"

While the statute provides that the circuit clerk shall act as the clerk of the Juvenile Court, we do not find that fees or compensation of any kind are specifically allowed him for performing the services in the Juvenile Court required by him under the law prior to the enactment of House Bill No. 177.

Section 11785, R. S. Mo. 1929, relating to fees of circuit clerks, provides fees for services in all civil proceedings, Section 11787 provides fees in criminal proceedings, and Section 11788 provides for fees in naturalization matters, but nowhere do we find any special fees are allowed for services for acting as the clerk of the Juvenile Court.

In 1919, by Laws of Missouri, 1919, page 273, the judges of the Juvenile Court, the judge of the Circuit Court in all counties containing less than 50,000 inhabitants, were granted additional compensation in addition to their salary as judges of the circuit court, for which extra and additional services and labors no compensation had theretofore been permitted under the law.

Since the establishment of the Juvenile Division of the Circuit Court in 1917 and the making of the judge of the circuit court, judge thereof, and the circuit clerk, clerk thereof, it has

been entirely separate and distinct from the circuit court itself. "The hearings may be conducted in the judge's chambers or in such other room or apartment as may be provided for such cases, and as far as practicable such cases shall not be heard in conjunction with the other business of the court." Being a separate and distinct division of the court, the judge acts wholly disconnected from his duties as circuit judge. The clerk of the Juvenile Court keeps his juvenile records in books other than records of the circuit clerk. The Juvenile Court was created for certain purposes, namely, the administering of juvenile cases, therefore, the duties of the clerk of the Juvenile Court are not incident to his duties as clerk of the Circuit Court; they are made incidental thereto only by the statute which creates them. These duties could have been delegated to any other individual or public officer by the Legislature, as it saw fit.

In the case of Little River Drainage District v. Lassater, 29 S. W. (2d) 716, 1. c. 719, in a somewhat analogous case, in dealing with Section 8, Article XIV of the Missouri Constitution, the Supreme Court said:

"The constitutional inhibition only applies to compensation or fees of officers for performing duties incident to their offices, and has no application to additional duties imposed upon such officers not ordinarily incident to their offices. State ex rel. McGrath v. Walker, 97 Mo. 162, 10 S. W. 473; State ex rel. Hickory County v. Dent, 121 Mo. 162, 25 S. W. 924; State ex rel. Linn County v. Adams, 172 Mo. 1, 72 S. W. 655; State ex rel. Harvey v. Sheehan, 269 Mo. 421, 190 S. W. 864; State v. Zevely v. Hackmann, 300 Mo. 59, 254 S. W. 53; State ex rel. Barrett v. Boeckler Lumber Co., 302 Mo. 187, 257 S. W. 453.

"The collection of drainage district taxes is no part of the duties ordinarily incident to the office of county and township collectors. Such duties are additional duties dependent upon the existence of a drainage district having lands, taxable for district purposes, lying within the territorial jurisdiction of such officers. In collecting such taxes, county and township collectors are officers and agents

of the particular drainage district. They are required to give separate bonds to such district. Section 4396, R. S. 1919. The provisions of section 8, art. 14, of the Constitution, are not violated by section 4575."

When new duties are delegated by statute to a public officer, which are without the scope or range of his office, and additional compensation is provided therefor, the statutory increase is not affected by a constitutional provision prohibiting any increase in the compensation of a public officer after his election or appointment. 21 A. L. R., 258, and cases cited therein.

As was said in *Tayloe v. Davis*, 40 A. L. R. 1052, 1. c. 1057, 102 So. 433:

"It has now been long declared by this court that for new and additional duties an incumbent of a public office may be awarded extra compensation without violation of (Constitution), forbidding an increase of salary during the term. It may be said a rule of legislative policy has grown up by sanction of this court's construction of these sections."

Our Supreme Court in *State ex rel. v. Sheehan*, 269 Mo. 421, 1. c. 429, said the following:

"Another contention made is that since the appellant was an officer at the time of the passage of the act, it is inapplicable to him because the Constitution prohibits any increase in the pay of an officer during his term of office. We think this contention unsound because the act in question enjoins upon such officers as appellant new and additional duties and provides merely a compensation therefor. While in some jurisdictions a constitutional provision such as ours has been held to inhibit even this, in this and many other states the contrary doctrine has been accepted and acted upon. (*Cunningham v. Current River Railroad Co.*, 165 Mo. 270; *State ex rel. v.*

Walker, 97 Mo. 162; State ex rel. v. Ranson, 73 Mo. 89; State ex rel. v. McGovney, 92 Mo. 428; County v. Felts, 104 Cal. 60; State ex rel. v. Board of Commissioners, 23 Mont. 250; State ex rel. v. Carson, 6 Wash. 250; Love, Attorney-General v. Baehr, Treasurer, 47 Cal. 364; Purnell v. Mann, 105 Ky. 87; Lewis v. State ex rel., 21 Ohio C. C. 410.)"

5227: As is said in 22 R. C. L. (Supplement), Vol. 7, page

"For new and additional duties which become incident to the office only by their creation, an incumbent of public office may be awarded the extra compensation without violating the constitutional inhibition of increase of salary during the term."

And stated another way in 22 R. C. L., p. 534:

"And where new duties are imposed upon a public officer which are not within the scope of his office, and extra compensation is provided therefor, such increase in compensation is not within the constitutional provision prohibiting any increase in the compensation of any officer during his term of office."

It was the manifest intention of the Legislature to provide compensation for clerks of the Juvenile Court and every reasonable doubt must be resolved in favor of the constitutionality of said law, and it is clearly apparent that the Legislature intended that same be effective for the benefit of the clerks of the Juvenile Court now in office. As was said in Cooley's Constitutional Limitations, 6th Ed., p. 217, the following:

"It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt."

August 6, 1937.

"The constitutionality of a law, then, is to be presumed, because the legislature, which was first required to pass upon the question, acting, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restrictions laid by the constitution upon their action, have adjudged that it is so. They are a co-ordinate department of the government with the judiciary, invested with very high and responsible duties, as to some of which their acts are not subject to judicial scrutiny, and they legislate under the solemnity of an official oath, which it is not to be supposed they will disregard. It must, therefore, be supposed that their own doubts of the constitutionality of their action have been deliberately solved in its favor, so that the courts may with some confidence repose upon their conclusion, as one based upon their best judgment."

From the above and foregoing, we think it was within the power and authority of the Legislature to provide compensation for the clerks of the Juvenile Court in counties having a population of less than 50,000, and it is our opinion that the clerks now serving, and during their present term, are entitled to same from and after ninety days after the adjournment of the Legislature, namely, September 6, 1937, payable out of the county treasury in monthly installments, as provided under Section 11814a, supra.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

LOTTERIES: "Surprise Night" and similar theatre schemes.

August 17, 1937



Honorable Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Sir:

We have your request of August 14, 1937, for an opinion, which request in part is as follows:

"The proprietor of a theatre in this county is contemplating the establishment of what he terms "Surprise Night", the plan being that on the night designated as "Surprise Night" a drawing will take place and to the winner of this drawing a prize either in the form of money or other property will be given. A list of the names from which the winner will be drawn is taken from a book or register in the lobby of the theatre proper."

The principle underlying all lottery laws and particularly Section 4314 R. S. Missouri 1929, is that a lottery is a scheme or device wherein anything of value is, for a consideration, allotted by chance. State v. Emerson 1 S. W. (2) 109. Brooklyn Daily Eagle v. Voorhies, 181 Fed. 579; 38 C. J. 289.

Honorable Walter G. Stillwell

August 17, 1937

We note that the winner is to be determined by a drawing made up from names taken from a book or register in the lobby of the theatre. People, in order to participate, are required to go to the theatre and register. We think this requirement is sufficient to constitute consideration. In *Maugh v. Porter* 157 Va. 451, 161 S. E. 242, the court held that a scheme whereby an auctioneer gave tickets for a prize drawing on an automobile in order to attract a crowd to his auction, was a lottery.

It is therefore the opinion of this office that "Surprise Night" is a lottery.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

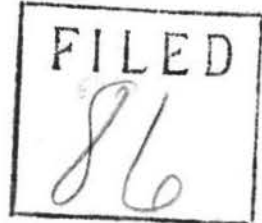
J. E. TAYLOR
(Acting) Attorney General

FER MR

VENDING MACHINES:--May be a lottery or slot machine depending upon the value of the tokens given as prizes.

November 12, 1937

11-15



Hon. Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Sir:

We have your request of October 21, 1937, for an opinion as to the legality of a mint vending machine for the sale of "Huck Finn Mints", wherein mints may be purchased from the machine by inserting a nickel, and in connection therewith sometimes the player will receive a number of metal tokens of the same size and thickness as a nickel. These tokens may not be used for the purchase of mints and are not to be redeemed in cash merchandise. The number of tokens received depends upon a combination of three symbols in the machine (similar to the operation of a slot machine).

Ordinarily a machine such as the one described here would be a slot machine within the prohibition of Section 4287 R. S. Missouri 1929, but your letter indicates that the machine is not designed for the purpose of playing games of chance for money or property, and that the metal tokens given if used for prizes are worthless.

In order for this machine to constitute a lottery in violation of Section 4314 R. S. Missouri 1929, it is necessary to find the element of chance, a consideration, and the awarding of a prize.

The word "lottery" is not a term of the common law and its definition in constitutional provisions and in statutes is that of common usage. State vs. Lipkin, 169 N.C. 265; 84 S.E. 340; Nat'l. Thrift Ass'n. vs. Crews, 116 Ore. 352; State ex rel. vs. Kansas Merc. Ass'n. 45 Kan. 351; 25 Pac. 984; 11 L.R.A. 430; People vs. Welch, 269 Mich. 449; 257 N.W. 859; State ex rel. vs. Lee, 238 Mo. 679; 233 S.W. 20, 29, 17 R.C.L. 1209.

November 12, 1937

The term in constitutions must be construed in the popular sense. Chaney Park Land Co. vs. Hart, 104 Ia. 592; 73 N.W. 1059. Johnson vs. State, 137 Ala. 101; 34 So. 1018. City of New Orleans, vs. Collins, 27 So. 532, 538.

The word "lottery" must be construed in its popular sense with the view of remedying the mischief intended to be prevented, and to suppress all evasions for the continuance of the mischief. People vs. McPhee, 139 Mich. 687, 103 N.W. 174; 69 L.R.A. 505. State vs. Mumford, 73 Mo. 647, 650. State vs. Wersebe, 181 Atl. 299, 301.

The word is generic; no sooner is it defined by a court than ingenuity evolves some scheme within the mischief discussed but not quite within the letter of the definition given. People vs. McPhee, 139 Mich. 687; 103 N.W. 174; 69 L.R.A. 505. State vs. Clark, 33 N.H. 329. This is made apparent from an examination of a large number of cases in which various methods of distributing money or goods by chance are examined and discussed.

This office is of the opinion that if the metal tokens which are distributed by this mint vending machine by chance are worthless, and that any number of them have no value whatsoever, then the machine is not a gambling device within the meaning of the above sections. If the tokens are of some value, then these machines are gambling devices prohibited by both of the above statutes. As to whether or not the vending machine is a gambling device, the decisive question is one of fact as to whether or not the tokens have any value. This is a question we cannot decide because this office is without authority to decide questions of fact. 6 Corpus Juris, Section 16, page 811.

Respectfully submitted,

APPROVED:

FRANKLIN E. REAGAN,
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

FER:MM

DEEDS OF TRUST:) Person must release within thirty days after date
AND MORTGAGES:) of payment of deed of trust or mortgage, after
request; and failing to do so penalty attaches.

January 20, 1937. 121



Honorable Robert D. Swezey
Attorney
Legal Department
Home Owners' Loan Corporation
Washington, D. C.

Dear Sir:

This is to acknowledge your letter as follows:

"A recent review of the statutes of Missouri has brought to our attention Section 3085, Annotated Statutes (1932) providing for a penalty of 10% of the amount of a mortgage or deed of trust payable to the mortgagor plus any other provable damages for failure on the part of a mortgagee to acknowledge satisfaction of a mortgage within thirty days after tender of payment.

"In certain cases the Corporation has, subsequent to the taking of its first mortgage, advanced additional monies to the borrower for reconditioning of the property and has taken as security for such advance a second recorded lien. It has occurred to us that in such cases a payment in full of the second lien might escape our notice and we unwittingly fail to enter a proper discharge of record. The failure to discharge is likely to arise, as indicated, only in those cases where the Corporation has both a first and second mortgage, since after payment in full has been made of the second mortgage the Corporation's books will still show the borrower indebted to the Corporation. In cases

where there is only a first mortgage there is very little likelihood of our neglecting to release immediately.

"Will you be kind enough to advise whether, in your opinion the statute cited would apply to a Federal instrumentality such as the Home Owners' Loan Corporation, the stock of which is wholly owned by the United States; and whether a Missouri court will invoke the penalty provided if through inadvertence the Corporation fails to discharge its second lien promptly."

Section 3085, R. S. Mo. 1929, has been on our statute books in its identical form for many years. It was Section 2850 of the Revised Statutes, 1909. Section 3085, supra, reads as follows:

"If any such person, thus receiving satisfaction, do not, within thirty days after request and tender of cost, acknowledge satisfaction on the margin of the record, or deliver to the person making satisfaction a sufficient deed of release, he shall forfeit to the party aggrieved ten per cent. upon the amount of the mortgage or deed of trust money, absolutely, and any other damages he may be able to prove he has sustained, to be recovered in any court of competent jurisdiction."

In *Wing v. Insurance Company*, 181 Mo. App. 381, the Kansas City Court of Appeals, in referring to Section 3085, supra, said (p. 385):

"Section 2850 (R. S. 1909) is highly penal and must be strictly construed. (*Wing v. Central Life Insurance Co.*, 155 Mo. App. 356; *Snow v. Bass*, 174 Mo. 149.) When the basis of an action is a statute which is highly penal, the statute must not only be strictly construed but must be applied only to such

cases as come clearly within its provisions and manifest intent. Eddington v. Telegraph Co., 115 Mo. App. 93, 1. c. 98; Bradshaw v. Telegraph Co., 150 Mo. App. 711; Rixke v. Telegraph Co., 96 Mo. App. 406.)" (Underscoring ours.)

You will note that Section 3085, supra, requires a request on the part of the party desiring acknowledgment of satisfaction before the penalty applies, and, further, the release or satisfaction may be executed within thirty days after the request. You state that if the Home Owners' Loan Corporation fails to release or discharge a lien, it would be through inadvertence. In other words, the corporation does not evince a desire not to release but would fail to release only through neglect. Section 3085, supra, is for the failure to release after the demand or request is made. The failure to release must be after request.

A case which we believe decisive of your question is Wing v. Life Insurance Company, 155 Mo. App. 356, wherein the Kansas City Court of Appeals said (pp. 357, 358):

"The statutes, sections 2844 and 2850, Revised Statutes 1909, require that a request or demand be made and provide that the mortgagee or cestui que trust shall acknowledge satisfaction on the margin of the record or deliver to the person making satisfaction a sufficient deed of release 'within thirty days after request and tender of costs.' The request is essential and no cause of action to recover the penalty can arise until the lapse of thirty days from the date of the request. The petition does not give the date, nor does it allege that the demand was made more than thirty days before the institution of the suit. This omission to allege one of the constitutive facts of the cause is fatal to a recovery. The statute is highly penal, must be strictly construed and the plaintiff invoking it must plead and prove all of the elemental facts. (Kingston v. Newell, 125 Mo. App. 389; Snow v. Bass, 174 Mo. 149; Grant v. Telegraph Co., 154 Mo. App. 279, 133 S. W. Rep. 673.)

Jan. 20, 1937.

"Nothing must be left to inference. 'It might be argued that plaintiffs would not have been guilty of the folly of tendering the costs and demanding an entry of satisfaction of the deed before the payment of the notes, but the facts which constitute plaintiffs' cause of action must be alleged and the court should not be left to infer unpleaded facts.' (Scott v. Robards, 67 Mo. 289.)

"Nor could such vital matter be cured by the verdict. It is not a case of defective statement but a case where facts necessary to a cause of action are not alleged.' (Kingston v. Newell, supra.)

"The petition being fatally defective we cannot inquire into the merits of the judgment rendered for defendant. Accordingly the judgment is affirmed. All concur."

From the above it is our opinion that a person after request for satisfaction in full of a deed of trust, failing to within thirty days release and acknowledge satisfaction thereof, is liable for the penalty. The Home Owners' Loan Corporation, no doubt, will within thirty days after request, if the debt is paid, acknowledge satisfaction. Consequently, we do not deem it necessary to write on the subject of whether or not said statute "would apply to a Federal instrumentality such as the Home Owners' Loan Corporation."

Yours very truly,

James L. HornBostel
Assistant Attorney-General

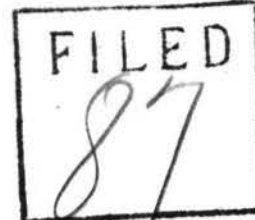
APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

PRIVATE SCHOOLS: A school incorporated under the provisions of Article X, of Chapter 32, of R. S. Mo. 1929, is entitled to hold property for corporate purposes up to an amount as indicated in Section 9743, R. S. Mo. 1929, and such property shall be tax exempt.

March 12, 1937

3-18



Mr. W. A. Swearengen
Assistant State Director
National Youth Administration
Jefferson City, Missouri

Dear Mr. Swearengen:

This will acknowledge receipt of your request for an opinion, which reads as follows:

"At the request of Mr. William E. Johnson of St. Joseph, Missouri, I am herewith forwarding to you the charter of the Johnson School of Business located at St. Joseph, Missouri. This institution is desirous of participating in the college aid program which is being conducted in this state by the National Youth Administration under the conditions set forth in the enclosed NYA Bulletin #5 dated August 10, 1936. On Page 2, Section 2, of this bulletin is set forth the conditions of eligibility of institutions for participation.

Will you please give this office a written opinion of the eligibility of this institution with reference to the non-profit making, tax exempt character of the institution according to its terms of organization as set forth in its charter."

Appended to your request is a copy of the National Youth Administration Bulletin No. 5 relating to the student aid program for 1936 and 1937, and the original Pro Forma Decree of Incorporation of the Johnson School of Business.

We have examined the Articles of Agreement of this School and it appears therefrom that this School is organized under the provisions of Article X, of Chapter 32, of R. S. No. 1929 relating to benevolent, religious, etc., associations, as a non-profit institution. As observed, the institution is organized as a non-profit school, but as to whether or not the school's business is being conducted in a non-profit manner, we can not pass upon so as to determine its eligibility for aid.

In respect to your question as to whether the institution is tax exempt, we direct your attention to Section 6, of Article X, of the Constitution of Missouri, which provides in part as follows:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile of more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

March 12, 1937

The general law respecting exemptions of property from taxation when used for certain purposes, is found in Section 9743, R. S. Mo. 1929, and reads in part as follows:

" * * * sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempted from taxation for state, county or local purposes."

In the case of State ex rel vs. Johnston 214 Mo. 656, the court had before it for consideration the above constitutional and statutory provisions and, in passing upon the question as to whether or not private military schools' property would come within the purview of the above statute, when the proprietor of the school resided within the school building with his family having no avocation except that of running a school, would such residence destroy the exemption? In passing upon this proposition, the court, at page 662, said:

"It is our opinion that viewed from the philosophy of the thing and measured by cardinal standards of legal interpretation, the right answer to that question is, No."

And, at page 663, the court further said:

"(b) The phrase 'exclusively used' has reference to the primary and inherent use as over against

a mere secondary and incidental use. (People ex rel. v. Lawler, 77 N. Y. Supp. 1.c. 842, et seq.) If the incidental use (in this instance residing in the building) does not interrupt the exclusive occupation of the building for school purposes, but dovetails into or rounds out those purposes, then there could fairly be said to be left an exclusive use in the school on which the law lays hold. (First Unitarian Society v. Hartford, 66 Conn. 1.c. 375.)"

In the case of the City of Kansas v. Kansas City Medical College, 111 Mo. 141, the court had before it for consideration the general law as above cited to determine whether or not the personal property of a college was exempt from taxation within the meaning of the statute and, in passing upon this question, said, at page 146:

"So that it only remains for us to determine whether the words, 'the lot with the buildings thereon,' can be construed to include the personal property used in the building and not a part of the realty in law. We are very clear that they do not.

The evident purpose was to exempt a certain amount of real estate. This is obvious from the immediate context. In the next succeeding clause the exemption of agricultural and horticultural property is extended to both real and personal property. Neither the language of the exemption, nor the provisions in pari materia will, in our opinion, admit of any other construction than that we have given it. The purpose is clear to limit the exemption to real estate and to

March 12, 1937

a definite amount."

CONCLUSION

It is the opinion of this department that this institution is incorporated as a non-profit association, but as to whether or not the institution is operating as such is a question of fact we can not pass upon.

We further conclude that this institution's real estate is tax exempt to the extent of one acre if its real estate be in an incorporated city or town, or within one mile of the limits of any such city or town; and, lots one mile or more distant from such city or town to the extent of five acres with the buildings thereon, when such property is used exclusively for its corporate purposes.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS:RT

PUBLIC ADMINISTRATOR: Term of office. Eligibility to office not affected by time of filing surety bond.

January 25, 1937.



Honorable R. W. Tener
Probate Judge
Newton County
Neosho, Missouri

Dear Sir:

We acknowledge your request for an opinion dated January 14, 1937, which reads as follows:

"The newly elected Public Administrator filed his bond in the County Clerk's office December 26th, 1936, and it was approved by the county court.

"Yesterday January 13th, 1937, the bond was handed to me by the county clerk, and no action was taken by this court.

"Under Sec. 296 and 297, R. V. S. 1929, what court should approve the bond of the Public Administrator?

Under Section 296, can the bond be filed after Jan. 1st, as required by said section, and if filed after that date can it be approved, if a good bond is filed, or should the old Public Administrator hold over?

"It has been the practice in this county for the Probate Judge to approve this bond, but it was handled by the county court this election."

Article XIV, Section 5, of the Missouri Constitution provides:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms,

and until their successors shall be duly elected or appointed and qualified."

Section 296, R. S. Mo. 1929, provides:

"Every county in this state, and the city of St. Louis, shall elect a public administrator at the general election in the year 1880, and every four years thereafter, who shall be ex officio public guardian and curator in and for his county. Before entering on the duties of his office, he shall take the oath required by the Constitution, and enter into bond to the state of Missouri in a sum not less than ten thousand dollars, with two or more securities, approved by the court and conditioned that he will faithfully discharge all the duties of his office, which said bond shall be given and oath of office taken on or before the first day of January following his election, and it shall be the duty of the judge of the court to require the public administrator to make a statement annually, under oath, of the amount of property in his hands or under his control as such administrator, for the purpose of ascertaining the amount of bond necessary to secure such property; and the court may from time to time, as occasion shall require, demand additional security of such administrator, and, in default of giving the same within twenty days after such demand, may remove the administrator and appoint another."

Section 297, R. S. Mo. 1929, provides:

"His certificate of election, official oath and bond shall be filed and recorded in the office of the clerk of said court, and copies thereof, certified under the seal of such court,

shall be evidence. Any person injured by the breach of such bond may sue upon the same in the name of the state for his own use."

Section 301, R. S. Mo. 1929, provides:

"When a public administrator has been appointed to take charge of an estate, he shall continue the administration until finally settled, unless he resigns, dies, is removed for cause, or is discharged in the ordinary course of law as the administrator."

46 C. J., Section 32, p. 937, states the law thus:

"Statutes imposing qualifications should receive a liberal construction in favor of the right of the people to exercise freedom of choice in the selection of officers. * * * *"

"There is a presumption in favor of eligibility of one who has been elected or appointed to public office."

"Provisions not intended to restrict the rights of the individual, but to secure the faithful and efficient performance of public duties, are not deemed to impose additional qualifications as to eligibility."

In Missouri, the filing of a bond is a prerequisite to the full title of office for in Ex Parte Craig, 130 Mo. 590, 1. c. 899, 32 S. W. 1121, the court said:

"It appears to us that until Mr. Nash has given bond, approved as required by law, he is not in position to demand of Mr. Craig immediate possession of the office."

January 25, 1937.

In that state of the case, Mr. Craig could not properly be held guilty of contempt in not giving the office and its public documents to Mr. Nash. On the contrary, Mr. Craig, in such circumstances, was entitled to remain in the office by virtue of his commission, until, at least, Mr. Nash, the contestant, had fully qualified according to law to enter on his duties. Under the constitution and the law, until Mr. Nash qualified, Mr. Craig was rightfully in the office."

In Missouri, the statutory requirement that a bond be filed within a prescribed time has been held to be directory only, for in *State v. Texas County*, 44 Mo. 230, 1. c. 231, the court said:

"It seems that the action of the court in rejecting the bond was arbitrary and oppressive. No evidence was permitted to be introduced to show the solvency of the sureties; but the court, acting of their own motion, summarily rejected the same, and declared the office vacant on the same day, without giving any time to file a new bond. When relator did present an additional bond, the court refused to entertain it for the reason that an appointment had been made, and it was too late. Admitting that the first bond was insufficient, the action of the court in proceeding to declare the office vacant on the day of its rejection, and appointing another person to fill the office, was totally unwarranted. If the time originally prescribed by law for filing the bond had expired when these proceedings were had, that created no forfeiture. The statute as to time is directory."

In the case of *State ex rel. v. Kennedy*, 25 Mo. App. 384, the court, in construing the Statute dealing with public administrators, said at 1. c. 388:

January 25, 1937.

"We are of the opinion that the true meaning of the statute is that a public administrator continues to administer estates in his hands even after the expiration of his term of office, unless he dies, resigns his office, is removed, or is otherwise discharged according to law. In this case, as before stated, Kennedy resigned his office, his resignation was accepted by the governor and his successor appointed. He thereby became incapacitated to further administer estates in his hands and his duties devolved upon his successors. His functions as administrator ceased as effectively as if he had been removed from office. The express provision of the statute is that he shall continue the administration 'unless he resigns.'"

CONCLUSION.

There are no statutes or cases in Missouri which specify with particularity when the term of the office of the public administrator shall commence. We construe Section 296, supra, to mean that the public administrator shall give the required bond before entering upon the discharge of his duties. Our construction is in accordance with accepted modes of statutory construction, there being a presumption of eligibility in favor of the people's choice. A reading of the act relating to public administrators, and especially Section 301, supra, and the cases decided thereunder, shows that the duties of a public administrator do not begin or end with a term, but rather begin when estates are placed in his hands, and said estates continue in his hands even after the expiration of his term, unless he dies, resigns his office, is removed, or is otherwise discharged according to law. See State ex rel. v. Kennedy, supra.

We are of the opinion that under the provisions of Section 296, supra, the probate court is the proper court to approve the bond of a public administrator, and that

Hon. R. W. Tener

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he must exercise reasonable discretion in performing this duty. We are of the opinion that the statute as it relates to "the first day of January" is merely directory, and the surety bond can be filed in the Probate Court and approved after that date and not affect the newly elected administrator's eligibility to said office.

It is our opinion that under the Constitution of Missouri, the old public administrator holds over until the newly elected public administrator's bond be approved by the probate court, but, on the other hand, it is not in the power of the probate court to arbitrarily refuse to approve a good bond as a subterfuge for keeping an otherwise elected and qualified office holder from taking full title to his office.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

WOS:HR:H

COUNTY CLERKS: County Courts cannot persist in keeping a county clerk on a fee basis until the expiration of the term for which the county clerk was elected.

September 22, 1937.

Mr. William H. Tellman
Clerk of the County Court
Cole County
Jefferson City, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion, reading as follows:

"Will you please send me an opinion on Laws of Missouri, Section 11811, page 440, Act of Legislature 1937, whereby county clerks are put on a salary, payable monthly, instead of on a fee basis, payable quarterly.

"Can the county court persist in keeping the county clerk on a fee basis until the end of our term, December 31, 1938, if our budget permits us to draw full salary beginning September 6, 1937, when the new law became effective."

Formerly, until the passage of Section 11811, Laws of Missouri, 1937, at page 440, the county clerks were paid on a fee basis. The county clerks were permitted to retain up to a certain amount according to the population of the various counties. If the amount permitted to be retained was not received or earned during the year, the clerks were limited to the amount received and earned. Laws of Missouri, 1933, page 369.

The pertinent part of Section 11811, supra, which we have considered in determining your request for an opinion, reads as follows:

"The clerks of the county courts of this State and their deputies and assistants shall receive for their

services annually, to be paid out of the county treasury in monthly installments at the end of each month by warrant drawn by the county court upon the county treasury, the following sums:"

Other parts of this section relate to the amount of salaries to be paid dependent upon population, together with amounts for deputy hire; duty of clerk to charge fees and collect the same accruing to their offices; and reports of fees collected. No where in this section is it mentioned, nor may it be contemplated that the county clerk is to remain on a fee basis until the end of the term for which he is elected. In considering this section we have considered the law before its repeal. As was said in the case of State v. Henson, 137 S. W. 968, 969:

"In ascertaining the intent of the law makers, it is always permissible and appropriate to consider the condition of the law prior to the passage of the Act to be construed."

We have noted from sections 11811, Laws of Missouri, 1933, page 370, that amended section 11811, R. S. Mo. 1929, which reduced the amount of fees a county clerk was permitted to retain as salary in some instances, contained this proviso:

"Provided, further, that until the expiration of their present term of office, the person holding the office of County Clerk shall be paid in the same manner and to the same extent as now provided by law provided that this act shall not apply to counties in which such clerks now or may hereafter receive a fixed salary in lieu of all fees, commissions and emoluments."

Thus when we consider the latter section with the previous section of the law, it becomes obvious that the Legislature did not intend the county clerks, now holding office, were to receive fees earned up to a certain amount for one year's service, until the expiration of their present term, but that they should be paid on an annual basis from and after the passage of the Act. Had the Legislature intended that they were to be paid in the same manner as before, the enactment of the present section until the expiration of their terms of office, it is reasonable to assume it would have been provided for. *Pembroke v. Houston* 79 S. W. 470, 471; *Pate v. Ross* 84 S. W. (2d) 931, 933.

Your will have noted from the pertinent part of the section above set forth that the county clerks shall receive for their services annually, certain salaries to be paid out of the county treasury, in monthly installments, at the end of each month, by a warrant drawn by the County Court upon the County Treasury. The use of the word "shall" in the pertinent part of this section indicates a mandate, and when the word "shall" is used in the sense as is indicated by this section, the statute is mandatory. *Ex parte Brown*, 297 S. W. 445; *State ex rel Stevens v. Wurdeman*, 246 S. W. 189.

We observe that Section 11811, *supra*, as amended by the Laws of Missouri, 1936, did not increase the salary which the county clerks had been permitted to retain under the provisions of Section 11811, Laws of Missouri, 1933. The changing from a fee basis to a salary of public officers has heretofore met with the approval of the Supreme Court of this State in the case of *State ex rel Emmons v. Farmer* 271 Mo. 306, although in that case the question before the Court was the compensation of circuit clerks. In a very recent opinion by this department, directed to the Honorable Walter G. Stillwell, Prosecuting Attorney for Marion County, Hannibal, Missouri, we said:

"The almost identical question was before the Supreme Court involving the compensation of the circuit clerks in a similar situation in

September 22, 1937.

in State ex rel. Emmons v. Farmer, 271 Mo. 306, and evidently the Legislature had before it this case when House Bill No. 177 was introduced, and attempted to meet and comply with the principles as announced in this case. It is a very similar situation and in substance the court held that the fixing of the salaries of circuit clerks at the same amounts they were permitted to retain in any one year from the fees collected by them, is not violative of the constitutional provision declaring that "the compensation of no state, county or municipal officer shall be increased during his term of office."

CONCLUSION.

In view of the above it is the opinion of this department that the County Court can not persist in keeping a county clerk on a fee basis until the expiration of the term for which the county clerk was elected.

Respectfully submitted

RUSSELL C. STONE
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

RCS:AH

COUNTY HIGHWAY COMMISSION: Expenses, mileage and per diem
for traveling outside the county.
COUNTY HIGHWAY ENGINEER: Expenses, mileage and per diem
for traveling outside the county.
COUNTY COURTS: Right to per diem for same day as County
Court and County Board of
Equalization.

March 5, 1937.

Hon. S. S. Thompson.
Presiding Judge, New Madrid County Court,
Portageville, New Madrid County, Mo.

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Dear Sir:

A request for an opinion has been received from you under date of January 18, 1937, such request being in the following terms:

"I am enclosing a letter C. W. Brown, Chief Engineer State High-way Dep't. which is self explanatory. Our Clerk wrote you about one week ago in reference to this same matter.

I have another letter from Mr. Brown, who states the meeting referred to will be held in St. Louis, 2/17/18/19.37, at Statler Hotel. This is very important that we should know if, we have a legal authority to pay the Expenses Mileage and Per-diem, for the Court, and Co. Highway Engineer, and County Highway Commission, to attend this or similar meetings which under the WPA system often requires the Court and Co. Highway Engineers presents.

Relative to the County Court and Board of Equalization being held at the same time and same days and being Paid for both, Provided we actually transact Court Business.

It very often happens that Tax payers attend the Board of Equalization to have an adjustment made before paying their 1936 Taxes, due to land being deducted that is occupied by Public Roads, Ditches, Levees or land that has caved in the Miss. River, etc. We know if we transact the business and Court not in session it is illegal, and it works a hardship on the Tax payer, and since there is no law that provides that a Court cannot make a charge for both Court and Board of Equalization, so we want to know what to do in such cases, it does seem that the Court should be paid for both days

#2 - Hon. S. S. Thompson

March 5, 1937.

when they actually transact such business. If we are not entitled to pay, it would certainly be illegal to transact any kind of business.

Will you be so kind as to inform me on the matters above mentioned at your very earliest convenience. Thanking you in advance for an early reply, I am

P.S. We have a County Road & Bridge Fund, also a Road Refund account in addition to the regular Special Road and Bridge Fund, the latter is used in the various Road Districts as is School Money. The expenses could be paid out Road Refund Account for such expenses as above mentioned."

Under date of March 4, 1937 we rendered an opinion to Hon. R. L. Jones, Clerk of your Court, in which we answered your questions about per diem, mileage and expenses of the members of your court in attending the annual meeting of the Highway Engineers' Association in St. Louis, and in making trips to Jefferson City in connection with road matters. We refer you to that opinion, which you have doubtless seen, for our conclusions on these matters and our views on the general principles applicable to the fees and expenses of county officers, which need not be repeated here.

This leaves for answer your questions about reimbursement of the members of the County Highway Commission and the County Engineer for attendance at this and similar meetings, and also the question of the right of members of the County Court to per diem for sitting as the County Court and also as the County Board of Equalization on the same day.

I.

COUNTY HIGHWAY COMMISSION.

R. S. Mo. 1929, section 7856 provides for the creation and establishment in the several counties of this state of a County Highway Commission of four members "who shall serve without compensation". This statute eliminates any allowance of per diem to the members of the Commission, and since there is no statute giving the members of the Commission a right to mileage, no mileage can be claimed.

March 5, 1937.

There remains the question of their expenses on these trips and this, according to the doctrine of *State ex rel Bradshaw v. Hackmann*, 276 Mo. 600, 208 S.W. 445 (1919), as explained in our opinion to Mr. Jones, will depend on whether this traveling is necessary as a part of the duties of the members of the Commission.

R. S. Mo. 1929, section 7861 directs the county court, after the completion of a highway, to convey it to the County Highway Commission "who shall thereafter have control and supervision thereof". Section 7862 gives the Commission "absolute jurisdiction and control over all highways constituting a part of the county highway system". Section 7863 provides as follows:

"The county highway commission is hereby authorized and empowered to receive, and expend, in the construction and maintenance of county highways, any money or property that may be appropriated or donated by any municipal corporation, special road district, township, or private individual, and to use and employ whatever means, methods, or power, that may be necessary in the construction and maintenance of said county highways, including the power to build culverts and bridges, for which purposes the county highway commission is hereby empowered to employ such technical and other help as may be deemed necessary for the administration and enforcement of this article."

Section 7864 authorizes the county court to make additional contributions to the Commission and section 7865 provides for reports to the county court by the Commission "showing in detail the amount of money received, and how applied".

The language of these statutes gives the County Highway Commission broad powers and responsibilities in connection with the county highways. The use of language like "absolute jurisdiction and control over all highways" denotes a grant of power seemingly as comprehensive as could be made. The power "to use and employ whatever means, methods, or power, that may be necessary in the construction and maintenance of said county highways" would give the members of the County Highway Commission the right to travel outside the county, if such travel was necessary to the proper and efficient discharge of the duties of their office. There is nothing in these statutes about the County Highway Commission limiting their functions to the county, or to adjudicating disputes or merely sitting as a Commission, and a fair construction of these statutes would give them the

March 5, 1937.

right to travel and to charge their traveling expenses to the county under the circumstances just described. Doubtless the fact that the members of the Commission perform a substantial public service without any compensation would not be a sufficient legal reason for reimbursing them for their expenses if the statutes did not warrant such reimbursement, but this fact makes the finding of such authority more agreeable.

II.

COUNTY ENGINEER.

The County Highway Engineer in your county, under R. S. Mo. 1929, section 8006, receives a salary in an amount to be fixed by an order of your County Court, not to be less than \$300.00 nor more than \$2,000.00 per annum. Therefore no question of per diem arises. There is no statute allowing the Engineer any mileage and therefore he is in the same position as the judges of the County Court and members of the County Highway Commission as to mileage. Under section 8013 the County Highway Engineer is given "direct supervision over all public roads of the county, and over the road overseers and of the expenditure of all county and district funds made by the road overseers of the county". In our opinion the reasons governing the allowance of expenses of the County Highway Commission for attendance at the Highway Engineers' Association meeting and similar meetings apply likewise to the attendance of the County Highway Engineer at such meetings, limited, of course, as are such expenses of the Highway Commission, to such expenses as are necessary to the proper and efficient discharge of the duties of the office.

PER DIEM AS COUNTY JUDGE AND
MEMBER OF COUNTY BOARD OF
EQUALIZATION FOR SAME DAY.

In our opinion to Mr. Jones we quoted from sections 2092 and 11780 of the Missouri Statutes, which fix a \$5.00 per diem for judges of the county court "for each day necessarily engaged in holding court".

R. S. Mo. 1929, section 9815 provides as follows:

"The judges of the county court, the county surveyor, the county assessor, the sheriff, and the county clerk shall receive \$5.00 per day for each day they shall act as members of the county board of equalization; Provided, that this section shall not apply to boards of equalization who are paid a salary."

OLD AGE ASSISTANCE:

House Concurrent Resolution No. 16 in Senate Journal, p. 580, as it applies to Old Age Assistance and the Old Age Assistance Department.

May 13, 1937.

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Honorable Allen M. Thompson
Commissioner
Old Age Assistance Department
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your letter of May 1, 1937, requesting an opinion as follows:

"Joint Resolutions of the House and Senate, No. 3 and No. 16, were unanimously adopted authorizing the various state departments to proceed with their usual payments of salary and other expense incidental to the operation of their offices. I assume that you have copies of both Resolutions referred to, and you will note that the usual limit was not placed on Old Age Assistance grants and administration.

"I would like to inquire if this means that we are to be confined to the 1935 and 1936 appropriation of \$2,500,000.00, likewise to the amount allowed for administration for that period."

This question necessarily calls for an interpretation of what was the intention of the Legislature when it passed said Resolution. A part of House Concurrent Resolution No. 16 in the Senate Journal, at page 580, is as follows:

"Be it resolved by the House of Representatives, the Senate concurring therein, That the State Auditor be requested to

audit and the State Treasurer to pay only such claims against the state as are authorized by the statutes for salaries and necessary expenses, including traveling expenses and postage maintaining and operating the office of * * * * * Old Age Assistance Department, Old Age Assistance, * * * * *; be it further

"Resolved that the State Auditor is hereby requested to only audit an amount not to exceed one-twenty-fourth, for each of the months of April, May and June of the appropriation made for these various institutions and departments for the last biennial period, except that he is requested to audit an amount not to exceed one-eighteenth of said appropriation for each of said months for the State School for the Deaf and for the State School for the Blind, and one-twelfth per month for Governor's Office and provided further that this paragraph shall not apply to the Old Age Assistance Department or Old Age Assistance; * * * * *"

We do not find any precedent in this State to be used as a guide in the construction of resolutions such as this, but in other jurisdictions resolutions of legislatures have been before the courts. In *Hawes & Co. v. Trigg & Co.*, 65 S. E., 1. c. 553, the Supreme Court of Virginia, in speaking of Joint Resolutions of Congress, said:

"The difference between an act of Congress and a joint resolution is that the former governs all persons under the jurisdiction of the enacting power, while the latter is but a rule for the guidance of the agents and servants of the sovereign."

It is clear then that the Joint Resolution in the instant case is not a law by which the funds available for Old Age Assistance, and the Old Age Assistance Department are to be determined, but is merely a rule to be used as a guide.

In *Ann Arbor R. Co. v. United States*, 74 L. Ed., 1. c. 1103, the Supreme Court of the United States said:

"The measure that is before us is the joint resolution which emerged from the legislative deliberations and proceedings. It is brought here to the end that we may determine its proper construction, which of course is to be done by applying to it the rules applicable to legislation in general."

That part of the Resolution with which we are concerned is in two paragraphs which we have set out, supra. The first requests the Auditor to audit and the Treasurer to pay those claims against the State that are authorized by statute and enumerates the various departments and institutions of which the salaries and expenses are to be paid.

The second paragraph requests the auditor to audit for the months of April, May and June, only a certain amount for each department or institution, this amount to be ascertained by taking a certain per cent. of that department's or institution's appropriation for the last biennial period. It is further provided that this paragraph shall not apply to the Old Age Assistance Department or Old Age Assistance.

The question now arises, as to what is meant by the proviso in the second paragraph relating to Old Age Assistance Department and Old Age Assistance? Does this proviso place a restriction on these two agencies as to the amount of money they are to receive, and if so, to what amount, if any, are they restricted?

In the *Ann Arbor R. Co.* case, supra, the rules which apply to the construction of statutes are made applicable to the construction of resolutions, and with this in mind we will attempt to construe said Resolution.

In *State v. City of St. Louis*, 73 S. W., 1. c. 629, the Supreme Court of Missouri, in construing a proviso in a statute, said:

"A proviso is something ingrafted upon an enactment, and is used for the purpose

of taking special cases out of the general act, and providing specially for them. An exception is a clause similar to the proviso, exempting from the operation of an enactment that which, but for it, would have been included. A saving clause is an exception of a special thing out of general things mentioned in the statute. It is ordinarily a restriction in a repealing act, and saves rights, pending proceedings, penalties, etc., from the annihilation which would result from unrestricted repeal. The particular intent expressed in a proviso or exception will control the general intent of the enactment. The proviso should be confined to what immediately precedes, unless a contrary intent clearly appears, and should be construed with the section with which it is connected. This rule is not, however, absolute, and, if the context requires, the proviso may be construed as a limitation extending over more than what immediately precedes, or may amount to an independent enactment. * * * * *. Neither grammatical construction, punctuation, nor relative arrangement of the several parts of the section must be allowed to absolutely control. A common-sense interpretation is the safest and surest to apply, bearing always in mind the mischiefs to be remedied and the benefits to be secured by the law."

In *Brown v. Patterson*, 124 S. W. 1, it is said:

"In 32 Cyc. P. 743 the following outline of the purposes of a proviso to a law is given:

"A clause which generally contains a condition that a certain thing shall or shall not be done in order that something in another clause shall take effect; something ingrafted upon a proceeding enactment, generally introduced

by the word 'provided'; something grafted upon a preceding enactment, and is legitimately used for the purpose of taking special cases out of the general enactments, and providing specially for them; something taken back from the power first declared."

In 2 Lewis' Sutherland Statutory Construction, p. 673, it is said to a like effect:

"The natural and appropriate office of the proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter. It is to be construed in connection with the section of which it forms a part, and it is substantially an exception. If it be a proviso to a particular section, it does not apply to others unless plainly intended. It should be construed with reference to the immediately preceding parts of the clause to which it is attached. In other words, the proviso will be so restricted in the absence of anything in its terms, or the subject it deals with, evincing an intention to give it a broader effect. It is not an arbitrary rule to be enforced at all events, but is based on the presumption that the meaning of the lawmaker is thereby reached."

Applying these rules, as stated in the cases quoted from, supra, to the proviso in question, it necessarily follows: That the first paragraph of said Resolution requests that claims authorized by statute for salaries and necessary expenses etc., for Old Age Assistance, and the Old Age Assistance Department be audited and paid. The second paragraph requests, and fixes, the amount to be audited and paid to the various agencies and institutions mentioned in the first paragraph and provides that this paragraph shall not apply to Old Age Assistance and the Old Age Assistance Department.

Following the rules of construction, we think this proviso applies to that which immediately precedes the proviso, unless a contrary intention appears, and we are unable to ascertain anything to the contrary by a careful reading of said Resolution, keeping in mind the rules of construction which are set forth in the cases cited, supra. The particular intent expressed by the proviso will control the general intent expressed in the Resolution. The general intent of this Resolution is to provide funds in order that these various agencies and institutions may continue to carry out their usual functions until the Legislature shall make their appropriation for the ensuing biennial. For each of the institutions and agencies a definite amount was fixed, but the proviso in the second paragraph of said Resolution took Old Age Assistance and the Old Age Assistance Department out of the general enactment as to amounts the other agencies and institutions were to be restricted, and by doing so placed no definite restriction on the amount these two agencies are to receive.

Said Resolution could have no other meaning, if it is construed to mean that said proviso does not exempt Old Age Assistance and the Old Age Assistance Department from the definite amount of one-twenty-fourth of their last biennial appropriation, it would paralyze the functions of said agencies due to present lack of funds.

For example, if this proviso does not have the meaning which we have attached to it, we can see that these two agencies are limited to one-twenty-fourth of their last biennial appropriation for each month. The last biennial appropriation for these agencies, as we are informed, was approximately \$2,500,000. One-twenty-fourth of this amount would be approximately \$104,000 per month, which would be available to carry out the functions of the Old Age Pension laws. Our information is that at present the Old Age Assistance requires approximately \$600,000 per month, not including the expenses of the Old Age Assistance Department. If this proviso was not intended to give these agencies such money as is necessary, then the Legislature has, indirectly, literally rendered useless our Old Age Pension laws. We think a common-sense construction is best, safest and surest, to apply here, yet, keeping in mind the rules of construction above set out, we think the interpretation to be given this Resolution, as

May 13, 1937.

indicated by the proviso, is that the Old Age Assistance and the Old Age Assistance Department are not limited to one-twenty-fourth of their last biennial appropriation but are to be allowed such funds as may be necessary to carry out their functions.

Therefore, it is our opinion, in view of the premises, that this proviso applies to the second paragraph of said Resolution, beginning with the word "Resolved," and takes Old Age Assistance and the Old Age Assistance Department out of said second paragraph in so far as it limits these two agencies to any definite amount which is to be available for the months of April, May, June, 1937, and further that the purpose of said proviso is to permit these agencies to expend as much as may be necessary to meet Old Age Assistance Pension payments and to pay legitimate expenses of the Old Age Assistance Department.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:

(Acting) J. E. TAYLOR
Attorney-General

LLB:EG

ANIMALS--STALLIONS: Owner of stallion has lien on foal for one year.

April 29, 1937.

W-30



Mr. E. A. Trowbridge, Chairman
Animal Husbandry Department
University of Missouri
Columbia, Missouri

Dear Sir:

We acknowledge receipt of your request for an opinion dated April 23, 1937, which reads as follows:

"The law requiring the licensing of stallions was repealed four or five years ago. That law carried a clause providing that in case stallions were properly licensed the owner of the stallions could hold the colt for the service fee if lien was filed before the colt was a year old. Will you please tell me what the situation is at present with respect to the question of holding a colt for the service fee?"

Section 3192 R. S. Mo. 1929, provides:

"The owner or keeper of any stallion, jack or bull may advertise the terms upon which he will let any such animal to service, by publication thereof in some newspaper of the county where such animal is kept, for sixty days during the season of each year, or by printed handbills conspicuously posted during such period, in four or more public places in said county, including the place where such animal is kept; and the publication or posting as aforesaid of the terms of such service shall impart notice thereof to the owner of any female animal served by such stallion, jack or bull

during any such season; and in all actions and controversies in respect to the foal or other product of such service, the owner of such female animal so served shall be deemed to have accepted and assented to said terms, when so advertised and published or posted as provided herein."

Section 3193 R. S. Mo. 1929, provides:

"When the said terms of such service by any such animal, published or posted as provided in the next preceding section, shall provide that the foal or other product of such service will be held for the money due for the service of such stallion, jack or bull, then and in that event the owner or keeper of any such animal shall have a lien for such sum on the offspring of any female animal served, for the period of one year after the birth thereof, which said lien shall be preferred to any prior lien, encumbrance or mortgage whatever; and the publication or posting as aforesaid of the terms of such service shall be deemed notice to any third party of the existence of such lien."

Section 3194 R. S. Mo. 1929, provides:

"Any person who shall sell, convey or dispose of any animal upon which there exists a lien as created in the preceding section, without the written consent of the party holding said lien and without informing the person to whom the same is sold or conveyed that said lien exists, or who shall injure or destroy such animal, or aid or abet the same, for the purpose of defrauding the lienor, or who shall remove or con-

ceal, or aid or abet in removing or concealing such animal with intent to hinder, delay or defraud such lienor, shall be deemed guilty of a misdemeanor."

Section 3195 R.S. Mo. 1929, provides:

"If any keeper of such stallion, jack or bull shall offer and advertise to let the service of any such animal, and shall give a false or fictitious pedigree, knowing the same to be false, or shall falsely represent said animal to be recorded or eligible to record in any of the various books of record kept for recording animals of that breed, he shall forfeit all claim to the value of the services rendered by any such animal, and shall not be entitled to the benefits of any provision of this article."

Section 3196 R. S. Mo. 1929, provides:

"For the purpose of enforcing such lien upon default in the payment of the sum secured, the lienor may proceed by replevin in any court of competent jurisdiction and possess himself of any encumbered property, and hold the same subject to such judgment as he shall recover."

CONCLUSION.

The law of Missouri relating to registration of stallions was repealed in Laws of 1931, p. 204. There is no stallion registration law in Missouri at this time.

Mr. E. A. Trowbridge

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April 29, 1937.

Under the provisions of Sections 3192 to 3196, supra, the owner of a stallion has a lien on the foal or other product of such service, for one year after its birth, providing the published terms of service impart notice of such intended lien, subject to a truthful advertisement of pedigree. This lien is enforceable by a replevin action.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

WOS:H

CITY COLLECTOR:

When special election may be called
to fill office; authority to re-
duce compensation.

5-14

April 29, 1937.



Mr. Vernon L. Turner
Attorney at Law
408-412 Paul Brown Bldg.
St. Louis, Missouri

Dear Sir:

This Department is in receipt of your request for an opinion for the Board of Alderman of the City of Glendale, Missouri, wherein you state as follows:

"The Board of Alderman of the City of Glendale has requested me to write you for an opinion about calling a special election for the offices of Collector and Police Judge in the City of Glendale.

"Glendale is organized as a city of the fourth class and on Tuesday, April 6th, 1937, it held its regular City election. The vote for the office of City Collector resulted in a tie. In the contest for Police Judge, it developed that the candidate receiving the highest number of votes was ineligible because he owed taxes to the City.

April 29, 1937.

"As far as I can determine, Section 6973 of the Revised Statutes of Missouri, 1929, is the only provision for calling a special election to fill offices in cities of the fourth class. Under authority of State ex rel. Crow vs. Kramer, 150 Mo.89, and State ex rel. Crow vs. Smith, 152 Mo.512, and numerous other cases which hold there is no vacancy while there is an incumbent in office to hold over, I have advised the Board that they have no authority to call a special election to elect persons to these offices.

"As authority to call a special election in case of a tie vote, my attention has been called to Section 10328, which will be found in Article 7 of Chapter 61, Revised Statutes of Missouri, 1929. It seems this section is modified by Section 10336, which states that Article 7 shall not apply to any election in cities of the fourth class or cities under three thousand inhabitants. Glendale is both a city of the fourth class and has less than three thousand inhabitants.

"In the event it is decided the incumbent Collector holds over, the Board of Aldermen has requested me to ask you if they have authority to reduce his compensation during the remainder of the time that he holds over. I have called their attention to Section 6971 Revised Statutes of Missouri, 1929, relating to cities of the fourth class, and to State ex rel. Stevenson vs. Smith, 87 Mo. 158, but the Board takes the position that this section does not apply because the Collector is only paid a commission on what he collects and does not receive a salary.

Honorable Vernon L. Turner -3-

April 29, 1937.

"The Board of Aldermen of the City of Glendale respectfully requests an opinion from you concerning these three matters."

I.

Section 6951 R. S. Mo. 1929, provides for the election of a Collector in cities of the fourth class, and states in part that-

"The following officers shall be elected by the qualified voters of the city, and shall hold office for the term of two years and until their successors are elected and qualified, to-wit: * * Collector * * * "

In the case of State ex inf. v. Smith, 152 Mo. 512, 1.c.521, the court, in holding that in the case of a tie vote there was no vacancy in office, said:

"In the case at bar Haughton was appointed under section 7 of the Act of 1891, to fill the unexpired term of Sheehan, which ended at the regular election in 1898, and until his successor was duly elected and qualified. The attempted election of his successor in 1898 failed by reason of a tie vote. No successor was then elected and hence none qualified. Therefore no vacancy existed or occurred in the office. The effect was the same as if no election for a successor had been

April 29, 1937

held in 1898. There being no vacancy there was no power in the judges named to appoint defendant to the office, either by virtue of the Act of 1891 or of any other statute, and hence their action was a nullity and defendant has no title to the office. Inasmuch as the Act of 1891 provided that there should be an election for justice of the peace, in St. Louis, at the regular election in 1894, 'and every four years thereafter', and inasmuch as there was in legal intentment no election held in the fourth district in St. Louis for justice of the peace in 1898, there has been no successor yet elected for Haughton, and as the purpose of the lawmakers is that there shall be uniformity in the time of electing all justices of the peace, and as there is no special statute covering cases like this, it follows that there can be no legal election held to elect a successor for Haughton until the regular election in the year 1902, and that he has a right to continue to hold the office of justice of the peace for the fourth district, in the city of St. Louis, until a successor is elected at that time, and thereafter duly qualifies, by virtue of his appointment until his successor is duly elected and qualified."

There being no vacancy in the office of City Collector by reason of the tie vote, the incumbent City Collector holds office until his successor is duly elected and qualified.

April 29, 1937.

It is the general law in this state that where no specific provision is made for special election, none can be called for that purpose.

In the case of State ex rel. Edwards v. Ellison, 196 S. W. 752, 271 Mo. 123, 1.c. 129, the court said:

"It is the law of this State that "no election can be held unless provided for by law" (State ex rel. v. Jenkins, 43 Mo. 1.c. 265), * * *

And in the case of State ex inf. v. Dobbs, 182 Mo. 359, 1.c. 367, the court said:

"A failure to elect at the time fixed by the statute, or the failure of the person chosen to qualify, will not, we think, authorize the holding of an election at any other time than that fixed by the act of the Legislature. (State ex rel. McHenry v. Jenkins, 43 Mo. 261; State ex rel. Attorney-General v. Thomas, 102 Mo. 85; In re Woolridge, 30 Mo. App. 618; Cooley's Constitutional Limitations (7 Ed.), 892; Mechem on Public Officers, secs. 141, 142."

Further in this opinion the court said:

"It was said in Woolridge's case, supra, that an election held at a time not provided for by law has no greater force than no election at all."

Honorable Vernon L. Turner -6-

April 29, 1937.

Section 6973 R. S. Mo. 1929, provides for the calling of special elections in cities of the fourth class to fill vacancies in office.

"If a vacancy occur in any elective office, the mayor or the person exercising the duties of the mayor shall cause a special election to be held to fill such vacancy, giving at least ten days' notice thereof by publication in some newspaper published in the city, or at least twenty handbills posted up at as many public places within the city; Provided, that when any such vacancy occurs within six months of a general municipal election, no election shall be called to fill such vacancy, but the same shall be filled by the mayor or the person exercising the duties of the mayor by appointment: Provided further, that any vacancy in the office of alderman which may occur within said six months preceding a general municipal election shall be filled in such manner as may be prescribed by ordinance. If a vacancy occur in any office not elective, the mayor shall appoint a suitable person to discharge the duties of such office until the first regular meeting of the board of aldermen thereafter, at which time such vacancy shall be permanently filled."

We are of the opinion that there being no vacancy in the office of City Collector by reason of the tie vote, Section 6973 is not applicable, and further that inasmuch as there is no other applicable provision for the calling of a special election, the incumbent City Collector holds office until his successor is duly elected and qualified.

April 29, 1937.

We note the fact that Article 7 of Chapter 61, Sec. 10328 R. S. Mo. 1929, provides the proceedings to be followed in case of a tie in certain offices.

"If there shall be a tie of the votes given for any two of the candidates, except in cases otherwise provided by law, the clerk or justices casting up the number of votes, or a majority of them, shall issue their order to the sheriff of the county where the same may occur, directing him or them to issue his proclamation for holding an election agreeably to the provisions of this chapter; and in all cases of such special election, the clerks and justices, or a majority of them, when they issue the order to the sheriff, shall, in such order, state the day on which such election shall be held, giving reasonable time for the same to be promulgated."

However, Section 10336, R.S.Mo. 1929, states that Article 7 does not apply to any city of the fourth class or city under 300,000 inhabitants.

"This article shall not apply to election for public offices determined otherwise than by ballot, to township or village elections, to school elections, or elections of county commissioners of public schools, or elections for road overseers, or to any city election in cities of the fourth class, or city of under 3,000 inhabitants existing under any special law."

April 29, 1937.

From the foregoing we are of the opinion that a city of the fourth class may not call a special election for the office of City Collector where in the general election for such office a tie vote has resulted.

II.

Section 6972, R. S. Mo. 1929, provides for the election of police judges in cities of the fourth class.

"The mayor and board of alderman of cities of the fourth class may, by ordinance, provide for the election of police judges in such cities, who shall be elected at the regular city elections, and who shall, when so elected, have exclusive jurisdiction to hear and determine all offenses against the ordinances of the city in which he was elected: Provided, that when such police judges shall be so elected, then the jurisdiction in this article hereinafter conferred on the mayor to hear and determine cases for the violation of city ordinances shall be held to refer to the police judge elected under this section: Provided further, that in case of the absence, sickness, or disability in anywise of such police judge, or in case of vacancy in such office, the mayor shall perform all such duties until the disability is removed or the vacancy is filled."

Honorable Vernon L. Turner -9-

April 29, 1937.

The City of Glendale, we assume, has provided for the election of police judge by ordinance.

Section 6949, R. S. Mo. 1929, provides for the election of officers of a city of the fourth class in part, as follows:

"A general election for the elective officers of each city of the fourth class shall be held on the first Tuesday in April next after the organization of such city under the provisions of this article, and every two years thereafter."

The City of Glendale has by ordinance made the office of police judge an elective office, and we are of the opinion that the said office is to be elected under the provisions of Section 6949, supra. This Section requires an election at the general election held on the first Tuesday in April, after the organization of the city under the statute relating to cities of the fourth class, and every two years thereafter, but does not prescribe that the person so elected shall hold his office until his successor is elected and qualified.

In the Smith case, supra, the court, in holding that under the Constitution of Missouri all officers regularly elected or appointed to office, unless it is otherwise provided by law, hold until their successors are elected or appointed and qualified, said: (l.c.517)

"There is no merit in defendant's contention that under the Act of 1891, justices of the peace in St. Louis hold for a fixed term of four years, and not until their successors are elected and qualified. True the first section of that act requires an election at the general election in 1894

Honorable Vernon L. Turner -10- April 29, 1937.

and every four years thereafter, and does not prescribe that the person so elected shall hold until his successor is elected, but such a provision was not necessary in the statutes to accomplish this result, for section 5 of article XIV of the Constitution of Missouri provides: 'In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified.' There is no contrary provision in the Act of 1891, hence Haughton's term continued until the regular election in 1898 and also until his successor should be duly elected and qualified, and such continuance after the election in 1898, was as much a part of his term as that which preceded that election."

In this connection we are pleased to enclose copy of an opinion rendered by this Department, Mr. Leo A. Politte, Prosecuting Attorney of Franklin County, under date of May 11, 1934, wherein it was held that in cities of the fourth class a candidate in arrears in city taxes on the day of election could not be elected to office.

No one having been elected to the office of police judge, we are of the opinion there is no vacancy in office, and that the present incumbent holds office, as in the case of the city collector, until his successor is elected and qualified. We are further of the opinion that there is no authority for the calling of a special election to fill the office.

April 29, 1937

III.

Section 6971, R.S. Mo. 1929, provides for the fixing of the compensation of the city collector in cities of the fourth class:

"The board of aldermen shall have the power to fix the compensation of all officers and employes of the city, by ordinance. But the salary of an officer shall not be changed during the time for which he was elected or appointed."

It is contended that this section applies only to officers paid a "salary" and not a "commission" as is paid in the instant case, and therefore that the city collector's compensation can be reduced during the remainder of the time that he holds over.

We will first consider whether that portion of time that the officer holds over until his successor is elected and qualified is part of the term of his office with reference to his compensation. The court, in the case of State ex rel. Stevenson v. Smith, 87 Mo. 158, in answering this question in the affirmative, said:

"To hold as is contended by the relator, viz: that after April 3, 1883, he administered the office, not as a part of his own term, but as a part of the term of his successor as to compensation, is to make a distinction without any substantial basis upon which it can rest."

We will now consider whether the term "salary" as used in Section 6971, supra, can be distinguished from the term "commission" so as to prohibit a change in the

April 29, 1937

amount of money to be received by the city collector during the time he holds office.

In the case of State v. Speed, 81 S. W. 1260, 1. c. 1263, 183 Mo. 186, 1.c. 198, the court, defining the term "salary", said:

"Thus in Burrell's Law Dictionary the word 'salary' is defined to mean, 'An annual compensation for services rendered; a fixed sum to be paid by the year for services,' and Anderson in his law dictionary gives this as one definition of the word, 'The per-annum compensation of men in official and in some other positions.' To the same effect is the language of this court in the case of Henderson v. Koenig, 188 Mo. 356. It is there said: 'Salary is regarded as a per-annum compensation.'

"Though we do not at this time undertake to assert that these definitions of the word salary are so well established and inflexible that it would be improper to say that its use could have reference to nothing else than a yearly or per-annum compensation, we do think that when the word salary is found in a legislative act as applied to one's compensation for official work done or required, it is so generally understood to apply to the officer's per-annum allowance, when not otherwise qualified, that we are justified in attributing that meaning to the word."

The term "salary" may then be regarded as a per-annum compensation, when not otherwise qualified.

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In the case of Purifoy v. Godfrey, 16 So. 701, 1.c. 703, the court, in defining the term "commission", said:

"The word has no technical meaning. As to particular persons, when it is used to express compensation for services rendered, it denotes, as is suggested by the attorney general, a percentage on the amount of moneys paid out or received."

The term "salary" may be distinguished from the term "commission" in that it denotes a fixed sum as distinguished from a sum that may vary according to the amount of money paid out or received by an officer.

As pointed out in the Speed case, supra, the term "salary" has a particular meaning when not otherwise qualified, and we must, therefore, in determining the meaning to be given the term, look to the context of the statute. Thus in the case of Nudelman v. Thimbles, 40 S. W. (2d) 475, 225 Mo. App. 553, we find the court using this language:

"We concede that, in legal usage, the term 'legal representatives' ordinarily refers to executors and administrators, but that is not the only sense in which it may be employed. To the contrary, the meaning to be attached to the term in a particular instance will be determined from the context, and the intent with which the expression is used, and, if those considerations are such as to indicate a meaning different from the ordinary one, the courts will not hesitate so to construe it. 36 C. J. 978."

And in the case of O'Malley v. Continental Life Insurance Company, 335 Mo. 1115, 75 S. W. (2d) 837, the court lays down the following rule in determining the

April 29, 1937.

meaning of a particular word in a statute that is doubtful:

"In the consideration of this clause we apply the rule that 'Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words and the meaning of a term may be enlarged or restrained by reference to the whole clause in which it is used.' (25 R.C.L., sec. 239, p. 995.)"

It is to be noted that the section speaks of the fixing of the "compensation" of officers, and therefore reference must be had to the meaning of this word in order to determine how the term "salary" was intended to be used in the section.

In the case of State ex rel. Emmons v. Farmer, 196 S. W. 1106, 1. c. 1108, the court in holding that the term "compensation" as used in the Constitution, Article 14, Section 8, providing that the compensation of certain officers should not be increased during their term, was broad enough to include salaries, fees, pay or other remuneration for official services, said:

"Moreover, the language of the Constitution includes both fees and salary under the comprehensive term 'compensation,' as witness this language:

"The compensation or fees of no state, county or municipal officer shall be increased during his term of office.'
Sec. 8, art. 14, Const.

"Clearly fees are not salary; so if the provision of the section quoted supra includes salary at all--and no one would be so bold as to deny that it does--then the word 'compensation' is the generic term,

April 29, 1937.

and includes, as used in the above provision of the Constitution, salary, fees, pay, remuneration for official services performed, in whatever form or manner or at whatsoever periods the same may be paid."

23 A. & E. Ency. of Law, p. 385, in speaking of "compensation" as it relates to public officers, says:

"The term 'compensation' as here used includes all forms which the remuneration of public officers may take, whether salaries, or fees, or percentage commissions, or mileage, or special appropriations, or allowances for necessary expenses."

From a reading of the entire section it is evident that the term "compensation" includes within its meaning both "salary" and "commission", and further that the Legislature in its use of the term "salary" was referring to the term "compensation" and not using it in a strict sense and standing alone.

From the foregoing, we are of the opinion that the Board of Aldermen of the City of Glendale does not have the authority to reduce the compensation, be it paid by salary or commission, during the remainder of the time that the incumbent city collector holds over.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

COSTS: Jury costs, under Section 8774, after a mistrial and a compromise between the parties in which each agrees to pay half, should be six dollars for each party

4-23
April 22, 1937

Honorable W. E. Waters
Circuit Clerk
Maries County
Vienna, Missouri



Dear Sir:

This Department is in receipt of your request for an opinion which reads as follows:

"I am writing you for information in a case that had its origin in a Justice's Court, was tried and a mistrial resulted and a change of venue taken to another J. P. Court and a mistrial resulted there and later the case was taken to the Circuit Court and a mistrial resulted then, and a compro. was agreed on as follows: Each party agreeing to pay one-half of all J. P. and Circuit Court costs, and each party taking care of his witnesses.

"The point that I am not clear on is, what is the actual legal costs in this case. My contention is that the case was a draw and section 8774 which governs costs of jury will not apply to this case,

"I have charged up the entire cost of Jury in circuit Court, One party has paid one-half of the cost, the other party has refused to pay but one-half of \$12.00, which the Statutes provides for cases which

April 22, 1937

reach a verdict, and no verdict was rendered in this case by the jury. I will appreciate an opinion from you at an early date.

"Thanking you in advance for the favor,"

Section 8774, Revised Statutes Missouri 1929, reads as follows:

"Whenever any jury provided for in this article shall serve in the trial of any case, other than criminal, there shall be taxed against the unsuccessful party and collected as costs, the sum of twelve dollars as jury fees, which, when collected, shall be paid into the county treasury to the credit of the county revenue fund; and the person paying the same into the county treasury shall take duplicate receipts therefor, one of which shall be filed with the county clerk, and such clerk shall charge the treasurer therewith."

In determining costs, the rule in Missouri as stated in Ex parte Wilder, 253 Mo. 627, 162 S.W. 167, is as follows:

"At the common law no costs were recoverable. Costs in Missouri being, therefore, purely, creatures of the statute, enactments in relation thereto must be strictly construed."

It will be noted that in the statute above the costs are taxed "against the unsuccessful party." When

a party files a suit, tries it and there is a mistrial and he then enters into a compromise and so dismisses the suit, the case is not a "draw" as contended in your letter but the party who files the suit is the unsuccessful party and is liable for the costs in absence of an agreement as to that matter.

A similar set of facts arose in Thompson v. The Union Elevator Co., 77 Mo. 520, in which there was a mistrial and a compromise with an agreement as to costs. The court said:

"If he had voluntarily dismissed his suit, as he should have done, the court could not have adjudged the costs against the defendant,* * * *
If a party would have the costs adjudged against his adversary, who prevails in the suit by reason of a compromise, under which the suit cannot be further prosecuted, he should so stipulate in his compromise agreement."

As was further said in Murphy v. Smith, 86 Mo. 333, 1. c. 339:

"When a court assumes to carry out a compromise requiring a special judgment for costs it would be in pursuance of a stipulation to that effect filed of record, or should be with the consent of the parties in open court."

It is, therefore, the opinion of this department where after a mistrial in a civil case the parties compromise and agree that each shall pay one half of the costs, that each is liable for six dollars (\$6.00) for jury costs

Honorable W. E. Waters

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April 22, 1937

which is one half of the twelve dollars (\$12.00) jury costs as taxed by Section 8774, Revised Statutes Missouri 1929.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

AO'K;LC

INHERITANCE TAX: Missouri estate tax on property belonging to non-resident is equal to 80% of the Federal estate tax imposed on said property.

August 6, 1937



Mr. Lynn Webb
McCune, Caldwell & Downing
2000 Fidelity Bank Building
Kansas City, Missouri

Dear Sir:

In reply to your letter of July 28, 1937, there is no question but that the State of Missouri is entitled to an estate tax under Section 573, Revised Statutes Missouri 1929, only to the extent of eighty per cent of the Federal tax imposed on property located in the State of Missouri belonging to a non-resident.

In this case if, as you say, the assets physically located in the State amount to only forty per cent of the entire estate of the non-resident, then for the purposes of assessing a tax under Section 573 only forty per cent of the Federal estate tax should be considered. In this case forty per cent of the Federal estate tax appears to be in the amount of \$1030.84; eighty per cent of that sum amounts to \$824.67, and if that sum is less than the Missouri inheritance tax already imposed and paid then there can be no further estate tax imposed under Section 573.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JWH:LC

ROADS AND) Warrants may be issued and registered up
BRIDGES) to amount of anticipated revenue, but not
in excess.

November 10, 1937

Hon. Randolph H. Weber
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri



Dear Sir:

This department is in receipt of your letter of October 23, 1937, in which you request an opinion as follows:

"I am writing you relative to warrants issued against the County Road Fund. In the event there are not sufficient funds in the County Road Fund, can a warrant legally be issued by the County Court to be presented to the County Treasurer to be protested?"

"The Section of the Missouri Statutes which is involved in this matter, is Section 7891. The point involved, is if the fund granted to Section 7891 is depleted, can the County go ahead and issue warrants on that fund and can the party who is the payee in this warrant present it to the Treasurer and have it protested and draw interest on it the same as on the regular county warrant?"

In State ex rel. Clark County v. Hackmann, 280 Mo. 686, the Supreme Court in discussing what constitutes a valid warrant said at l.c. 696:

"The county authorities know from the assessed values and the tax rates just what revenue should come in for the year. They often issue warrants

November 10, 1937

up to the very limit of the anticipated revenue, and these warrants we have held to be valid obligations of the county. This, on the theory that the warrants represent valid contracts made during the year. By valid contracts we mean contracts within the anticipated revenue of the year. Thus in *Trask v. Livingston County*, 210 Mo. l.c. 594, it is said:

'It has been uniformly construed that this provision of the Constitution permits the anticipation of the current revenues to the extent of the year's income in which the debt is contracted or created, and prohibits the anticipation of the revenues of any future year.'

So also in *State ex rel. v. Johnson*, 162 Mo. l.c. 629, it is said:

'It was ruled in *Book v. Earl*, 87 Mo. 246, that 'the evident purpose of the framers of the Constitution and the people who adopted it was to abolish in the administration of county and municipal government, the credit system, and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year.' But it was at the same time said: 'Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it.'

'It was then anticipated that, though the county court might not issue warrants in excess of the levy for a year's current expenses, and that a creditor might rely upon the fact that his contract was within the amount of revenue levied and provided, and trust to the power of the State to enforce its taxes, still it might happen from some unforeseen cause enough of the estimated amount of revenue might not be collected to pay all the warrants drawn against it in anticipation. Under such circumstances it has never been ruled that such a creditor's warrant was absolutely void and extinguished by the non-payment in the year in which it was drawn. On the contrary, this court has often said in no uncertain terms that it was valid and payable out of any surplus revenue in the hands of the county treasurer that might arise in subsequent years."

At l.c. 698 in the Hackmann case, it is said:

"this court has said (and rightfully so) that the purpose of Sections 11 and 12 of Article X of the Constitution was to place the business of the counties upon a cash basis, we did not mean that debts contracted within the anticipated revenues of the year were invalid because the collected revenues were insufficient to meet all of such debts. Nor did we mean by such expression that warrants issued for such debts were invalid because all of them could not be paid out of the revenue actually collected. Nor did we mean that each debt should be met with cash, but we did mean that during the fiscal year the cash would be available to meet the debt if the anticipated revenue was collected and rightfully disbursed. In other words, we have dealt with the matter upon the basis of a year's business, and the term 'cash basis' has been used in the sense that the anticipated revenues of the year should at least equal the contracted debts of the year.

November 10, 1937

Such has been our construction of the constitutional system, and as suggested by counsel for respondent, if the county desired to contract debts in excess of the year's revenue, resort would have to be made to the people for their consent to the creation of such debt."

In the case of *Watson v. Kerr*, 279 S.W. 692, it is held that if, at the time of the creation of an indebtedness, it is within the income which might reasonably be anticipated, or if the indebtedness is created before it becomes apparent that the total indebtedness so created will exceed the whole of the anticipated income, that said indebtedness is not invalid and that mere errors in judgment in estimating whether indebtedness can be incurred and the total expenditures still kept within the income anticipated, is not sufficient to impeach good faith of the county court, and that to so impeach county court, there must have been fraud or palpable attempt to evade Article X, Section 12 of the Constitution.

CONCLUSION

Therefore, it is the opinion of this department that if there is not sufficient funds in the County Road Fund, created by authority of Section 7891 of the Revised Statutes of Missouri, 1929, due to failure to collect all the anticipated revenue, to pay warrants as they are issued, that said warrants may be issued and registered with the county treasurer, if said warrant is within the amount of the anticipated revenue. If said warrant is in excess of the total amount of anticipated revenue, it may not be issued because it would be contrary to Article X, Section 12 of the Constitution of Missouri.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

LLB:VAL

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

TAXATION: Personal property of Naval Reservists subject to property tax.

January 4, 1937



Honorable Andy W. Wilcox
Chairman State Tax Commission
Jefferson City, Missouri

Dear Mr. Wilcox:

Your communication of December 28, 1936, requesting an opinion of this office on the following matter has been received:

"This department desires an opinion as to whether Naval Reservists who reside in Missouri are exempt from personal property tax."

Section 6 of Article X of the Constitution of Missouri reads as follows:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile of more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

January 4, 1937

Section 7 of Article X of the Constitution of Missouri provides:

"All laws exempting property from taxation, other than the property above enumerated, shall be void."

By these constitutional provisions we see there is no basis for the exemption of personal property belonging to a Naval Reservist.

On September 17, 1936, this office rendered an opinion to the Honorable William A. Sapp, Prosecuting Attorney of Boone County, in which the following conclusion was reached:

"This department is of the opinion that the assessor's duty is to assess all property in the State including the personal and real property belonging to member of the Reserve Officers Training Corp.

In the course of the opinion Section 9743 R. S. Missouri 1929, which purportedly exempts "all persons belonging to the army of the United States" was set out. Referring to this section it was stated:

"Exemption of United States soldiers and United States property does not exempt the personal property of the soldier."

It therefore appears that this opinion to Mr. Sapp is determinative of the question put in your inquiry and we are accordingly enclosing to you a copy of the opinion.

CONCLUSION

It is therefore the opinion of this office that Naval Reservists who reside in Missouri are subject to the payment of personal property taxes.

Respectfully submitted,


HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HGW:MM
Enclosure.

TAXATION: Certificate holder only entitled to receive amount of certificate plus subsequent taxes paid.

January 4, 1937.



Hon. Mark W. Wilson
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Mr. Wilson:

We are in receipt of your communication of recent date requesting an opinion of this office on the following matters:

"The following question has arisen concerning the new tax law providing for the sale of delinquent property as appears in the 1933 Session Acts on page 425 et seq., and I would appreciate very much if you will give me an opinion for the County Treasurer on the same.

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In October, 1936, a piece of property in Deepwater, Henry County, Missouri, was sold as provided by the 1933 Act. The certificate specifically set forth the State and County taxes for the year for which the property was sold. The purchaser of the certificate thereafter paid the city taxes delinquent on said property described in his certificate and due to the City of Deepwater, which were taxes from the year 1931 to date. The owner of the property is now tendering to the County Treasurer and has paid into his hands the amount of state and county taxes plus interest and costs as provided for in the certificate of sale, but the title owner of the property is refusing to reimburse the certificate holder for the city taxes paid as above noted.

The following questions are asked:

1. Has the Treasurer and ex-officio collector of Henry County the right to demand of the title holder the amount of city taxes paid by the certificate purchaser?
2. Has the purchaser of a certificate under the law, any right to reimbursement from the title holder for taxes paid to the City of Deepwater which were delinquent and a lien on the property?"

Your communication involves two entirely separate and distinct problems. The second question appears to concern only the individual rights of the purchaser of the certificate and what if any rights he may have against some third party. As this is a matter of private litigation not involving the State or your office it does not appear that this is a proper subject for an opinion. We are therefore limiting this opinion to the proposition first stated.

I.

Treasurer and ex-officio collector can only demand of redeemer the amount of the certificate of purchase with interest thereon stated and all subsequent taxes paid by purchaser with interest at eight per centum per annum.

Section 9956a, page 437, Laws of Missouri 1933, provides the manner in which an owner, occupant or other person having an interest in the land may redeem the land from the tax sale and provides that he may do so

"By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to

exceed ten per centum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption.*****"

It is to be noted that in addition to the purchase price of the certificate the redeemor must pay to the purchaser "all subsequent taxes" which were paid.

It will be seen that a mandatory duty is placed upon the holder of the certificate of purchase to pay, under Section 9957c, page 440, Laws of Missouri 1933,

"all taxes that have accrued thereon since the issuance of said certificate, or any prior taxes that may remain due and unpaid on said property, and the lien for which was not foreclosed by sale under which such holder makes demand for deed,
*****"

In the instant case it is certain that the city taxes which were paid by the holder of the certificate of purchase a few days after the sale had not "accrued" since "the execution of said certificate," as all such taxes had been due and accrued for such time, nor could such city taxes be considered as prior taxes remaining due and unpaid, lien for which had not been foreclosed as it is recognized that city taxes are inferior to and not "prior" to state and county taxes. This section further provides that if

"any purchaser shall suffer a subsequent tax to become delinquent and a subsequent certificate of purchase to issue on the same property***such first purchaser shall forfeit his rights of priority thereunder to the subsequent purchaser,*****."

Thus it appears that the purchaser of a certificate who fails to follow the mandatory directions and pay taxes subsequently accrued is penalized by forfeiture of his rights, but it is to be noted that this applies to "subsequent taxes" and does not purport to cover any and all taxes which may at any time have been or will be assessed against the property.

By referring to Section 9958c, page 441, Laws of Missouri 1933, we see that in case any conveyance for taxes proves to be invalid, the lien of the State is preserved and vested in the grantee of such certificate who shall be entitled to a lien on the land for the amount of taxes, penalties and interest

"together with the amount of all subsequent taxes paid, with interest, *****".

The purchaser then is again protected as to the amount paid for the certificate plus any "subsequent taxes" paid.

Referring to Section 9962d, page 446, Laws of Missouri 1933, a section somewhat similar in its provisions to Section 9958c, only further applying to cases involving suit to quiet title, it is provided that "the Court shall ascertain the amount due the party holding such tax deed and from whom due for principal and interest and for all improvements made by him on such lands including subsequent taxes paid with interest,". Considering this act in its entirety it appears that protection is given to the certificate holder for subsequent taxes which are paid by him but nothing is said authorizing or requiring him to pay taxes which may be of inferior character and which were due and accrued at the time of the sale but were inferior to the taxes for which the land was sold.

It therefore appears that the Jones-Munger law did not contemplate, authorize or require the holder of the certificate to pay the taxes referred to in your communication and that to require their payment to the Treasurer, ex-officio collector would be to extend and expand the requirements set out in Section 9956a.

Hon. Mark W. Wilson


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January 4, 1937

CONCLUSION

It is therefore the opinion of this office that the Treasurer, ex-officio Collector of Henry County may not demand of the party redeeming the amount of city taxes paid by the purchaser in the instant case.

Respectfully submitted,


HARRY G. WALTNER, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HGW:MM

SHERIFFS: Contracting with sheriff's brother to feed prisoners at County Jail would not be a violation of the Nepotism Act.

1-18
January 13, 1937

Honorable Russell Wilkes
Sheriff of Monroe County
Paris, Missouri



Dear Mr. Wilkes:

This Department is in receipt of your letter of January 11, wherein you make the following request:

"At the last general election I was elected Sheriff of Monroe County, Missouri, and subsequently qualified and am now acting in that capacity.

"Among other duties connected with my office is the duty of feeding prisoners that are confined in the County Jail. The County Court allows me .75 cents a day for each prisoner I feed.

"I am about to enter into a verbal contract with my brother to furnish the food and prepare the meals for the above mentioned prisoners. In the event that I do this will it be in violation of the State Nepotism Laws?

"As I am very anxious to get this matter lined up I would appreciate having an opinion from your office concerning the above question at your very earliest convenience."

Section 11794, Revised Statutes Missouri, 1929, refers to the allowance to sheriffs and marshals for boarding prisoners, and is as follows:

"Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court, of each county, and by the municipal assembly of any city not in a county in this state: Provided, that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court."

In making a contract with your brother it would be necessary to follow the terms of the proviso contained in the above section to the effect that you could not contract for a less price than fixed by the county court. You state the county court did allow you seventy-five cents a day for each prisoner. The nepotism section in the Missouri Constitution, Section 13 of Article XIV, is as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

It was ruled by the Supreme Court in the case of State ex rel Saline County v. Price 296 Mo., 121, 1. c. 130, that the fees received by the sheriff for boarding prisoners are not of such nature as can be considered as a part of his compensation allowed by the statute. The court said:

"The trial court held that sums received by the sheriff from the county for the board of prisoners in his charge as jailer, were not fees for which the defendant can be held to account, as a part of his compensation allowed by the statute. (Sec.11036,R.S.1919.) Section 12551, Revised Statutes 1919 provides that 'the sheriff . . . shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible.' In this capacity it became his duty to see that the prisoners confined there were provided with food, bedding and medical attention. Section 11003 makes it the duty of the county court at the November term of each year to fix the fee for furnishing each prisoner with board for each day during the following calendar year. During the entire term of the defendant Price, the amount of this daily charge was limited to fifty cents, and the sheriff or mailer was forbidden to make any contract for the boarding of prisoners for a less sum."

And on page 132,

"While the statute making it the duty of the county court to fix the daily allowance for the feeding of prisoners terms it a 'fee' (Sec.11003,R.S.1919) the section creating that allowance (Sec.11002, R. S. 1919) seems carefully to avoid any such designation. This case turns upon the question whether or not this allowance is included in the word 'fees' as it is used in

January 13, 1937

Section 11036, Revised Statutes
1919."

CONCLUSION

The Statutes place the custody of the jail under the sheriff. The allowance made by the county court for feeding prisoners confined therein is in the nature of reimbursement for money which he must expend for food for the prisoners; and, as stated in the above decision, same is no part of his usual statutory compensation. Section 11794 prohibits the sheriff from contracting with any one for a sum less than the amount allowed by the county court. The nepotism section, Section 13 of Article XIV of the Constitution, quoted supra, states who shall, by virtue of said office or employment, have the right to name or appoint any person to render services to the State or to any political subdivision thereof.

We are of the opinion it is not applicable to the case of your contracting with your brother for feeding of the prisoners. He receives no money direct from the county but receives his compensation from you, nor is he rendering any service to any political subdivision thereof within the meaning of the Act.

We, therefore, hold that such contract would not be in violation of the nepotism act.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

RECORDER: Recorded instruments may be destroyed without
liability on the part of the Recorder.

January 27, 1937.

Honorable Mark W. Wilson
Prosecuting Attorney
Henry County
Clinton, Missouri



Dear Sir:

We acknowledge your request for an opinion dated
January 9, 1937, which reads as follows:

"The Recorder of Deeds has a considerable number of old deeds from twenty to thirty years old, or even older, which have long since been recorded, but which have not been called for by the parties who left them for record.

"The vault in the Recorder's office is very crowded with their other books and records. Is the Recorder authorized to destroy such old deeds, and how long should a deed that is recorded be held before it can be destroyed? The law provides that chattel mortgages may be destroyed after five years. Should the Recorder destroy them or should he obtain an order from the County Court to destroy them after they are five years old."

Corpus Juris, vol. 53, p. 1070, Sec. 1, defines the nature of the office of recorders of deeds thus:

"A register of deeds is a public officer authorized and required by law to keep records in the manner directed by law, of instruments in writing, especially instruments affecting the title to real property. Such an officer is in some

jurisdictions designated as a recorder of deeds, a county recorder, etc., and in other jurisdictions his duties are imposed upon other specific ministerial officers, such as county clerks, clerks of court, etc."

The Legislature of Missouri has provided the method whereby a recorder is to receive and record written instruments. Original instruments cannot be destroyed contrary to section 4209 R. S. Mo. 1929, which provides:

"If any person shall unlawfully, willfully and maliciously tear, cut, burn, or in any way whatever destroy any will, deed or other instrument of writing, the falsely making, altering, forging or counterfeiting of which is hereinbefore declared to be a punishable offense, he shall, on conviction, be punished by imprisonment in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."

Again in section 11548 R. S. Mo. 1929, it is provided:

"The recorder shall certify, on or under such deed, mortgage, conveyance, deed of trust, bond, commission or other instrument, so recorded, the day and time of the day, month and year, when he received it, and the book and page or pages of the book in which it is recorded, and, when recorded, deliver it to the party or his order."

Again in section 3100, Laws of Missouri, 1935, p. 208, the Legislature has provided for destroying chattel mortgages:

"Every such mortgage or deed of trust, where the original or a copy shall have been filed, as herein provided, shall cease to be valid against the

mortgagor or the person making the same, or subsequent purchaser or mortgagees in good faith, after the expiration of five years from the filing of the same, and the Recorders of the several counties are hereby authorized to destroy any and all such mortgages remaining on file in their respective offices after the expiration of five years from the filing of the same: Provided, that when any such mortgage shall be destroyed, as herein provided, the Recorder shall note such destruction and the date thereof upon his chattel mortgage register. Provided further, that this Section shall apply only to chattel mortgages or encumbrances upon chattels, which are merely filed but are not recorded at length. As to chattel mortgages or encumbrances on chattels which are recorded at length in the Recorder's office, the limitation of the lien and validity thereof shall be governed by the General Statutes of Limitations pertaining to written instruments."

In Corpus Juris, vol. 53, p. 1072, sec. 10, under the title of Rights, Powers, Duties and Liabilities of Recorders of deeds, we find the law said thus:

"In addition to the powers expressly conferred upon registers of deeds by the constitutional or statutory provisions applicable to their office, they may possess such incidental powers as are necessary to the proper performance of the duties expressly imposed on them. * * * *"

"Generally, the duty of the register is to receive and file, or receive and record, as the case may be, such instruments as by law are entitled to be filed or recorded, and to file or

record them in such manner as to
serve all the purposes of the law,
* * * *."

In Lewis v. State, 32 Arizona 182, 256 Pacific 1048,
l. c. 1050, that court said:

"The whole object of all laws which
require or permit instruments to be
filed, registered, or recorded in
any public office is that the general
public, if interested in the subject-
matter of the instrument, may pro-
ceed to the proper office, and if
therein they find an instrument duly
filed, registered, or recorded, they
may and must act with the presumption
that such an instrument is indeed in
existence and is genuine, and govern
their affairs accordingly."

In the case of Ewing v. Vernon County, 216 Mo. 681,
l. c. 694, the court in holding that the recorder was by
section 11548, supra, required to deliver the deed when
recorded "to the party or his order" said:

"It is stoutly argued that it was
not his statutory duty to return
recorded instruments at all, even
when requested to do so. It is
shrewdly (and sourly) suggested in
oral argument that if he obliged the
general public by the courtesy of
the return of a recorded instrument,
such act was selfserving and must be
referred to future political ambition
in currying favor with voters. He
is likened to a sower, who sows that
he may reap at seed time.. But we
shall not take this view of it. The
legal duty of an officer is to be
obliging and courteous. The general
welfare of the public demands the
application of the idea that noblesse
oblige. Not only so, but by section
9069 he is required to deliver the

January 27, 1937.

deed and its certificate of record, when recorded, 'to the party or his order.' By section 9089 he is required in certain instances to transmit deeds from one county to another."

CONCLUSION.

Section 3100, supra, provides that the recorders may destroy chattel mortgages merely filed and remaining on file five years after filing same, without an order of the court, but the statutes do not specifically provide for the recorder to destroy any other type of original written instruments in his possession, such as deeds, mortgages, or deeds of trust. By virtue of section 4209, supra, this opinion is necessarily limited to those cases where the recorder has not unlawfully, willfully or maliciously destroyed any original written instrument in his possession.

As in Arizona, the object and purpose of Missouri's recording laws is to prevent fraud in transactions by securing certainty and publicity in recorded dealings, and to permit and require the general public to act with the presumption that genuine instruments exist, of which recorded instruments are but a monument.

It was not the intention of the Missouri Legislature that a recorder clutter up his office with ancient original written instruments long since recorded. The recorded instrument can serve all purposes intended by the recording law, and an original written instrument properly recorded is valuable only as an heirloom or keepsake, and the recorder's office is no depository for keepsakes.

The recorder is bound to make an effort to deliver all original written instruments to "the party or his order", after he has recorded same, according to provisions of section 11548, supra, and being unable to deliver same, this department is of the opinion that original instruments duly recorded and remaining in the recorder's

Hon. M. W. Wilson

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January 27, 1937.

possession for an unreasonable length of time from the date of recording, may be destroyed by the recorder as a necessary incidental power to periodically clean house, and without liability on his part for such conduct. This right to possession of "the party or his order" is not a right which will be enforced to the detriment of the general public's interest in having county records kept in an up-to-date orderly fashion.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

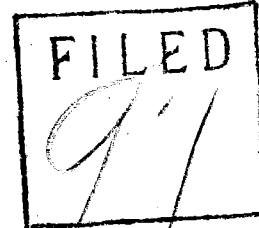
J. E. TAYLOR.
(Acting) Attorney General.

WOS:H

COUNTY HIGHWAY ENGINEER: Compensation and when same may be withheld.

3-16

March 10, 1937.



Hon. W. P. Wilkerson,
Prosecuting Attorney,
Sikeston, Missouri.

Dear Sir:

We wish to acknowledge your request for an opinion under date of February 19th, wherein you state as follows:

"It has recently come to light that our Scott County has been paying the County Surveyor and ex-officio Highway Engineer \$3,000.00 per year, ostensibly under authority of Section 8006. It appears, however, that the County Highway Engineer Law was suspended as provided in Section 8019, if the elections held for that purpose were legal. It appears by an order of the County Court on October 4, 1910, that the proposition was ordered submitted to the voters at the general election of November 8, 1910 and on that date there were cast 810 votes for the proposition and 1162 against the County Highway Engineer Law. It further appears from the records of the County Court that on October 24, 1912, the question was ordered submitted again and was submitted in that year with 773 votes for the proposition and 1279 against it.

"Afterwards, and on February 8, 1913, the County Court fixed the salary of the Highway Engineer at \$5.00 per day for each and every day he actually worked.

"In this state of affairs I would be very much pleased to have you advise me

1. Whether the elections held in 1910 and 1912, under the provisions of Section 8019, were sufficient to suspend the provisions of the Highway Engineer Law inasmuch as that section provides at the present time, that this proposition shall be submitted at a special election not to be held within ninety days of any general election. I do not have the statutes of 1909 available and it may be possible that this provision for the special election was not present in the statute at that time.
2. I would be pleased to have you advise me whether the County Highway Engineer is, in your opinion, liable to the County General Revenue Fund for the excessive salary he has drawn in the three years last past.
3. Inasmuch as this Highway Engineer is broke and nothing substantial can be collected from him, in the event of his liability for the excessive amount of salary drawn, is it in your opinion right and proper to instruct the County Court to pay him nothing by way of salary until such time as he may have this matter straightened up? In fact, he probably cannot straighten it up because he has nothing to pay with and to refuse to pay him anything simply means he must quit and another man be hired.

"In connection with the above, I have tentatively advised the Court that this Highway Engineer is liable for the excessive salary drawn by him. I reached this conclusion chiefly on account of the rulings in State ex rel. vs. Adams, 172 Mo. 1; and Jackson County vs. Stone, 168 Mo. 577; as well as the text in 46 CJ, page 1030, although it appears

from the annotations that the cases cited therein do not bear out the statement in the text.

"There is also another angle to this case, in that the County Highway Engineer, while being paid \$250.00 per month out of the County General Revenue Fund did a great deal of very valuable engineering work for and on behalf of certain County Drainage Districts which are being administered in our County in connection with certain refinancing and refunding operations of these said Districts, for which he was paid nothing. In other words, the County General Revenue Fund was burdened with this expense and the Drainage Districts obtained the benefit of it. I do not know the value of this work but am advised that it will run between \$2,000.00 and \$3,000.00, and it is probably worth \$2,500.00.

"After talking with Bill Dorsey, a representative of the State Auditor's Office, we have decided we would recommend to the Court that they pay the reasonable value of these services into the General Revenue Fund of the County and credit that amount on the delinquencies of the Highway Engineer. This the County Court agreed to do but subsequently called a meeting of the landowners in the different districts, and the landowners refused to sanction the payment in excess of \$500.00 for all the districts, and consequently the County Court refused to make the required payment.

"In this state of affairs, I would be glad to have you advise me whether, in case you hold the Highway Engineer liable to the County for the excessive salary drawn, we can sue these drainage districts and compel them to pay into the General Revenue Fund the reasonable value of this engineer's services. There is no question in my mind but that the Highway Engineer, individually, can sue and compel these districts to pay him the reasonable price of his work, but whether the State has any right to compel

March 10, 1937

such a payment is another matter, and I'm afraid a tough one.

"I can clear up this last point by taking an assignment from him and suing on the assignment in the name of the State."

I.

Section 8019, R. S. No. 1929, provides the manner in which the County Highway Engineer Law may be suspended, thus:

"Whenever a petition, signed by at least ten per cent. of the taxpaying citizens and voters representing at least two-thirds of the townships of any county in this state, shall be presented to the county court thereof asking that a proposition be submitted to the qualified voters of the county, to determine whether or not the provisions of this article shall continue to apply to such county, the court, after due consideration, may order that a proposition for the approval or rejection of the provisions of this article be submitted to the qualified voters of the county at any general election held for the purpose of electing county officers, or upon a petition, signed by at least fifteen per cent. of the taxpaying citizens and the voters representing at least two-thirds of the townships of any county in this state asking that such proposition be submitted, at a special election, the county court shall call the special election for the submission of such proposition within ninety days from the filing of such petition: Provided, such special election shall not be held within ninety days of any general election. The county court shall give notice of such election by publishing the same in some newspaper published in the county. Such notice shall be published for at least two consecutive weeks, the last insertion to be within ten days next before such election, and such other notice may be given as the

court may deem proper. The proposition so submitted shall be printed on the ballots in the following form: 'For county highway engineer law,' 'Against county highway engineer law,' with the direction 'Mark out the clause you do not favor.' If a majority of those voting at such election upon the proposition vote for the county highway engineer law, then this article shall remain in full force and effect in such county, but if a majority of those voting at such election upon the proposition vote against the county highway engineer law, then this article and the provisions of the law relating to the appointment and duties of a county highway engineer shall not be enforced in such county."

Under the above provision, the voters may petition the county court that the proposition be submitted without specifying the time it is to be voted on, and in such instance the court may order that it be submitted at any general election held for the purpose of electing county officers, or the voters may petition the county court, designating that such proposition be submitted at a special election. If the latter be the case, then the county court must call the special election within ninety days from the filing of the petition, and it must not be held within ninety days of any election.

You state in your letter that the court ordered the proposition be submitted to the voters at the general elections in 1910 and 1912, and ask whether, under the provisions of Section 8019, supra, they were sufficient to suspend the provisions of the County Highway Engineer Law, inasmuch as it provides that the proposition be submitted at a special election not to be held within ninety days of any general election.

The provisions of Section 8019, supra, and Section 10571, R. S. No. 1909, are identical, and since, as pointed out, Section 8019, supra, provides that where the voters petitioning the court fail to specify the time for voting on the proposition, the court may order that it be submitted at any general election, we are of the opinion that there was no breach of the statute, assuming that the petition was signed by at least ten per cent of the taxpaying citizens and voters representing at least two-thirds of the townships of the county.

II.

You state that at the general election held November 8, 1910, there were 810 votes cast for the proposition and 1162 against it. Therefore, by virtue of Section 8019, supra, the County Highway Engineer Law was suspended.

Section 8021, R. S. Mo. 1929, provides that where the County Highway Engineer Law has been suspended, the question may be resubmitted after the expiration of one year, thus:

"If any county shall have voted to suspend the county highway engineer law as provided in section 8019, the question may be resubmitted after the expiration of one year, upon the petition of two hundred resident taxpaying citizens and voters representing not less than two-thirds of the townships of the county, at the ensuing election held for the purpose of electing county officials, and if a majority of the qualified votes cast upon the proposition be for the adoption of the county highway engineer law, it shall again become effective and be in force in such county from and after the February term of court following such election. The form of the ballot at such election shall be as follows: 'For county highway engineer law,' 'Against county highway engineer law,' with the direction 'Mark out the clause you do not favor.'"

This, we understand, was done in the instant case in the year 1912, when a vote was recorded of 773 votes for the proposition and 1279 against it. The County Highway Engineer Law remained suspended, and we assume remains so today.

Section 8020, R. S. Mo. 1929, provides that where the county highway engineer has been dispensed with, as provided by Section 8019, supra, the county surveyor is ex officio county highway engineer, and receives compensation as may be allowed by the county court, of not less than three dollars nor more than five dollars for each day actually employed as such county highway engineer, thus:

"In all counties in this state that may vote against the county highway engineer law in the manner prescribed in section 8019 of this article, all matters relating to roads and highways and the expenditures of the public funds thereon shall be governed by the laws then in force in such counties, except that part of the law pertaining to the appointment of the county highway engineer. In all counties wherein the services of a county highway engineer are dispensed with, as provided by section 8019 of this article, the county surveyor shall be ex officio county highway engineer, and, as such, shall perform such services pertaining to the working, improvement, repairing and maintenance of the roads and highways, and the building of bridges and culverts as provided by this article to be done and performed by the county highway engineer, or as may be ordered by the county court; and for his services as ex officio county highway engineer he shall receive such compensation as may be allowed by the county court, of not less than three dollars nor more than five dollars for each day he may be actually employed or engaged as such county highway engineer. The county court may empower the county highway engineer, or the county surveyor when acting as county highway engineer, to employ such assistants as may be deemed necessary to carry out the court's orders and at such compensation as may be fixed by the court, not to exceed the sum of four dollars per day for deputy county highway engineer nor more than three dollars per day for each other assistant for each day they may be actually employed."

It is our opinion that, under the above circumstances, if the county surveyor and ex officio county highway engineer is receiving and has received more than the amount allowed by the county court, which cannot be less than three dollars nor more than five dollars for each day actually employed as such county highway engineer, he is liable to the county general revenue fund for the excess salary he has drawn.

III.

You next inquire, in the event it is the opinion of this department that the county surveyor and ex officio county highway engineer has received in excess of the amount of salary due him, whether it is right and proper to instruct the county court to pay him nothing by way of salary until such time as he may have this matter straightened up?

We have been unable to find any decisions directly in point on this question in the State of Missouri, but it appears to be a well established rule of law that any compensation paid to a public official by a governmental body not authorized by law or in excess of the compensation authorized by law, may be recovered back without suit by holding back the future salary of the officer. Thus in the case of Price v. Lancaster County, 24 Pa. County Court, 1. c. 235, the court said:

"Conceding, therefore, that the plaintiff did receive from the county the above illegal payments, can they be recovered back into the county treasury, or used by way of set-off? The answer to this proposition is fully contained in County of Allegheny v. Grier, 179 Pa. 639. Suit was brought by the county of Allegheny to recover from the controller of that county \$1,290.32, alleged to have been paid to him by mistake in excess of his salary as fixed by law. Among other defenses, it was urged that the payments made to the defendant and sued for were voluntary payments. The court below entered judgment in favor of the county, and this decision was affirmed by the Supreme Court. The late Chief Justice Sterrett, in delivering the opinion of the court, said: 'The act of 1864 being in force, the amount received by the controller in excess of the salary there fixed was, therefore, illegal. So, on the grounds of public policy, the court was right in holding that the maxim volenti non fit injuria has no application to the illegal payment of public funds to a public officer, more especially, where, as here, it is the peculiar function of that officer to guard the public treasury. Public revenues are but trust funds, and officers

but trustees for its administration for the people. It is no answer, to a suit brought by a trustee to recover private trust funds, that he has been a party to the devastavit. There could be no retention by color of right: Abbot v. Reeves, 49 Pa. 494. With much the stronger reason is this doctrine applicable where the interests of the whole people are involved, and the authorities are, accordingly, numerous to this effect: New Orleans v. Finnerty, 27 La. Ann. 681; Com. v. Field, 84 Va. 26; Day Land and Cattle Co. v. State, 68 Texas, 526; Am. Steamship Co. v. Young, 89 Pa. 191; Taylor v. Board of Health, 31 Pa. 73; Smith v. Com., 41 Pa. 335. It is obviously immaterial whether the illegal payment be through design or mistake, for, in either event, the result must be not only misuse of trust funds, but, what is of far more importance, demoralization in the service. The only practical difference lies in this, that one makes a criminal and the other a trustee. So it is immaterial by what officer the funds are had and received. Fidelity to the government which he represents and is sworn to support makes restitution a duty. He can plead neither laches nor estoppel in pais to a suit for malversation. Public office is a public trust, the sanctity of public property is essential to its due administration, and necessarily implies a remedy for any diversion from legitimate use."

From the foregoing, we are of the opinion that the county court can legally withhold the amount it may owe the county surveyor and ex officio county highway engineer by way of salary, and the same may be treated as a counterclaim or setoff.

Hon. W. P. Wilkerson

-10-

March 10, 1937

We note that you have cleared up the last point in your letter, hence we will not pass on same.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

COUNTY BUDGET ACT: Contracts made with an Engineer for determining data for roads and bridges, if the compensation is fixed according to the amount of data prepared and he is to be paid after completion of the work his compensation should be paid out of the revenue for the year in which the work is completed.

March 23, 1937

Honorable Joseph V. Willhite
Prosecuting Attorney
Worth County
Grant City, Missouri



Dear Sir:

This Department is in receipt of your letter of March 3, relative to a contract made by the County Court of your County in February, 1935, wherein G.A. Merckling was to receive five per cent of the amount for preparing an itemized bill of expenditures by the county for certain rights-of-way and materials. On February 26 you were forwarded an opinion to C. W. McKim, Clerk of the County Court, which, upon the facts it contained, apparently answered the question. However, the facts from which the McKim opinion was rendered appear somewhat different from the facts which you now present. The main paragraph of your last letter is as follows:

"The County Court is convinced that there is no question on the correctness of that opinion, but it does not reach the question they had in mind, that is to say: Does this contract to pay 5% of such amount as Mr. Merckling may discover and put into the form of a bill to be presented to the State for repayment to the County constitute an indebtedness against the County in the year in which the contract was signed, the same as in the case of a contract to pay a specific sum of money, or is it a contract to be performed in the future, depending upon a

March 23, 1937

condition precedent, which may never be performed, and the amount of which can not be determined until performed, and which can not ripen into a debt until performed, and therefore payable out of the funds of the year in which completed? For instance, in the case of Trask vs. Livingston County 210 Mo. 582, cited in the McKim opinion above mentioned, l. c. 595, quoting with approval from Saleno vs. the City of Neosho 127 Mo. 639, the Court says that, 'A debt is understood to be an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, depending upon a condition precedent, which may never be performed, and which can not ripen into a debt until performed.' "

In determining whether or not the revenue of 1935 or the revenue of 1937 is liable for the work as performed by Mr. Merckling, we must consider the nature of the contract. It appears to be executory in nature, that is, to be performed in the future, depending upon a condition precedent, and the same does not ripen into a debt until it is performed, hence, we are of the opinion that the decision in the case of Tate v. School Dist. No. 11 of Gentry County 23 S. W. (2d) l. c. 1023, is applicable to the question. The decision in the Tate v. School Dist. case reviews and distinguishes the various cases relating to the question including Trask v. Livingston County, which was cited in the original opinion to Mr. McKim:

"The contract of employment of December 18, 1924, is one calling for the personal and professional services of plaintiff for a period of eight months, commencing on the 3rd day of August, 1925, and whereby the board of directors of the

school district contracted and agreed to pay plaintiff the sum of \$90 per month, payable monthly, 'for services properly rendered.' It is clear to our minds that such contract is wholly executory, and that the pecuniary liability of the defendant school district thereunder is contingent upon the rendition of such personal services by plaintiff. If, and as, such personal services are properly rendered by plaintiff from month to month, during the term of the contract, the school district becomes indebted to plaintiff for the personal services actually rendered by plaintiff. In the event of the death or disability of plaintiff, either before or during the term of the employment, the contract is terminated and discharged. 'Contracts to perform personal acts are considered as made on the implied condition that the party shall be alive and shall be capable of performing the contract, so that death or disability will operate as a discharge.' 13 C.J.644, and cases there cited. Thus the contract here in controversy might never be performed by plaintiff; in which event, of course, there is no pecuniary liability of the school district, and consequently no debt on its part. That such contract of employment is wholly executory and contingent is clearly recognized by the school statute (section 11138, R.S.1919), which provides that, 'should the schoolhouse (which the teacher is employed to teach) be destroyed, the contract becomes void.' We are constrained to the view that the mere execution of the contract of employment did not create

a debt of the defendant school district on December 18, 1924, within the meaning or intent of section 12, art.10, of the Constitution, and that the defendant school district did not become indebted to plaintiff, under the terms of the contract of employment, until the time for the performance of such contract had expired.

"Speaking to the subject, Mr. James M. Gray, in his standard treatise on Constitutional Limitations of the Taxing Power and Public Indebtedness, sec.2162, p.1117, says: 'The time when the debt actually comes into existence, as a binding obligation on the municipality, is the time as to which all calculations as to its validity should be made.'

"In *Saleno v. City of Neosho*, 127 Mo. 627, 639, 30 S.W. 190, 192, 27 L. R. A. 769, 48 Am. St. Rep. 653, wherein it was contended by the defendant municipality that a contract between defendant and plaintiff, whereby the defendant city agreed to pay plaintiff a fixed price annually for twenty years, by way of hydrant rental, for the use of water for the city and other purposes, created an illegal indebtedness of the city within the meaning of the aforesaid constitutional inhibition, this court en banc said: 'The only question that we have to deal with is as to whether the contract created an indebtedness upon the part of defendant, as contemplated by the constitution; and upon that question the authorities are not entirely in harmony. In construing words used in that instrument (i.e. the Constitution), in the absence of some restriction placed upon

their meaning, they must be given such meaning as is generally accorded to them. A debt is understood to be an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, depending upon a condition precedent, which may never be performed, and which cannot ripen into a debt until performed. Here the hydrant rental depended upon the water supply to be furnished to defendant, and, if not furnished, no payment could be required of it.' The learned writer of the opinion, Judge Burgess, then proceeds to review the authorities, pro and con, bearing upon the question for decision, and concludes: 'Our conclusion is that the weight of authority is adverse to the contention of defendant, and is in accord with the spirit and meaning of our constitution as we understand it, and as we think also comports with better reason. '

"While the correctness of the conclusion reached by this court in the Saleno Case, supra, has been sought to be questioned in subsequent cases, this court en banc has consistently adhered to, and followed, the rule of construction announced in the Saleno Case, although conceding, as was done in the Saleno Case, that there is some contrariety of judicial opinion on the subject. Vide Water Co. v. City of Neosho, 136 Mo. 498, 507, 38 S. W. 89; Lamar Water & Light Co. v. City of Lamar, 140 Mo. 145, 156, 39 S. W. 768; State ex rel. v. City of Neosho, 203 Mo. 40, 75, 101 S. W. 99. In Mountain Grove Bank v.

Douglas County, 146 Mo. 42, 56, 47 S. W. 944, this division of our court ruled, in substance and effect, that a debt of a county is created when the services are rendered, or when the goods are sold and delivered to the county; in other words, when the contract is actually performed by the party with whom the county has contracted.

"Appellant cites Trask v. Livingston County, 210 Mo. 582, 109 S. W. 656, 37 L.R. A. (N.S.) 1045, State ex rel. v. Gordon, 265 Mo. 181, 176 S. W. 1, and State ex rel. v. Hackmann, 280 Mo. 686, 218 S. W. 318, in support of its contention that the contract of employment herein violates the constitutional inhibition aforestated. In the Trask Case, the defendant county had contracted for the construction of two bridges in September, 1889, and an appropriation was made at that time for the purpose of paying the cost of the construction of such bridges, and the contract, by its terms, was to be wholly performed, and the bridges were to be constructed and completed, during the year 1889. The bridges were not accepted by the county, however, until May, 1890, and warrants were issued and delivered to the contractor by the county, in payment of the contract price of such bridge construction, in May, 1890,. It was held that the debt of the county was created in the year 1889, and not in the year 1890, when the bridges were accepted by the county and the warrants were issued to pay for the same; therefore the contract price for the construction of the bridges was held to be chargeable, as a debt of the county, against the

revenues of 1889, and not against the revenues of 1890. The gist of our rulings in the Gordon and Hackmann cases was that a county bond issue creates an immediate and binding debt of the county at the time the bonds are issued, sold, and delivered, although such bonds are payable in annual installments thereafter. Obviously the cases cited by appellant have no bearing or application upon the question for decision in the case at bar; namely, whether a wholly executory and contingent contract for personal services to be rendered at a future time, whereby a school district is obligated to pay for such personal services only when, and as, rendered by the opposite party to such contract, constitutes an indebtedness of the school district until such personal services have been actually rendered and the contract has been performed. Appellant has cited decisions from other and foreign jurisdictions which hold that similar contracts of employment are in derogation of like constitutional limitations upon the creation of municipal or quasi municipal indebtedness. We recognize that there is some contrariety of judicial opinion on the subject, as was recognized by this court en banc in the Saleno and kindred cases, supra, but the rule as announced by this court in the Saleno and kindred cases follows the weight of juristic authority, which is to the effect that executory and contingent contracts which are to be performed in futuro do not constitute an indebtedness against the municipal or quasi municipal corporation, in the sense of

Honorable Joseph V. Willhite -8- March 23, 1937

the constitutional inhibition,
until such contracts have been
performed."

Without burdening the opinion with further
decisions, we think that if the contract under which
Mr. Merckling was hired has now been completed and
if he is entitled to compensation according to the
terms of the contract, that his compensation should
be paid from the 1937 revenue.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

SCHOOLS: District of residence need not pay any of the first \$50.00 of high school tuition for its pupils.

4-21
April 20, 1937.



Honorable Bryan A. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Mr. Williams:

This is to acknowledge your letter dated April 17, 1937, as follows:

"I would be obliged if you would please let me have a ruling on the following question:

"If the per capita cost (teachers' and incidentals) of a public high school is \$50 or less can the district accepting high school pupils charge and collect from the pupils' home district tuition?"

We answer your question in the negative, in our opinion. Section 16, Laws of Missouri, 1935, page 351; State ex rel. Burnett v. School District of City of Jefferson, 74 S. W. (2d) 30,34.

Section 16, supra, specifically provides as to the rate of tuition as follows:

"* * * but the rate of tuition paid shall not exceed the per-pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars for the entire term, * * * the cost of maintaining the school attended shall be defined as the amount spent for teachers' wages and incidental purposes.

April 20, 1937.

* * * In no case, however, shall the amount collected from a pupil, parent, or guardian, exceed the difference between fifty dollars and the per-pupil amount actually paid by the State, nor shall the amount the district of the pupil's residence is required to pay exceed the amount by which the per-pupil cost of maintaining the school attended is greater than fifty dollars."

The court in State ex rel. Burnett v. School District, supra, reached the conclusion that Section 16 was exclusive and a complete scheme for the payment of tuition. The duty rests upon the school district of residence to pay the tuition of the pupils, less a deduction of fifty dollars for the entire term. In other words, the State is supposed to pay the first fifty dollars and if it does not, then the difference, whatever the amount might be, may be collected from the pupil or his or her parents or guardian. The district of residence pays that over and above the first fifty dollars. Therefore, the district of residence would not have to pay any of the first fifty dollars of a pupil's tuition.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

JLH:EG

TOWNSHIP TREASURER:

The township ex officio treasurer of township is not entitled to commission on money belonging to office which he turns over to his successor.

April 30, 1937.

5-12



Hon. Mark W. Wilson,
Prosecuting Attorney
Henry County,
Clinton, Missouri.

Dear Sir:

This Department is in receipt of your letter of April 24th, 1937, in which you request an opinion as follows:

"Sec. 12310 provides that the township treasurer receives as compensation 2% on receiving and disbursing all moneys coming into his hands as treasurer on the first \$1000.00, and 1% on all sums over that amount. In view of the above is an outgoing township treasurer entitled to a commission on paying over the balance in his hands to his successor in office? In other words is the turning over of the township funds by the treasurer to his successor a disbursing within the meaning of the law so as to entitle him to a commission?"

Section 12310, R. S. Mo. 1929, as amended Laws of Missouri, 1931, page 377, authorizes the payment of compensation to certain township officers, and a part of said section pertaining to the compensation of ex officio treasurer is as follows:

"That the township trustee, as ex officio treasurer, shall receive a compensation of 2% for receiving and disbursing all moneys coming into his hands as such treasurer when the same shall not exceed the sum of \$1000.00, and 1% of all sums over said amount."

The proper answer to this question, we think, depends upon the meaning to be placed upon the word "disbursing" as it is used in this section. Does this word, as it is used here mean the payment of township charges as they are defined in Sec. 12303 R. S. Mo. 1929, or does it mean the disbursing of said money for township charges and the turning over, by the treasurer, of the balance on hand at the end of his term to his successor? If this means disbursing for township charges and the turning over by the treasurer of the balance on hand to his successor, we cannot understand why the Legislature made disbursing one of the elements upon which the commission is to be based. They might well have said that the treasurer shall receive a commission on all money which he receives. It would have the same effect, because if the treasurer is to receive his commission on the money he turns over to his successor, he would be receiving a commission on all money which comes into his hands.

To so construe this section would not give effect to the word "disbursing", as is said in *State v. Daues*, 14 S.W. (2d) 1.c. 1002:

"It is an elementary and cardinal rule of construction that effect must be given, if possible, to every word, clause, sentence, paragraph, and section of a statute, and a statute should be so construed that effect may be given to all of its provisions, so that no part, or section, will be inoperative, superfluous, contradictory, or conflicting, and so that one section, or part, will not destroy another.* * *"

In *Wright's, Admr. v. Wilkerson*, 41 Ala. 1.c. 272, the court, when it had before it the interpretation of the phrase "receipts and disbursements", in determining what compensation should be allowed an administrator, said:

"The word disbursement in the same section evidently means money or currency paid out in extinguishment of the liabilities of the decedent, or the expenses of the administrator."

Section 12303, R. S. Mo. 1929, is as follows:

"The following shall be deemed township charges: First, the compensation of township officers for their services rendered in their respective townships; second, contingent expenses necessarily incurred for the use and benefit of the township; third, the moneys authorized to be raised by the township board of directors for any purpose, for the use of the township."

This section fixes the things which are liabilities of the township. The paying over by the ex officio treasurer to his successor at the expiration of his term of office, of the money belonging to the office, is not an extinguishment of the liabilities of the township, or a payment of administration expense, as is defined by Section 12303, R. S. Mo. 1929.

CONCLUSION.

Therefore, it is our opinion that in order to give force and effect to each word and phrase of Section 12310, R. S. Mo. 1929, as amended Laws of Missouri, 1931, page 377, the township trustee, as ex officio treasurer, is only entitled to a commission upon the funds expended for township charges, as they are defined in Section 12303, R. S. Mo. 1929, and is not entitled to a commission upon money belonging to the office which is turned over to his successor. This is not a disbursement within the meaning of said section upon which the treasurer is entitled to a commission.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

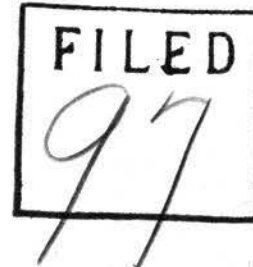
J. E. TAYLOR
(Acting) Attorney-General.

LLB/LD
EG

TAXATION:) Building and Loan association cannot be compelled
BUILDING & LOAN:) by county board of equalization to give list
of shareholders; shareholders must return list of
shares and actual cash value thereof; shares upon
which there is a loan need not be returned on the
assessment list.

May 6, 1937.

5-8



Honorable Andy W. Wilcox
Chairman
State Tax Commission
Jefferson City, Missouri

Dear Mr. Wilcox:

This is to acknowledge your letter as follows:

"I am enclosing you herewith a letter from the Central Savings and Loan Association of Marshall and ask that you render an opinion on the three points indicated in this letter.

"I would like to have this opinion as soon as possible as the Board of Appeals in that County will adjourn in the next few days."

The letter from the Central Savings and Loan Association, enclosed with your letter, reads in part as follows:

"We have been called upon by the Board of Equalization of this County for a list of our shareholders for the purpose of arriving at the amount of personal tax which they might owe due to their ownership of shares in this Association. There seems to be a difference of opinion among our attorneys here as to whether or not the Board of Equalization has the right to demand this list of shareholders. I wish therefore that you would let me have a written opinion upon the following three points:-

- "1st - Does the Board of Equalization have the right to demand this list of shareholders?
- "2nd - If the shareholder gives in his shares to the Assessor, is he supposed to be taxed upon the book value or the market value of these shares?
- "3rd - If the shares at par value or at matured value should equal more than the loan upon which this stock is issued, would the shareholder have to pay upon this difference, or would he have to pay upon the shares at all? In order to make this question clear, I would like to make an example, saying that the shareholder has \$1,000.00 worth of shares at par value or matured value and he has borrowed thereon \$600.00, should he be required to pay a tax upon the difference of \$400.00, or should he be required to pay any tax at all?"

I.

Does the Board of Equalization have the right to demand a list of a building and loan association's shareholders?

A building and loan association is not required by any statute to make a return to the assessor showing the shareholders and the amount of stock or shares such shareholders have in the association. Shareholders return an assessment list which discloses the number of shares or stock such own.

Section 9768, R. S. Mo. 1929, in part reads as follows:

"All parties holding stock or shares as owners or in trust in any building and

loan association in this state, on which no loan has been obtained from such association, shall be required to give a just and true list of the same to the assessor, with the actual cash value of each share on the first day of June in each year. * * * and any failure on the part of such owner, holder or depositor of such shares, shall subject such holder to the same penalties now provided for failure to give to the assessor a true list of all taxable property, verified by affidavit."

You will therefore note that the duty rests with the owner of the shares or stock to make a return to the assessor. No duty rests upon the building and loan association to return a list. The letter from the Central Savings and Loan Association states that the County Board of Equalization asked for a list of their shareholders, and the question presents itself as to whether the association has to comply with said request.

Article 3, Chapter 59, R. S. Mo. 1929, relates to "County Boards of Equalization." Section 9812 defines the powers and duties of the board, providing in part the following:

"Said board shall have power to hear complaints and to equalize the valuation and assessments upon all real and personal property within the county which is made taxable by law."

Section 9816 of said article and chapter provides that the county board may assess property omitted from the assessor's books. However, before the county board can assess property omitted from the assessor's books "it shall cause notice in writing to be served upon the owner of such property, stating the kind and class of property and the value fixed thereon by said board, and naming the time and place, not less than five days thereafter, when and where such owner may appear before said board and show cause why said assessment should not be made."

Section 9813 of said article and chapter prescribes rules to be observed by the county board of equalization, providing in part as follows:

"But, after the board shall have raised the valuation of such real estate, it shall give notice of the fact, specifying the property and the amount raised to the persons owning or controlling the same, by personal notice, through the mail or by advertisement in any paper * * *"

Section 9815 of said article and chapter gives the county board of equalization the power to subpoena persons and compel attendance. Said section reads in part as follows:

"The said board of equalization shall have power to send for persons and papers and compel the attendance of witnesses in relation to any appeal before them."

Section 9762, R. S. Mo. 1929, reads in part as follows:

"If any person shall, with intent to defraud, deliver to any assessor a false list of his property, it shall be the duty of the assessor to give notice in writing thereof to the county board of equalization; and the said board shall, on receiving such notice, give notice thereof to the person who shall have furnished such false list, which notice shall specify the particulars in which said list is alleged to be false, and shall fix a time for a hearing of the matter, * * *"

You will note from a reading of the above statutory provisions that the county board of equalization must have a specific case pending before it may compel the attendance of witnesses. In other words, if a person failed to list property the county board could make an assessment and give notice to

the party against whom the assessment was made and set the matter for hearing. At the hearing the county board could compel the attendance of any witness who would be in possession of any fact material and relevant to the matter under consideration. Also, if a person gave a false list the county board of equalization, after notice, could conduct a hearing and at that hearing could compel the attendance of any witness or the production of any books or papers material and relevant to the matter under consideration. In other words, the county board of equalization must have a definite matter before it in order to compel attendance and the production of books and papers. It does not have the right to compel the attendance of witnesses or the production of books and papers merely for the purpose of inquiry or investigation.

The Supreme Court of Missouri, en banc, in the case of *In Re Sanford*, 236 Mo. 665, said (p. 686):

"We are therefore of the opinion that there was a cause pending and on trial before the board of equalization at the time the petitioner refused to testify; but not upon an appeal within the strict legal sense of that word, but by virtue of the fact that the petitioner, under the authority of the statutes before quoted invoked the aid of the board to review and modify the false assessment, which was objected to by Hendrix."

In the *Sanford* case a taxpayer by the name of Hendrix made a return of his taxable property but on the list he showed that he had no money on hand or on deposit. The assessor made a report as required by Section 9762, R. S. Mo. 1929, that Hendrix made a false and fraudulent return. The county board of equalization met and gave notice to Hendrix to appear. Hendrix appeared and the board subpoenaed Sanford, Cashier of the Holland Banking Company, and requested the production of the books and papers of said bank relating to Hendrix' bank account. The Cashier, Sanford, refused to testify and was adjudged in contempt. Upon application by Sanford for release on a writ of habeas corpus the court denied said writ, holding that Sanford would have to testify and produce the records and books of the bank in so far as such pertained to the case before

the Board.

In a later case, namely, Aven v. Wynes, 223 S. W. 583, Division No. 2 of the Supreme Court of Missouri granted a writ of habeas corpus, holding (p. 585):

"The Board of Equalization of Cedar County was without authority to compel the attendance of petitioner or commit him for failure to testify or produce the books of his bank. The prisoner is therefore discharged."

The facts in the above case disclosed that petitioner Aven was Cashier of the Bank and the Board ordered him to appear "and testify in a certain matter of investigation before the Board and to produce in evidence his record of time deposits of patrons of the institution of which he was Cashier." Aven appeared and refused to testify and the Board committed him for contempt. The court held that as there was no cause pending before the Board that the Board of Equalization did not have the power to compel Aven as a witness or to produce books belonging to the corporation.

Corpus Juris, Vol. 61, p. 827, has the following to say:

"Attendance of a witness under the statute can be compelled, however, only where the proceedings before the board is valid."

As heretofore pointed out, the assessment of shares or stock of a building and loan association is made in the individual's name (Section 9768, supra); the county board of equalization must give notice and have a particular cause pending before it, before it can compel the attendance of witnesses.

Therefore, it is our opinion, in answer to your first question, that the County Board of Equalization could not compel by process of law a list of shareholders of the Central Savings and Loan Association. However, it is our further opinion that if the County Board of Equalization has a cause pending, namely, the assessment of a shareholder, then the Central Savings and Loan Association would be compelled to produce its books and give testimony concerning said shareholder.

May 6, 1937.

It is thus seen that there is quite a difference between the production of a list of all shareholders and the giving of testimony and production of books relating to specific instances or cases concerning shareholders. Of course, if the association voluntarily wants to give a list of the shareholders, that is a matter up to the board of directors. However, the board cannot be compelled to give the list unless there is a cause pending and on trial before the Board of Equalization.

II.

If the shareholder gives in his shares to the Assessor, is he supposed to be taxed upon the book value or the market value of these shares?

Section 9768, R. S. Mo. 1929, provides in part as follows:

"All parties holding stock or shares as owners or in trust in any building and loan association * * *, shall be required to give a just and true list of the same * * * with the actual cash value of each share * * * and the tax shall be levied upon said shares, and collected from such holder or depositor of the same, as taxes on other personal property."

There is quite a difference in some instances between the book value and the market value of shares of stock. As Section 9768, supra, uses the words "actual cash value," we are of the opinion that the cash value of the shares should be returned on the assessment list and not the book value.

III.

Are shares upon which there is a loan required to be returned for taxation?

Section 9768, supra, specifically provides that no return is necessary on shares or stock which has a loan on same. Said provision, pertinent, reads:

"On which no loan has been obtained from such association."

May 6, 1937.

As Section 9768, supra, provides that a person does not have to place on his assessment list shares of stock in a building and loan association, on which a loan has been obtained, it is our opinion that when there is a loan on shares of stock that regardless of the size or amount of the loan that such shares of stock do not have to be returned by the individual on his assessment list. We invite your attention to two cases concerning taxation of building and loan shareholders, namely, *Kansas City v. Mercantile Mutual Building and Loan Association*, 145 Mo. 50, and *State ex rel. v. Stamm*, 165 Mo. 73.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

(Acting) J. E. TAYLOR
Attorney-General

JLH:EG

DRAINAGE & LEVEE DISTRICTS:)
LEVEE & DRAINAGE DISTRICTS:)
COUNTY TREASURER:) Fees due county treasurer for disbursing
TAXATION AND REVENUE:) levee funds organized under county
COUNTY TREASURER'S FEES:) courts.

May 18, 1937.

5-18



Honorable W. P. Wilkerson
Prosecuting Attorney
Scott County
Benton, Missouri

Dear Sir:

This is to acknowledge your letter of recent date in which you asked this Department numerous questions. Your letter is as follows:

"On the first of the year the offices of County Treasurer and collector were combined in this County. Up to now the County Treasurer has been getting a commission on disbursements of Levee Districts under the provisions of Section 10969. He has also been drawing a commission on disbursements of County Court Drainage Districts. This has always been done here and when I sought authority for allowing the commission on Drainage District funds was cited to Sec. 10881.

"In view of the fact that the County Collector-Treasurer will make his first settlement soon I should like very much to be advised:

"1. Whether his commission on disbursements of Levee Districts are non-accountable, that is whether they go to him in excess of his \$5500.00 limit as allowed by the statute.

"2. Whether Sec. 10881 constitutes any authority whatever for the payment of a fee on County Court drainage District Funds disbursed by the Collector-Treasurer, where the districts are long established and are not in process of organization. And if not,

May 18,
~~Feb. 23,~~ 1937.

whether there is any authorization for such a commission in law, and if there is no authorization in law, whether the County Court has the power to contract for the payment of such compensation.

"3. If it is determined that the County Collector-Treasurer is entitled to the fee mentioned in 2 above or can contract for a commission with the County Court, then we would like to know whether or not this commission is non-accountable."

We note that your county comes under the provisions of a law enacted by the 57th General Assembly, Laws of Missouri, 1933, page 338, Section 11232a, providing that the county treasurer shall take over all the duties now performed by the county treasurer and such collector shall be county collector and ex officio county treasurer and shall perform any and all duties now devolving upon the county collector and county treasurer, under which statute the county collector performs the duties of the county treasurer. We shall undertake to answer the questions asked by you in the order submitted in your request.

I.

Whether his commission on disbursements of Levee Districts are non-accountable, that is, whether they go to him in excess of his \$5500.00 limit as allowed by the statute?

We assume from your statement that your collector comes under the provisions of sub-division 13, Laws of Missouri, 1933, p. 458, which limits the amount of money retained by the county collector in your county to \$5500.00.

In the case of Little Drainage District v. Lassater, 29 S. W. (2d) 716, 1. c. 719, the court said:

"The constitutional inhibition only applies to compensation or fees of officers for performing duties incident to their offices, and has no application to additional duties imposed upon such officers not ordinarily incident to their offices. State ex rel. McGrath v. Walker, 97 Mo. 162, 10 S. W. 473;

May 18,
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State ex rel. Hickory County v. Dent, 121 Mo. 162, 25 S. W. 924; State ex rel. Linn County v. Adams, 172 Mo. 1, 72 S. W. 655; State ex rel. Harvey v. Sheehan, 269 Mo. 421, 190 S. W. 864; State v. Zevely v. Hackmann, 300 Mo. 59, 254 S. W. 53; State ex rel. Barrett v. Boeckler Lumber Co., 302 Mo. 187, 257 S. W. 453.

"The collection of drainage district taxes is no part of the duties ordinarily incident to the office of county and township collectors. Such duties are additional duties dependent upon the existence of a drainage district having lands, taxable for district purposes, lying within the territorial jurisdiction of such officers. In collecting such taxes, county and township collectors are officers and agents of the particular drainage district. They are required to give separate bonds to such district. Section 4396, R. S. 1919. The provisions of section 8, art. 14, of the Constitution, are not violated by section 4575."

While this case refers to the township collector in the collection of drainage district taxes, we think that it is an analogous case and is authority that the fees or compensation received by the county collector and ex officio county treasurer under Sections 10881 and 10969, R. S. Mo. 1929, is not such a fee which must be accounted for by him in his \$5500.00 limitation.

II.

Coming now to the second question in your letter we find that Section 10881, R. S. Mo. 1929, which was enacted Laws of Missouri, 1913, page 321, and is found in Article 4, Chapter 64, R. S. Mo. 1929, provides:

"County Treasurers for receiving, receipting for, preserving and paying out funds of drainage and levee districts, shall receive one per cent. of sums paid out."

May 18,
Feb. 23, 1937.

From your question we note that you give some force and effect to the words "fees for services rendered in organizing drainage and levee districts" under Article 4, and on examination of the Session Acts of 1913, at page 321, we find that the same words are therein used as the heading for same. This is no part of the Act and we refer you to that part of the enacting clause which provides:

"An Act defining the fees to be paid county and township officers for services rendered drainage and levee districts organized in Missouri."

It does not state that they are fees for services rendered in organizing drainage and levee districts.

In the case of King v. Riverland Levee District, 279 S. W. 195, 1. c. 196, the court said:

"It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. State ex rel. Evans v. Gordon, 245 Mo. 12 loc. cit, 27, 149 S. W. 638;"

It is, therefore, our opinion that the fees earned by the treasurer are fixed by the statute and there is no necessity of any contract as mentioned in your letter.

III.

Answering the third question asked in your letter, we think that the case of Little Drainage District v. Lassater, supra, is authority for the holding that these fees paid to the treasurer for services rendered to the drainage and levee districts, are not accountable fees.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR

ASSESSOR: Under Section 12357 is to receive four cents for the complete blank and not for each separate item filled out in said blank.

May 25, 1937

Honorable Bryan A. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri



Dear Sir:

This Department is in receipt of your letter of May 13, 1937, requesting an opinion on a portion of section 12357, Revised Statutes Missouri 1929. Your letter is as follows:

"Referring to Sec. 12357 (R.S. 1929), particularly that part of same reading as follows:

" ' . . . The assessor shall receive for such additional assessment service as required in this section an additional fee of four cents for each individual statistical listing of land acreage and other accompanying agricultural statistics filed by him with the secretary of said board of agriculture, . . . '

"The Assessor of Bollinger County has asked the following question:

" 'Am I entitled to 4 cents for each separate item that is filled out on the blanks furnished me, or am I only entitled to 4 cents for filling out one complete blank?' "

Section 12357 is under Article I, Chapter 87,

May 25, 1937

captioned "Agriculture." The purpose of the section is to obtain reliable data or statistics from year to year of soil under cultivation. The burden of the fee, for assembling the data, was evidently placed on the office of assessor because the assessor could obtain the information more easily than any other officer. The data can be collected by the assessor as he makes his annual assessments of personal and real property. The portion of the statute quoted in your letter, as it relates to the fee, is as follows:

"additional fee of four cents for each individual statistical listing of land acreage and other accompanying agricultural statistics filed by him with the secretary of said board of agriculture."

It must be conceded that the above portion of the statute is not crystal clear. The confusing words are "each individual statistical listing of land acreage."

Section 12357, formerly 11943, Revised Statutes Missouri 1919, was declared constitutional in the case of State ex rel. Board of Agriculture v. W. W. Woods, 317 Mo. 403. The decision throws no light on the question which you present. The recent case of State v. Gomer, 101 S. W. (2d) 57, relates to assessors' fees, but also has no reference to the question which you present. However, in the Gomer decision, the court refers to various forms of "lists" which are to be made by the assessor and the compensation that the assessor is to receive for each list. The case would, therefore, have bearing on the intention of the Legislature in enacting Section 12357, in that the data to be obtained by the assessor under Section 12357 is to be considered as in the case of assessing other property as one list to each individual. We cannot interpret the statute to mean other than the assessor is to receive four cents for each blank properly filled out showing the data as required, and that the word "listing" of land acreage and agricultural statistics

Honorable Bryan A. Williams

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May 25, 1937

means the list from one individual of all this data the same as the list as used in the sections relating to the assessment of real and personal property. In other words, the assessor is to receive four cents for one complete blank and not four cents for each separate item contained in the blank.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

COLLECTORS: Rule for determining the classification under Section 9935. Taxes levied for special road district to be included in classification.

June 7, 1937.



Mr. A. A. Willard,
Collector of Revenue,
Dallas County,
Buffalo, Missouri.

Dear Sir:

This Department is in receipt of your request for an opinion, which reads as follows:

"The question has arisen as to charges determining collector's pay.

Section 9935 in Missouri Laws of 1933 sets out wherein the whole state, county, bridge, road, school and all other local taxes including merchants and dram shop licenses assessed and levied for any one year, (setting out the amount) shall determine the class wherein each collector of the various counties shall settle.

The question is: Does the taxes for special road districts which is levied by the local road commissioners of the various road districts count the same as other taxes as to charges to determine collector's class?"

Section 9935, R. S. Mo. 1929, as amended in the Laws of 1933, page 454, Extra Session, Laws of Missouri 1933-34, page 104, and in the Laws of 1935, page 406, reads in part as follows:

"The collector, except in counties where the collector is by law paid a salary in lieu of fees and other compensation, shall receive as full compensation for his services in collecting the revenue, except back taxes, the following commissions and no more:

"I. In each county in this state wherein the whole state, county, bridge, road, school and all other local taxes, including merchants' and dramshop licenses, assessed and levied for

June 7, 1937.

any one year amount to _____
dollars or less, a commission of _____
per cent on the amount collected."

While this law, in the form above, has been on the statute books since 1877, there seems to be no case wherein the courts have directly interpreted this section in the light of whether when it says the whole taxes "assessed and levied", it means all taxes assessed and levied or only those to be collected by the collector.

Two rules in construing statutes are that statutes should receive a sensible construction such as will effect the legislative intention and, if possible, so as to avoid an unjust or an absurd conclusion, *State ex rel. Taylor v. Daues*, 281 S. W. 398, 313 Mo. 200; and that the court in construing a statute should avoid an unreasonable construction where a reasonable construction can be adapted. *State ex rel. Pearson v. Louisiana R. R. Co.*, 114 S. W. 956, 215 Mo. 479.

In *State ex rel. Scotland Co. v. Ewing*, 116 Mo. 129, 22 S. W. 476, the court held:

"It is manifest from a reading of the foregoing provisions that the per cent of commissions should have been determined by the amount of all such taxes levied, that is by the amount ordered or required to be raised and not by the amount actually collected."

"Commission" is defined in *Purefoy v. Godfrey*, 150 Ala. 142, 16 So. 701 as,

"When used to express compensation for service rendered, it usually denotes a percentage on the amount of moneys paid out or received."

We believe a reasonable construction of Section 9935, *supra*, is that the legislative intent was to fix the per cent classification so that if the collector collected the entire amount, he would receive a fair compensation for the work which was involved in collecting that amount. However, the legislature must have taken cognizance, as they did in the Budget Act, that the entire amount of taxes assessed and levied for any year are as a matter of actual practice rarely collected that year, so they placed his commission "on the amount actually collected," that is, as was said in *Gordon v. Lafayette County*, 74 Mo. 426, "None is allowed for ineffectual effort to collect the revenue." As was pointed out in an opinion rendered by this Department to Lewis A. Duvall on August 21, 1935, a copy of which is enclosed:

"Since the collector does not collect said tax and consequently receives no commission therefor, it is apparent that the corporation franchise tax should not be included in the amount of the taxes assessed and levied for the purpose of determining the collector's commission."

Watson v. Schnecko, 13 Mo. App. 208, we believe aptly states the rule when it says the classification of the counties is by the "gross amount of collections in each whereupon the percentage is fixed in each instance on the amount collected." To hold otherwise would be to put a strained construction on Section 9935, supra, and would result in an unfair and unjust conclusion. There might be two collectors who both collect the same amount of taxes. However, if one county had a large amount of taxes assessed and levied which were not to be collected by the collector but were included in determining the percent classification, then the collector of that county would have a lower rate of commission on the taxes he collected than the collector in the other county which had no such taxes and consequently the first collector would receive less compensation than the second, although the amount collected and the work involved was the same.

Therefore, having concluded that the classification of the county be determined by the amount of taxes, assessed and levied, that are to be collected by the collector, we next turn to your question of whether "taxes for special road districts which is levied by the local road commissioners of the various road districts count the same as other taxes as to charges to determine collectors class?"

From your question we infer that you refer to "special road districts--benefit assessments in counties not under township organization" as set forth in Article 10, Chapter 42, Revised Statutes of Missouri, 1929, because this is the only special road district in which the board of commissioners may levy taxes.

Section 8067, R. S. Mo. 1929, provides in part as follows:

"The board of commissioners of any district so incorporated shall have power to levy, for the construction and maintenance of bridges and culverts in the district, and working,

repairing and dragging roads in the district, general taxes on property taxable in the district, and shall also have power and authority and be its duty to levy special taxes for the purpose of paying the interest on bonds when it falls due and to create a sinking fund sufficient to pay the principal of such bonds at maturity; and, whenever such commissioners shall, at any time between the first day of January and the first day of March of any year, file with the clerk of the county court a written statement that they have levied such tax, and stating the amount of the levy for each hundred dollars assessed valuation, the county clerk, in making out the tax books for such year shall charge all property taxable in such district with such tax, and such tax shall be collected as county taxes are collected. * * *

It is apparent from the above statute that the taxes levied by the road commissioners are to be collected by the county collector and so the amount should be included with the other taxes so as to determine in which classification the collector falls so as to determine the percent he is allowed. We, however, direct your attention to Section 8066, R. S. Mo. 1929, and which provides that the poll tax shall be collected by the commissioners. This tax is not to be included in the classification.

We set forth in detail above the rule to be followed in determining the class so that you may have a guide from which to determine your percent.

It is, therefore, the opinion of this Department that under Section 9935, supra, only taxes that are to be collected by the collector are to be included in the classification which determines the percent the collector is to receive. It is further the opinion of this Department, that

A. A. Willard

Page 5.

June 7, 1937.

since under Section 8067, supra, the county collector is to collect the taxes levied by the commissioners of a special road district, such taxes should be included in the classification to determine the collector's percent.

Yours very truly,

Olliver W. Nolen,
Assistant Attorney-General.

APPROVED:

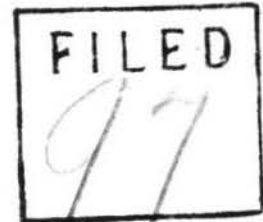
J. E. TAYLOR
(Acting) Attorney-General.

AO'K MR

CRIMINAL COST: Neither State, County or Prosecuting Attorney's Office are liable for cost when a person charged with a felony on complaint of prosecuting attorney, is discharged by examining official, or at request of Prosecuting Attorney.

June 11, 1937

6/12



Honorable Mark W. Wilson
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Sir:

This department is in receipt of your letter of June 3, 1937, in which you request an opinion as follows:

"The prosecuting attorney signs a complaint on his own information and belief, charging a defendant with a felony, and the defendant is arrested, but before the preliminary hearing the prosecuting attorney decides the defendant is not guilty and has the justice of the peace dismiss the charge. Is the justice entitled to make a cost bill and collect his fees and the Sheriff's? If so who would be liable for the costs the State or County?"

Section 3832 Revised Statutes Missouri 1929, is as follows:

"If a person, charged with a felony, shall be discharged by the officer taking his examination, the costs shall be paid by the prosecutor or person on whose oath the prosecution was instituted, and the officer taking such examination shall enter judgment against such person for the same, and issue execution therefor immediately; and in no case shall the state or county pay the costs."

June 11, 1937

The last clause of this section provides, as you will notice, as follows:

"And in no such case shall the state or county pay such costs."

In *Cummings vs. Kansas City Public Service Company*, 66 S.W. (2d) 920, 1. c. 931, the court said:

"It is, of course, fundamental that where the language of a statute is plain and admits of but one meaning there is no room for construction."

This is the situation here. Section 3832 R.S. Mo. 1929, provides that where a person charged with a felony is discharged by the examining officer, the prosecutor or person on whose oath the prosecution was instituted shall pay the costs and in no such case shall the state or county pay said costs. The fact that the Prosecuting Attorney requested the dismissal of said charge, is of the same effect as the examining officer discharging said person.

Section 3510 Revised Statutes Missouri 1929 concerning costs in criminal prosecutions is as follows:

"When the information is based on an affidavit filed with the clerk or delivered to the prosecuting attorney, as provided for in section 3505, the person who made such affidavit shall be deemed the prosecuting witness, and in all cases in which by law an indictment is required to be indorsed by a prosecutor, the person who makes the affidavit upon which the information is based, or who verifies the information, shall be deemed the prosecutor; and in case the prosecution shall fail from any cause, or the defendant shall be acquitted, such prosecuting witness or prosecutor shall be liable for the costs in the case not otherwise adjudged by the court, but the prosecuting attorney shall not be liable for costs in any case."

June 11, 1937

Therefore, it is the opinion of this department that when a person charged with a felony on complaint of Prosecuting Attorney is discharged by the examining officer, or the charge is dismissed at the request of the Prosecuting Attorney, that neither the state, county nor Prosecuting Attorney are liable for the costs which have accrued in said case, and that the officers concerned are not entitled to collect any costs in such case.

I am enclosing a copy of an opinion upon this subject written to B.G. Dilworth, Prosecuting Attorney of Dent County on April 8, 1937, by the Honorable Russell C. Stone, Assistant Attorney General.

Respectfully submitted,

A. R. HAMMETT, Jr.,
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General

ARE:MR
Enclosure.

TAXATION-
ABANDONED RAILROAD
RIGHT-OF-WAY:

)
) Mode of collecting tax on same.
)

July 27, 1937

7-28



Honorable Andy W. Wilcox
Chairman, State Tax Commission
Jefferson City, Missouri

Dear Sir:

This office acknowledges receipt from your Department of the following letter:

"This department is desirous of an opinion relative to the collecting of delinquent taxes on abandoned railroad right-of-way called to our attention by the County Collector of Polk County, whose letter we are enclosing herewith".

Accompanying this letter was a request from the County Collector of Polk County, Missouri, as follows:

"Please let me have information as to how to handle the tax on the abandoned Kansas City Clinton and Springfield Railroad. They have taken up the track and have not paid 1936 tax. Also they have said they do not intend to pay them.

"The tax is charged on the Railroad tax book with no description of the land. Will this have to be cut up into description by the quarter and advertised as other land, or will it have to be transferred to the land book?

Honorable Andy W. Wilcox -2-

July 27, 1937

"There are a number of parties who would like to pay on the right-of-way through or by their place but I do not know what or how to handle it. I'll appreciate an early instruction."

It appears from the request of the Collector that he is treating this property as having been abandoned by the railroad company. In such case the right-of-way- that is, that portion of the right-of-way as has been obtained by condemnation, reverts to the owner and his heirs and assigns. Section 21, Article II, Constitution of Missouri.

That portion of the right-of-way which was conveyed to the railroad with reverter clause in the deed providing that such land should revert to the grantor, his heirs or assigns when such railroad discontinued the use of the right-of-way for right-of-way purposes, reverts to such grantors and their heirs and assigns upon the abandonment of the right-of-way by the railroad. *Hatton v. K.C. C. & S. R.R. Co.*, 162 S. W., 1.c.234.

If the railroad obtained land by purchase and without a reverter clause then upon termination of its use as a right-of-way it continues to hold such lands in fee.

The procedure for collection of delinquent railroad taxes is set out in Sections 10035, 10037, 10038, 10039 and 10040 of the R. S. Mo. 1929, and if this property referred to as abandoned right-of-way has been properly assessed upon the railroad tax book, then the procedure would be as suggested by the foregoing Sections.

July 27, 1937

Section 9788, R. S. Mo. 1929 provides as follows:

"If the assessor discovers any real property, presumed to be subject to taxation, which has not been returned to him by the clerk, he shall assess such property and enter the same on the assessment list. And if, upon the return of such list to the clerk, it shall appear that any such real property has not been returned by the Auditor, it shall be the duty of the clerk to advise the auditor of the facts, describing the property so returned by the assessor, and the auditor shall ascertain the true condition of such real property, and advise the said clerk thereof, who shall correct the records of his office in accordance with the facts in the case."

Section 9789, R. S. Mo. 1929 provides as follows:

"If by any means any tract of land or town lot shall be omitted in the assessment of any year or series of years, and not put upon the assessor's book, the same, when discovered, shall be assessed by the assessor for the time being, and placed upon his book before the same is returned to the court, with all arrearages of tax which ought to have been assessed and paid in former years charged thereon".

Section 9810, R. S. Mo. 1929 provides as follows:

"Whenever, for any cause except when exemptions have been granted by law, there has been a failure to assess the property in any county for any year or years, the assessor of said county for the time being shall assess the property for the year or years in which said failure shall have occurred. Such assessment shall be made at the same time as is now provided by law for the assessment of property, the assessment for each year to be in a separate book, In making the said assessment, and in all subsequent proceedings thereon, the assessor, county court, clerk of the county court and collector shall be governed by the same law as is now in force for the assessment and collection of taxes, and shall receive the same compensation as is now provided by law for similar duties".

If the tax upon this property has not been properly assessed and charged on the railroad tax book, and if it does not appear upon the land book, then the mode for assessment and collection of the tax is set out in the first three sections of the statute cited above.

Honorable Andy W. Wilcox

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July 27, 1937

CONCLUSION

It is therefore the opinion of this Department that such taxes as appear on the railroad tax book in the Collector's office that have been properly assessed, if delinquent, should be collected in the manner and form as set out in Sections 10035, 10037, 10038, 10039 and 10040, R. S. Mo. 1929.

If such property has been abandoned, and if for any year or years this property does not appear upon the tax books, then it is the duty of the County Assessor to treat such property as omitted property, and to place it upon the tax books as is set out in the foregoing Sections 9788, 9789 and 9810, R. S. Mo. 1929, assessing such property to the proper owners thereof, and that the question of who is the owner will depend upon facts which this Department is not in a position to pass upon with the information it has.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

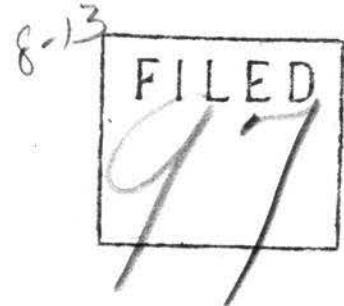
J. E. TAYLOR
(Acting) Attorney General

TWB/R

COUNTY COURT: ROAD BONDS: Section 7963, R. S. Mo. 1929, requires proceeds of road bonds to be turned over to the township treasurer and disbursed by him on order of county court.

August 10, 1937.

Mr. Mark W. Wilson,
Prosecuting Attorney,
Clinton, Missouri.



Dear Sir:

This will acknowledge receipt of your inquiry which is as follows:

"I have been asked by the County Court of Henry County, Missouri, to request of your office an opinion and ruling on the above statute.

"This county is under township organization. Under a portion of section of the statute to be found in Chapter 42, Article 5, the County Court is authorized to call a special election in townships properly petitioned for the purpose of voting on the issuance of road bonds in such townships. Section 7963 provides that the County Court on behalf of the townships (in counties under township organization), shall sell said bonds and the proceeds shall be paid over to the treasurer of the township and be by him disbursed on the order of the Board of Commissioners or the County Court. From a reading of the section it is apparent that elsewhere the term "Board of Commissioners" refers to the Board of Commissioners of Special Road Districts and there is no direct authority contained in the statute authorizing the expenditure of bond money thus acquired and that it be expended by the order and under the direction and control of the County Court. There may be some judicial interpretation of this section of the statute whereby

August 10, 1937.

the language herein used is broadened so as to permit the expenditure of such funds upon the order of the township board. Since the statute does not state that such money shall be expended except upon the order of the Board of Commissioners or the County Court it would seem that here is a grave question as to the authority of the County Court permitting Township Boards to direct the direction of such funds since the County Court as a general rule is considered, generally, the supervisor of all political subdivisions forming a part of the county government.

"Please furnish my office with an opinion on the above subject so that I may advise the County Court of this county."

Section 7960, R. S. Mo. 1929, provides when county courts may issue road bonds on behalf of townships in their respective counties, in part, as follows:

" * * * county courts of the several counties, on behalf of any township in their respective counties, are hereby authorized to issue road bonds to an amount, including existing indebtedness, not exceeding five per centum of the assessed valuation of such * * * township, * * * to be ascertained by the assessment next before the last assessment for state and county purposes. Such bonds shall be issued in denominations of one hundred dollars or some multiple thereof, to bear interest at not exceeding six per centum per annum, payable semi-annually, and to become due and payable at such times as the * * * county courts shall determine by order of record, not exceeding twenty (20) years from date of issue."

Section 7961, R. S. Mo. 1929, makes it the duty of the county court to order an election in the township upon the question of issuing road bonds upon the filing with the clerk of the court of a petition asking for such bonds:

"* * * whenever twenty legal voters of any township shall file with the clerk of the county court wherein the township is located a petition in writing asking that bonds for road purposes be issued for and on behalf of such township, it shall be the duty of the court to order an election to be held in such township upon the question of issuing bonds. The notice of election, in either case, shall state the amount of bonds to be issued and the polling place or places at which the election is to be held, and shall be published once each week for three consecutive weeks in some newspaper published in the county wherein is located the township * * *; the first publication to be at least twenty-one days prior to the date of the election, computed as is provided in section 655, R. S. 1929, * * *. The county court, on behalf of the township, * * * shall appoint the judges and clerks of election, and the returns of the election shall be filed with the clerk of the county court * * *, and be canvassed by the county court * * * and the result ascertained by, and entered upon the records of, such court * * *: Provided, that no person shall be permitted to vote at such election who would not be qualified to vote at a general election were a general election held on that day. If it shall appear that two-thirds of the voters voting at such election on said question shall have voted in favor of the issuance of said bonds, * * * the county court * * * shall order and direct the execution of the bonds for and on behalf of such * * * township, and shall provide for the levy and collection of a direct annual tax upon all the taxable property in said * * *

township sufficient to provide for the payment of the principal and interest of the bonds so authorized as they respectively become due. * * * At the time the county court is required to determine and levy the rate of taxation for state, county, school and other taxes, to determine, order and levy such a rate of taxation upon the taxable property in any township in such county as may have outstanding bonds issued under this section as will be sufficient to pay interest and principal falling due during the next succeeding year. It shall be the duty of the clerk of the court to extend upon the tax books of the county such rate of taxation upon and against all of the taxable property in such township, and when so extended the same shall be collected by the collector of the revenue at the time, in the manner, and by the means that state, county, school and other taxes are collected. All of the laws, rights and remedies of the state of Missouri for the collection of state, county, school and other taxes, shall be applicable to the collection of taxes herein authorized to be collected."

Section 7962, R. S. Mo. 1929, provides the form of the ballot to be used at the election held upon the question of issuing township road bonds.

Section 7963, R. S. Mo. 1929, provides when and how the bonds are to be sold, in part, as follows:

" * * * the county court on behalf of the townships, shall sell said bonds to the best advantage and the proceeds shall be paid over to the treasurer of the * * * township * * * and be by him disbursed, on the order of the * * * county court, in payment of the cost of holding said election and in paying the cost of constructing or improving roads in such districts or townships, including bridges and culverts."

The above section is clear and unambiguous, providing that when the county court has sold the bonds, the proceeds are to be turned over to the township treasurer, and to be disbursed by him on the order of the county court.

Section 7963, supra, was construed by the court in the case of State ex rel. v. Affolder, 257 S. W. (Mo. App.) 493, 1. c. 494:

"Does section 13204, R. S. 1919, prohibit defendant from paying the warrant? This section reads:

"The township trustee and ex officio treasurer shall not pay out any moneys belonging to the township for any purpose whatever, except upon the order of the township board, * * * and attested by the township clerk."

"This section was enacted in 1879 (Laws 1879, p. 225), when the Township Organization Act was passed, and has come down without substantial change. Section 10750, R. S. 1919, was passed in 1917 (Laws 1917, p. 473), and provides among other things as stated, supra, that the proceeds of the bonds shall be paid over to the township treasurer and by him disbursed on the order of the county court, etc. In State ex inf. Major v. Amick, 247 Mo. loc. cit. 292, 152 S. W. loc. cit. 597, the court said:

"Where there are two acts and the provisions of one apply specially to a particular subject, which clearly includes the matter in question, and the other general in its terms, and such that if standing alone it would include the same matter, and thus conflict with each other, then the former act must be taken as constituting an exception to the latter or general act."

"This rule of construction has been invoked many times, and is applicable here. Since section 10750 is a much later statute than is section 13204, and since section 10750 applies to a

August 10, 1937.

particular subject, and since section 13204 is general in its application, we hold that section 10750, on the point in question, should be construed as an exception to the general and prior section 13204."

From the foregoing, we are of the opinion that when the county court has sold the road bonds the proceeds are to be turned over to the township treasurer, and to be disbursed by him on the order of the county court.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

JUSTICES OF THE PEACE - Powers to grant stays of execution can
commute fines to imprisonment

August 16, 1937

Honorable James L. Williams
Sheriff, Jackson County
Kansas City, Missouri



Dear Sir:

We have your request of August 4, 1937, which
is as follows:

"In accordance with the offer in
your letter of August 3rd, stating
that you would be pleased to render
an opinion relative to the rights
and powers of the justice of the
peace to grant stays of execution
or commutation of sentence, I wish
to advise that I would be greatly
pleased to have such an opinion
from your office."

I.

Power of justice of peace
to grant stay of execution

Section 3739, R. S. Missouri, 1929, authorizes
a justice of the peace to grant a stay of execution for any
offense where the punishment has been fixed at a fine or
imprisonment in the county jail, or workhouse, or by both
a fine and imprisonment. This stay of execution must be
for a definite period of time to be fixed by the justice
"not to exceed six months". This statute merely affords

temporary relief, but under no circumstances may the stay of execution exceed a period of six months. The term "stay of execution" means the temporary suspension of the judgment. State ex rel Gray v. Hennings, 185 S. W. 1153, 194 Missouri Appeal 545. It means that during the term for which the "stay of execution" is issued, that no execution can issue on the judgment. Brown v. National Bank of Shawnee, 271 Pacific 833, 133 Oklahoma 173. At the expiration of the stay of execution the defendant must surrender himself in execution. The justice of the peace has authority to grant one stay of execution for the total of six months, but has no authority to grant a second stay of execution suspending the judgment for any length of time beyond the period of six months.

If the defendant is confined in jail, he may apply to the court or judge of the court having jurisdiction of appeals from justices of the peace in criminal cases for parole, Section 3814, R. S. Missouri, 1929. Whenever any person is confined in jail under a judgment of a justice of the peace, the circuit or criminal courts may grant a parole to such person, which parole may be terminated at any time by the court granting it, Section 3810, R. S. Missouri, 1929. Such persons on parole may obtain an absolute discharge in six months. The parole shall not be continued for a longer period than two years, Section 3817, R. S. Missouri, 1929.

CONCLUSION

It is therefore the opinion of this office that a justice of the peace may grant a stay of execution to persons convicted in justice courts, which stay of execution, or stays of execution, may not exceed the total period of six months.

II.

The powers of justices of the peace to commute sen- tences

Section 3726, R. S. Missouri, 1929, provides that whenever any person or convict shall be sentenced to imprisonment in the county jail, or to pay a fine, he shall be imprisoned until the sentence is fully complied with and all costs paid. Section 3727, R. S. Missouri, 1929, provides:

August 16, 1937

"When any person is held in custody or imprisoned for a fine imposed for a criminal offense, as specified in the last section, the court in which the cause was tried; or the judge thereof in vacation, on the petition of the prisoner for that purpose, shall sentence him to imprisonment for a limited time, in lieu of the fine; and at the expiration of such time, the prisoner shall be discharged on the payment of costs, or obtaining his discharge in the manner in the next sections provided."

It does not specifically appear as to whether or not the above statute would apply to the authority of a justice of the peace. However, the answer is found in Section 3441, R. S. Missouri, 1929, in the following language:

"When any person shall be unable to pay any fine and costs assessed against him, the justice shall have power, * * * to commute such fine and costs to imprisonment in the county jail for a period of time not exceeding one day's imprisonment for every \$2.00 of said fine and costs, nor less than one day's imprisonment for every \$10.00 of such fine and costs."

Section 8 of Article V of the Constitution of Missouri, grants to the Governor the power to grant reprieves, commutations and pardons. The above statute authorizing a justice of the peace to grant a commutation is not in violation of the Missouri Constitution, ex parte Parker 106 Missouri 551. However, in obtaining commutation the statutes providing therefor must be strictly complied with. Ex parte Secrest 32 S. W. (2d) 1085, Workman v. Turner, 283. S. W. 61.

Hon. James L. Williams

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August 16, 1937

CONCLUSION

It is, therefore, the opinion of this office that a justice of the peace may grant a commutation of a fine to a fixed number of days in jail at the rate of not less than \$2.00 per day, nor more than \$10.00 per day.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

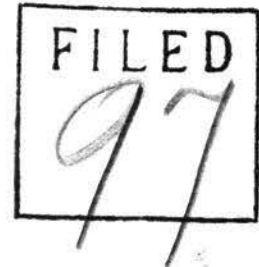
J. E. TAYLOR
(Acting) Attorney General

FER MR

TAXATION: County Collector has the right to accept payment for less than all taxes, interest and penalties due and delinquent on land being advertised for the third sale.

September 3, 1937

10-13



Mr. Bryan A. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Sir:

This office is in receipt of your request for an opinion, which is as follows:

"The County Collector has asked the following question with regard to the sale of land under the Jones-Munger Law:

On a track of land being advertised the third time, and the party who is delinquent with his taxes offers to pay part of his taxes (two years); has the County Collector the right to accept payment, and stop the tax sale?"

This office, in an opinion to the State Tax Commission, dated August 8, 1933, shortly after the effective date of Senate Bill 94, and prior to the passage of Senate Bill 54 of the Extra Session, held that the provisions of said Senate Bill 94 were mandatory, requiring the sale each year of all lands and lots upon which there were any delinquent and unpaid taxes; that said Senate Bill No. 94, as enacted, required the offering for sale each year of all tracts and lots for delinquent and unpaid taxes. In said opinion, it was held that the mandatory provisions of said Senate Bill No. 94, were not in any way affected or modified by Section 9961, R. S. Missouri, 1929.

Said Section 9961, R. S. Missouri, 1929, was repealed by Senate Bill 54 of the Extra Session of 1933, and the same was thereafter amended in Senate Bill No. 57 of the Session Acts of 1935, it being a statute with exactly the same wording as said Section 9961 of the 1933 Session Acts, except the proviso which was omitted and had no bearing on this question. Said Section 9961 in Senate Bill 57 of the Session Acts of 1935, is as follows:

"No action for recovery of taxes against real estate shall be commenced, had or maintained, unless action therefor shall be commenced within five years after delinquency, excepting taxes now delinquent, or which suit may be commenced at any time within five years after this chapter shall take effect, but not thereafter."

In an opinion of this office addressed to Hon. Charles M. Hay, City Counselor, City of St. Louis, on September 4, 1934, it was held that the message of the Governor authorized the General Assembly, at the Special Session, to consider the subject matter of House Bill No. 54, and he indicated that any enactment passed under this authorization was to apply to the proceedings contemplated in Senate Bill 94. His message authorized the repeal of the law relating to limitation of actions and the enactment of the law relating to limitation of sales in pursuance thereof. Said opinion held that said Senate Bill 54, provides that initial proceedings for the sale of lots may be commenced at any time within five years of delinquency, holding that:

"This provision is certain and must be given effect or the entire statute would be meaningless. This provision is to operate directly for the benefit and advantage of the taxpayer. It is remedial in nature and intended to modify the harsh requirements of Senate Bill 94, to-wit, the requirement that all lands and lots upon which taxes are delinquent be offered for sale each year. If the new Section 9961 does not have this effect it is entirely meaningless, for if all lands and lots are to be sold each year, initial proceedings will then be instituted the first year of delinquency (after the sale this November) and no taxpayer will be granted the

grace given by Senate Bill 54."

In conclusion said opinion, held:

"It is therefore, the opinion of this office that the provisions of Senate Bill 94, passed by the 57th General Assembly in Regular Session have been modified by the passage of Senate Bill 54 of the 57th General Assembly in Extra Session, so as to permit initial proceedings to be instituted at any time within five years of the date of delinquency."

The purpose of said Senate Bill 54 and Section 9961 thereof, was to give to the Collector the discretion as to when he was to advertise the delinquent lands and lots, but in case that the said Collector did advertise any lands or lots, he would have to follow the procedure provided in Section 9952a of said Senate Bill 94 of the Session Acts of Missouri, 1933, which is as follows:

"All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this act on the first Monday of November of each year, and it shall not be necessary to include the name of the owner, mortgagee, occupant or any other person or corporation owning or claiming an interest in or to any of said lands or lots in the notice of such sale; provided, however, delinquent taxes, with penalty, interest and costs, may be paid to the county collector at any time before the property is sold therefor. The entry of record by the county collector listing the delinquent lands and lots as provided for in this act shall be and become a levy upon such delinquent lands and lots for the purpose of enforcing the lien of delinquent and unpaid taxes, together with penalty, interest and costs."

The above said opinion further stated:

"The mandatory character of Senate Bill No. 94, cannot be retained if the act of the Extra Session is to be given any effect. Therefore, we conclude that those provisions of Senate Bill 94 affected by Senate Bill 54, have become directory insofar as is necessary to give effect to the latter, and full benefit of this remedial law is to be given the taxpayer."

CONCLUSION

The above bill giving the collector discretion as to when tracts and lots of land on which taxes were delinquent, would be submitted for sale and the proviso in said Section 9952a which provided that delinquent taxes, with penalty, interest and costs, may be paid to the county collector at any time before the property is sold therefor, further gave to said collector the right of selling all the delinquent property advertised at the third sale and in case that the owner or party interested desired to pay the delinquent tax on said property for any given number of years less than the total number of years for which said property was advertised for sale, the collector might accept a payment for a given number of years and dismiss as to the remaining years, if the remaining years for which said property was advertised and unpaid would not come within the statute of limitations as to the collection of delinquent taxes.

Therefore, it is the opinion of this office that a tract of land being advertised for the third time for a given number of years for delinquent taxes, and an interested party offers to pay part of the years, the county collector has the right to accept payment of the same and stop the sale as to the balance of said delinquent payments.

Respectfully submitted,

APPROVED:

S. V. MEDLING
Assistant Attorney General

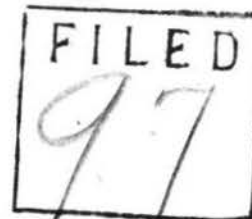
J. E. TAYLOR
(Acting Attorney General)

SVM MR

PRIVATE CORPORATIONS: Subject to prosecution for violations of the criminal law.

9/4

September 4, 1937.



Honorable Bryan A. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Sir:

We have your request of August 26, 1937, for an opinion, which reads as follows:

"Advise at once, if we can legally raid a private club, chartered by the State, off a State or National Highway, where members pay dues, and public not permitted. Will act as soon as you advise can be done."

I know of no law of this State which removes a private club or any other organization from the operation of the criminal laws. They are as amenable to the criminal laws as individuals.

The proper method to get service on a corporation charged with the violation of some criminal statute, is to have a copy of the information and indictment served on the proper officer of the corporation.

14 C. J. 878;
7 R. C. L. 771;
State v. White 96 Mo. Ap. 34.

An officer of the corporation is criminally liable for any criminal act of the corporation of which he has knowledge of its commission, prior to the commission thereof.

14 C. J. 244;
State v. Parsons and Harris, 12 Mo. Ap. 205;
State v. Yocum, 206 S. W. 236.

Hon. B. A. Williams

-2-

September 4, 1937.

It is, therefore, the opinion of this office that private clubs or corporations are subject to prosecution for violations of the criminal law.

Respectfully submitted

FRANKLIN E. REAGAN
Assistant Attorney
General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

FER:H

TAXATION: Sales of delinquent lots and lands may be held at any courthouse located in the county if notice provides for same; if notice does not provide then sale to be held at county seat courthouse.

September 14, 1937

Hon. Andy W. Wilcox
State Tax Commission
Jefferson City, Missouri



Dear Mr. Wilcox:

This is to acknowledge your letter as follows:

"Pursuant to Section 9960d authorizing and directing this Commission, with your advice, to determine the true construction and interpretation of the Jones-Munger Law, page 425, Laws of Missouri 1933, as amended by the 58th General Assembly, page 403, Laws of Missouri 1935.

Under the provisions of Section 9962b, it is provided that the list of delinquent lands and lots shall be published in the newspapers with general circulation, etc., and that to such lists shall be attached a notice that so much of said lands will be sold as is necessary to discharge the lien for taxes, interest and costs; and that the same 'will be sold at public auction at the Court House door of such County'.

There are several counties in this state which have more than one Court House, but the Jones-Munger Act does not make any provisions by its terms indicating which Court House shall be the situs of the sale. In some of these counties,

Collector's offices are maintained in both Court Houses, but the County is divided and the taxes on part thereof are payable at one Court House and taxes in the remainder of the County are payable at the other Court House.

In view of this situation, we will appreciate your opinion as to the proper construction of the term 'court house' as used in Section 9952b, page 405, Laws of Missouri, 1935."

The only question presented, for our opinion, relates to the interpretation to be given the words "court-house door of such county", found in Section 9952b, Laws of Missouri 1935, pp. 403-404.

In 1933 the Legislature enacted a law providing for a new method of collecting delinquent and back taxes, Laws of Missouri 1933, pp. 425-449 incl. and amendments. The method prior to 1933 for the collection of delinquent and back taxes was by suit in the circuit court. However, in 1933, provision was made for the advertising of lands and lots on which the state had a lien and for selling same at public auction to the highest bidder. Section 9952a, Laws of Missouri 1933, p. 430; Section 9952b, Laws of Missouri 1935, p. 403; Section 9952d, Laws of Missouri 1933, p. 432; Section 9953, Laws of Missouri 1933, p. 432.

Section 9952b, Laws of Missouri 1935, p. 403, required the county collector to publish a list of delinquent lands and lots and said notice to include, among other things, the following:

" * * * To such list shall be attached and in like manner so printed and published a notice that so much of said lands and lots as may be necessary to discharge the taxes, interest and charges which may be due thereon at the time of sale will be sold at public auction at the courthouse door of such county. * * *"

It is seen from a reading of Section 9952b, supra, that the Legislature instructed the county collectors to give

enough notice and information so as to apprise the public fully regarding the sale. In giving the notice, the time and place of the sale was to be included. The place of the sale to be at the courthouse door. The words "courthouse door" in some instances are ambiguous and, consequently, must be given a meaning that will accomplish the intent of the legislature when it enacted Section 9952b, Article 2, Chapter 4, R. S. Missouri 1929. For example, a courthouse will have several doors, to-wit: some in the basement, first floor, second floor, etc., and the collector apparently could conduct the sale at any door in the courthouse. However, we are of the opinion that the door at which the sale is held should be the entrance or main door to the courthouse. Likewise, there are two courthouses in several counties in the State of Missouri, and in such counties the word "courthouse" used in Section 9952b, supra, would be ambiguous. A county has statutory authority to provide for more than one courthouse. However, each county must at the established seat of justice provide a sufficient courthouse and jail, Section 12043, R. S. Missouri 1929. But after the establishment of a courthouse and jail at the established seat of justice the county court, if the voters so direct, they may erect and maintain other courthouses. We invite your attention to Section 12045, R. S. Missouri 1929, which reads in part as follows:

"All county seats or other cities or towns which are duly incorporated and in which circuit court is held as by law provided, are hereby authorized, upon such terms as may be agreed upon, in conjunction with their respective counties, to erect and maintain courthouses and jails in such county seats and in such other towns or cities where circuit court is held according to law, for the joint use of such county seats or other towns or cities and the county wherein they are located; * * *"

Thus the Legislature, by enacting Section 12045, permits the erection of additional courthouses in cities or towns other than at the county seat, and such courthouses as erected and maintained may be for the joint use of the county. There is a difference in meaning between the words "county seat," "seat of justice," and "courthouse."

Babcock v. Hahn, 175 Mo. 136; Bouldin v. Ewart, 63 Mo. 330; State ex rel v. Bates, 286 S. W. 420. Suffice it to say that there can only be one county seat and seat of justice, but there may be several courthouses. However, if there are two courthouses, one of such must be located at the county seat. When the Legislature in 1933 enacted Section 9952b, supra, it knew that several counties in this state had more than one courthouse, and as it provided in said law a means and method of giving as much notice as permissible in order to have as many persons present at the public auction, the conclusion is inescapable that the sale may be held at any courthouse in the county if the place of sale would cause higher bids to be received, in our opinion. However, in counties having two courthouses the collector should designate in the notice the courthouse where the sale will be had. To illustrate: A county having two courthouses, one of which is located at the county seat and the other in a distant city, the notice should designate that the sale will take place at the county seat courthouse (name place) or at the city courthouse (name city). Randolph County has two courthouses, one located at Huntsville, (the county seat) and circuit court is held at Moberly. If delinquent lands and lots located in Moberly were to be sold at Huntsville, perhaps a less amount would be bid than if such were sold at Moberly. Therefore, the county collector could divide the delinquent lands and lots to be sold and publish one group to be sold at the Huntsville Courthouse door, and the other group to be sold at the Moberly Courthouse door. It is not mandatory upon the collector to sell at both places, because he may sell at any one of the courthouses; the reason we are permitting by interpretation the selling at both places, being to affect a more accessible market in order to obtain better prices. However, if the collector advertises all properties without specifying the courthouse where the lands and lots are to be sold, it is our opinion that the collector must sell them at the county seat courthouse. State ex rel v. Bates, 286 S.W. 420.

Section 9957a, Laws of Missouri 1933, p. 438, provides for the form of deed to be executed by the county collector. Said deed recites in part as follows:

"* * * which it appears that the said A. B. did, on the _____ day of _____ 19____, purchase at public auction at the door of the courthouse in said county, the tract, parcel or lot of land lastly in this indenture described, * * *"

September 14, 1937

If property was sold at public auction in a county having two courthouses, then in said deed the courthouse at which the sale was made should be inserted. In other words, it should be inserted that the purchase was made at public auction at the door of the "county seat" or "city" courthouse in said county, as the case may be.

Section 9957b permits of the variation of the form of deed, if the substance of same is retained.

From the above and foregoing, it is our opinion that the county collector may, if his notice so provides, sell lands and lots at any main entrance door of any courthouse located in his county. However, it is not mandatory upon the county collector to conduct sales in two places, and if he desires to conduct the sale at only one courthouse in the county, then such sale should be conducted at the courthouse located at the county seat. We do not wish to be understood as holding that the county collector may conduct sales on the same property at two courthouses, as one sale at one courthouse is sufficient and all that the law requires.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW MR

TAXATION: Procedure to be followed in sale of land for delinquent taxes under Jones-Munger Law in view of remission statutes.

September 17, 1937



Honorable Andy W. Wilcox
State Tax Commission
Jefferson City, Missouri

Dear Mr. Wilcox:

This Department is in receipt of your request for an opinion which reads as follows:

"Pursuant to Section 9960d, page 443, Laws of Missouri 1933, the Tax Commission is herewith requesting your advice and opinion as to the correct, true construction and interpretation of the Jones-Munger Law as amended in 1935 in view of the enactment by the 59th General Assembly of House Bill 70.

The Commission desires your opinion as to the manner in which the list of delinquent lands and lots should be made up and published under the provisions of Section 9953, page 429, Laws of Missouri 1933, in respect to the amount of penalties, interest and costs which shall be stated in the publication as due on tracts or parcels of land. It is to be noted that House Bill 70 provides that from September 1st to October 31st 1937, the taxpayer shall be entitled to a remission of 50% of the penalties, interest and costs, exclusive of the Collector's commission in the event the taxes are paid in full during that period of time. In the event the taxes are paid in full between November 1st and December 31st 1937, the taxpayer is entitled to a remission of 25% of such penalties, interest and costs exclusive of the Collector's commission. Under the Jones-Munger Law, the advertisements will be made during the period prior to November 1st, but the sale will not be held until the period subsequent to November 1st.

September 17, 1937

The foregoing request is based on the assumption that House Bill 70, supra, does not prevent or postpone proceedings under the Jones-Munger Law for the enforcement of the payment of taxes. We also request your opinion as to whether or not House Bill 70 either prohibits or postpones the proceedings for the enforcement of the payment of delinquent taxes. In this connection, by prohibit we mean that no advertisement and sale can be held until November 1938; and by postpone we mean that no sale can be held until House Bill 70 has expired by its own provisions. In the latter event kindly advise when the first publication is to be made. In this connection, we direct your attention to the fact that if no proceedings are initiated before January 1, 1938, some taxes will thereupon become outlawed by virtue of Section 9961, page 405, Laws of Missouri 1935.

In view of these difficulties, it seems wise that this Commission should with your advice make a ruling in respect to these matters and we shall therefore be pleased to receive your opinion."

The Jones-Munger Law provides for the collection of delinquent taxes on real property and is found in Laws of 1933, pages 425, 449, amended Laws of 1935, pages 403, 404.

Section 9952b, Laws of Missouri 1935, page 403, provides that the county collector shall cause a copy of such lists of delinquent lands to be printed in some newspaper of general circulation and published in the county for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November. The list is to state the aggregate of the taxes, penalty, interest and cost thereon. To such list shall be attached a notice that so much of said lands as may be necessary to discharge the taxes, interest and charges will be sold at public auction at the courthouse on the first Monday in November at ten o'clock, and the sale is to continue from day to day until all are offered.

Section 9952c, Laws of Missouri 1933, page 431, provides that on the first day mentioned in the notice, to-wit, the first Monday in November, the County Collector shall commence the sale of such land and continue the same from day to day.

Section 9953d, Laws of Missouri 1933, page 443, provides that after payment shall be made the county collector shall give the purchaser a certificate in writing to be designated as the certificate of purchase, which will describe the land purchased and the amount paid.

Section 9956a, Laws of Missouri 1933, page 437, provides that the owner of any land sold for taxes may redeem the same at any time during the two years next ensuing by paying to the county collector, to the use of the purchaser, the full sum of the purchase money named in the certificate and all costs of sale, together with interest at the rate specified in such certificate not to exceed ten per cent annually, with all subsequent taxes which have been paid thereon by the purchaser with interest at the rate of eight per cent per annum, and in addition thereto pay the costs incident to the entry of recital of such redemption.

Laws of 1937, page 572, to which we will refer as the remission statute, provides as follows:

"Section 1. Remission of penalties, interest and costs.-- In payment of the taxes assessed against any person whose name appears upon the personal delinquent lists of any year or years prior to January 1, 1937, and in payment of the taxes assessed against any real estate which appears upon the lists of delinquent and back taxes of any year or years prior to January 1st, 1937, including delinquent taxes for the year 1936, the collectors of revenue of the counties and cities of this state are hereby empowered and directed to accept the original amount of said taxes as charged against any such person or real estate relieved of the penalties, interest and costs accrued upon the same except the commission of said collectors of revenue, as same are now provided by law for the collection of delinquent taxes; Provided, however, that such remission of penalties, interest and costs shall be in full if said taxes are paid not later than June 30, 1937; if paid after June

30, 1937 and not later than August 31, 1937, then such remission shall be 75 per cent of such penalties, interest and costs; if paid after August 31, 1937, and not later than October 31, 1937, such remission shall be 50 per cent of such penalties, interest and cost; if paid after October 31, 1937 and not later than December 31, 1937, then such remission shall be 25 per cent of such penalties, interest and costs, Provided further, that after December 31, 1937, all penalties, interest and costs as aforesaid shall be restored and be in full force and effect for the full period of time since their accrual and as if this act had not been passed."

The act contained an emergency clause and also provided it would be of no affect after January 1, 1938.

The question here presented is what effect the remission statute has on the sale of land for delinquent taxes under the Jones-Munger Law?

In 1933 the Legislature passed a statute practically identical with the present remission statute. The effect of that statute in regard to the other statutory provisions is stated in State ex rel. McKittrick vs. Bair, 63 S. W. (2d) 64:

"The legislature intended that the act (remission statute) should suspend all provisions of law repugnant to the same or out of harmony therewith."

To the same effect is State ex rel. Crutcher vs. Koeln, 61 S. W. (2d) 756, wherein the Court said:

"No. 80 is a valid and presently effective and operative temporary law and effectually, during the limited period of its operation, suspends the effectiveness and operation of Nos. 110 and 115, and also suspends, during the same period and by necessary implication, such statutory provisions contained in said chapter on taxation as are in conflict with No. 80,* * *."

We must, therefore, ascertain whether the procedure as provided for in the Jones-Munger Law is repugnant or out of harmony with the remission statute and if so, what parts are suspended by said act.

It must be kept in mind that the sale is conducted under the Jones-Munger Law and is governed entirely by the procedure laid down therein and the remission statute only suspends the operation of such statute when a repugnancy occurs.

It is a rule of statutory construction that repeal or suspension by implication is not favored and if by a fair interpretation both statutes may stand, then that interpretation should be followed. State ex rel. Karbe vs. Bader, 78 S. W. (2d) 835, 336 Mo. 259.

The Jones-Munger Act provides that notice of the sale shall be printed in some newspaper for three consecutive weeks, the last insertion to be at least fifteen days prior to the first Monday in November, and that on the first Monday in November the sale shall be commenced and continued from day to day.

In Schlafly vs. Baumann (not yet officially reported) the Supreme Court of Missouri held that the requirements of Sections 9952b and 9952c, as to the notice and date of sale, were mandatory upon the collector. It will be seen that the collector must advertise such sale in strict compliance with the Jones-Munger Law and commence such sale on the first Monday in November.

Reviewing the procedure described above, the printing of the notice, the sale on the first Monday of November and the giving of the certificate of purchase are not forbidden by the remission statute in that the same may be done and not be out of harmony with such statute. However, it will be noted that the remission statute gives the owner until December 31st to come in and pay his taxes, plus three-fourths of the penalties, interest and costs. However, under the Jones-Munger Act, the sale is held on the first Monday in November and a certificate of purchase is given which states that the owner may redeem only upon the paying of the purchase price plus taxes paid by purchaser and interest thereon, plus the cost of sale and redemption and interest not to exceed ten per cent.

Therefore, rights acquired by the purchaser under the Jones-Munger law are subject to be defeated upon the happening of certain conditions, that is, if the owner redeems within two years. The remission statute

imposes another condition upon the sale. That is, if the owner comes in by the 31st of December and pays the tax, plus the three-fourths of the penalties, interest and costs, then he is entitled to his land free from any tax lien that attaches thereto. This is an added condition imposed by the remission statute and is in addition to those placed on the sale by the Jones-Munger Act. When the purchaser at the sale, takes the purchase certificate, he takes it subject to the conditions imposed not only by the Jones-Munger Act itself, but by those imposed by the remission statute.

In other words, the rights acquired by the purchaser will be defeated if the owner before January 1, 1938, pays the taxes plus three-fourths of the penalties, interest and costs. Also, the rights of the purchaser of the certificate will be defeated if the owner within two years pays the purchase price plus cost of sale with interest specified in the certificate not to exceed ten per cent annually, and all subsequent taxes paid by purchaser with interest at eight per cent per annum, and costs incident to entry of recital of redemption.

At the sale all parties are presumed to know the conditions of such sale including those imposed by the remission statute. As stated above the sale is subject to be defeated if the owner pays before January first. Therefore, the amount paid by the purchaser should be held in trust for the purchaser or the county until such time. If the owner pays under the remission statute, then the money held in trust should be returned to the purchaser. If the owner does not pay then the money should go into the treasury.

CONCLUSION

It is therefore the opinion of this Department:

(1) Notice should be published for three consecutive weeks, one insertion weekly, the last insertion to be at least fifteen days prior to the first Monday in November. The notice shall include the amount of taxes plus the entire amount of the penalties, interest and cost.

September 17, 1937

(2) The sale should be held on the first Monday in November and a certificate given to the purchaser. However, to such sale is added the condition that the owner has until January 1, 1938, in which to pay his taxes plus three-fourths of the penalty, interest and costs.

(3) The collector should hold the purchase price in trust. If the owner pays his taxes and three-fourths of the penalties, interest and costs before January 1, 1938, then such purchase price is given back to the purchaser. If the owner does not pay, then such amount is deposited in the treasury.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

AO:MM

PROSECUTING ATTORNEYS: It is not the duty of the prosecuting attorney to bring suits in behalf of the parents of students against the school district.

October 9, 1937

Mr. Mark W. Wilson
Prosecuting Attorney, Henry County
Clinton, Missouri

Dear Sir:

This department is in receipt of your request for an opinion which reads as follows:

"We are having some trouble in the County over tuition being paid by districts to the high schools. The parents of the children in some of the districts wish to file suit against the districts. They feel that I should represent them in an official capacity. I could find no law to that effect and told them so."

Section 11316, R.S. Mo. 1929, provides in part as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses."

10-9



Section 11318, R.S. Mo. 1929, provides in part as follows:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto:"

It will be noted that it is the duty of the prosecuting attorney to defend only such suits in which the county or state may be concerned or interested.

From the facts presented in your request, it seems that it is the parents of the children who wish you to represent them in the suit against the district. This is not a matter in which "the county or state may be concerned", nor is it one "in which the county is interested". We believe the rule is aptly stated in *State ex rel St. Ferdinand Sewer District vs. McElhinney*, 52 S.W. (2nd) 400 from which the S.C. of Missouri en banc said:

"While said injunction suits were instituted by the prosecuting attorney of St. Louis county in the name of the state, it appears from the allegations and prayers of the petitions therein that said suits were, in fact, instituted in behalf of the taxpayers in said sewer districts and for the protection of the property rights and interests of said taxpayers. No property right or pecuniary interest of the state would be affected by any decree that could be rendered in said suits, and

no condition affecting the safety, health, or morals of the public is involved in said suits. True, suits by the state in its own behalf are not limited to those in which its property rights or pecuniary interests are involved, but certainly such suits are limited to those in which public rights or interests, as distinguished from private rights or interests, are involved. So, our conclusion is that said injunction suits are not suits instituted by the state 'in its own behalf,' within the meaning of the statute above quoted."

CONCLUSION

It is, therefore, the opinion of this department, that in view of the above authorities, that it is not the duty of the prosecuting attorney to represent the parents of students in a suit against the school district to require the payment of tuition.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney-General

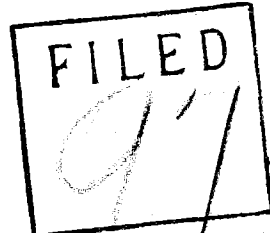
AO'K:VAL

MOTOR VEHICLE ACT:

DRIVER'S LICENSE ACT: Requires an operator to take out only one driver's license

October 11, 1937

Honorable Bryan A. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion from this Department under date of August 31st, which reads as follows:

"Referring to Section 10, Driver's license card - form - shall be carried by driver at all times, of the Session acts of the Fifty-Ninth General Assembly of Missouri at page 374 of the Session Acts:

"Does the Driver's license only apply to one car, or does this license give the license holder the right to drive any car?

"Would appreciate your opinion."

Prior to the new Driver's License Law, becoming effective on September 6, 1937, there was no provision for licensing of all persons driving automobiles but only to the licensing of chauffeurs and registered operators as respectively shown in Sections 7765 and 7766, Revised Statutes Missouri 1929.

The new Driver's License Law enacted by the Fifty-ninth General Assembly, found at pages 370-379, Laws of Missouri 1937, requires each and every person operating a motor vehicle on the highways of this State to apply for a Driver's license, with the exception of certain exemptions found in Section 3 of said

Act, and any person holding a valid chauffeur's license or registered operator's license (Section 2, new act).

In construing statutory provisions the cardinal rule is to determine the legislative intent. *Tooker v. Missouri Power & Light Co.*, 80 S.W. (2d) 691. Another well established rule of construction is that all sections of the Act should be so construed as to harmonize, if possible. In *Re Rossing's Estate*, 85 S.W. (2d) 495, 337 Mo. 544.

Section 8 of the new Driver's License Act, page 373, Laws of 1937, provides what each application for a Driver's License shall contain, and reads as follows:

"Applications for a motor vehicle driver's license shall be made upon an approved form furnished by the Commissioner of Motor Vehicles. Every application shall state the name, age, height, weight, color of eyes, color of hair, sex, residence and business address of the applicant, whether or not the applicant has been licensed, if an operator or chauffeur of an automobile, and if so, when and by what state and whether or not such license has ever been suspended or revoked; and if revoked or suspended, the date and reason for such suspension or revocation. The application shall also give the applicant's qualification for driving a motor vehicle; he or she shall state whether or not the applicant has been convicted in this or any other state for violating the laws of this or any other state, or any ordinance of any municipality, relating to careless driving, or

driving while intoxicated, or failing to stop after an accident, and disclosing his or her identity, or driving a motor vehicle without the owner's consent. Said application shall be verified by the applicant before a person authorized to administer oaths, and officers and employees of the department are hereby authorized to administer such oaths without charge, and every application shall be accompanied by a fee of twenty-five cents. If the application shows that the applicant is under the age of sixteen (16) years or has been convicted of any of the offenses above set forth within the one year, prior to making the application, or is otherwise disqualified under the provisions of this act, the commissioner may not issue such license."

There is no provision in Section 8, supra, requiring an applicant to state what kind or type of vehicle he is qualified to operate or what kind of vehicle he owns or operates.

Section 10 of this Act simply provides the form of Driver's License and what same shall contain. Said section reads as follows:

"The motor vehicle driver's license issued under the provisions of this act shall be a white license card containing briefly the information given in the application. Such license card shall be signed with the applicant's usual signature with pen and ink in a space provided for that purpose on the license card so issued to him immediately upon the receipt

of such card and such license shall not be valid until the card is so signed. The license card so issued and signed shall be carried at all times by the licensed driver of such motor vehicle while driving the same, and shall be displayed upon demand of any officer of the highway patrol or any police officer or peace officer or any other duly authorized person, for inspection when demand is made therefor. Failure of any driver of a motor vehicle to exhibit his or her license to any of the aforesaid officers or other duly authorized officer, shall be presumptive evidence that said person is not a duly licensed driver."

There are other provisions which may help in answering your query.

Under Section 3, subdivision (2) of this Act, it is provided:

"A nonresident who is at least sixteen (16) years of age and who has in his immediate possession a valid operator's license issued to him in his home State or country may operate a motor vehicle in this State only as an operator."

The nonresident who has a valid operator's license issued to him from his home State may operate a motor vehicle in this State as an operator without obtaining a Driver's License in this State. This does not provide he shall drive only one certain vehicle but that he may operate a motor vehicle.

In like manner subdivision (3) of Section 3, supra, provides that a nonresident eighteen years of age, in

possession of a valid chauffeur's license issued to him in his home State may operate a motor vehicle in this State, either as an operator or chauffeur, without obtaining a Driver's license under this Act. This provision does not require that he drive only one certain vehicle, but, as in subdivision (2), supra, he "may operate a motor vehicle." Said subdivision (3) of Section 3, supra, provides as follows:

"A nonresident who is at least eighteen (18) years of age and who has in his immediate possession a valid chauffeur's license issued to him in his home State or country may operate a motor vehicle in this State either as an operator or chauffeur, except any such person must be licensed as a chauffeur hereunder before accepting employment as a chauffeur from a resident of this State;"

Section 13 of this Act, in part, reads as follows:

"It shall be unlawful for any person * * * to lend to, or knowingly permit the use of by another any motor vehicle driver's license issued to the person so lending or permitting the use thereof, * * *"

If this Act required the issuance of a separate license for an operator to drive each and every vehicle he might desire to operate, such provision as we have hereinabove quoted would never have been included in this Act. Furthermore, the application for said license would have required the license and motor number of the particular vehicle said applicant should operate. To require an operator to take out more than one license would also cause an unnecessary expense and be burdensome for the reason that he must at all times have in his possession his Driver's License while operating a motor vehicle.

Apparently, the purpose of said Driver's License

Honorable Bryan A. Williams

-6-

October 11, 1937

Law was to enable the Commissioner of Motor Vehicles to have some regulatory power and revoke the driver's license of any operator for certain violations (Sections 15, 16, 17, 18, 19 and 20). For this purpose the issuing of one license would serve the purpose as well as issuing a separate license for each vehicle operated.

In view of the foregoing, it is the opinion of this Department that the Driver's License Act (pages 370-379, Laws of 1927) is plain and unambiguous and requires an operator to take out only one driver's license.

Yours very truly,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

ARR LC

TAXATION & REVENUE:

Jones-Munger Bill. Purchaser of any title or interest or real estate by proper conveyance would have the same right of redemption as former owner.

November 12, 1937

11-15
FILED
97

Mr. Bryan A. Williams,
Prosecuting Attorney,
Marble Hill, Mo.

Dear Mr. Williams:

We wish to acknowledge receipt of your inquiry of November 5th which is as follows:

"Referring to Sections 9953b, and 9956a with regard to the redemption of lands sold for taxes under the Jones-Munger Law.

On property advertised the third time, and sold to the highest bidder-Would the original owner be required to pay the amount of the certificate of purchase, together with any other amount which may have been due for delinquent taxes before he can redeem this land?

Or, would the original owner just pay the amount of the highest bidder (certificate of purchaser), and if there remained any additional amount representing delinquent taxes due at the time of the sale, would this same land be put up for sale the following year for delinquent taxes unpaid at the time the sale was made after the third advertisement?

A party purchasing land from the original owner, which land has been advertised the third time, and sold for delinquent taxes to the highest bidder-Would such party be required to redeem land in the same manner as the original owner?

My opinion is, that when land is advertised and sold for taxes (third advertisement), the land goes to the highest bidder, and in two years if the land is not redeemed, he will get good title. Should the land be redeemed by the original owner, the amount he pays to cover the highest bidder (which is paid to the collector), will be applied on delinquent taxes due at the time of the sale, and then the land can be advertised the following year for the balance of delinquent taxes and costs.

However, a purchaser at a tax sale would be at a better advantage than the original owner, as he can acquire good title in two years by oftentimes a nominal amount (highest bid), whereas the owner is required to pay up all delinquent taxes before he can redeem. A party purchasing land from the original owner which has been sold, would seem to me, to only acquire the same right as the original owner-the right of redemption."

Your first two questions are answered by an opinion rendered by this department to the State Tax Commission on August 21, 1937 in II of said opinion.

Section 3014 of the 1929 Statutes of Missouri providing for the conveyance of land, or any estate or interest therein is as follows:

"Conveyances of lands, or of any estate or interest therein, may be made by deed executed by any person having authority to convey the same, or by his agent or attorney, and acknowledged and recorded as herein directed, without any other act or ceremony whatever."

Under the provision of this section any interest or estate in land may be conveyed and the grantee in such conveyance will receive whatever interest may be conveyed therein and will have all the rights and privileges of the grantor.

Section 9956a of the 1933 Session Acts at page 437 is in part as follows:

"The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing *****."

CONCLUSION

Therefore, it is the opinion of this department that the purchaser of any title or interest to real estate by proper conveyance would have the same rights of redemption of lands sold under the Jones-Munger Bill as the former owner of such

Mr. Bryan A. Williams

Page 3

November 12, 1937

real estate.

Respectfully submitted,

S. V. Medling
Assistant Attorney General

APPROVED:

J.E. TAYLOR
(Acting) Attorney General

SVM:DA

TAXATION: Poll taxes for 1937 to be collected;

Section 8181 relating to poll tax in Special Road Districts not repealed.

November 12, 1937



Mr. Mark W. Wilson
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Sir:

This department is in receipt of your request for an opinion which reads as follows:

"There has been considerable differences in opinion on the effect of the law passed by the recent legislature in regard to the repealing of the poll taxes. I would like to have an opinion on the following two questions:

Should the poll tax for this year be collected although the law took effect in September?

Also, I notice that the legislature did not repeal the section on the poll tax in Special Road Districts. Should the tax be collected in the Special Road Districts, though not collectible in the Townships?

As to the first question, I believe it necessary to determine when the poll tax is due. If due before the law went into effect, then it should be collected this year and if it was not due until after the law passed, it should not be collected."

Laws of 1937, page 440, provides as follows:

"That Sections 7879, 7880, 7881, 7882, 7883, 7884, 7885, 7886, 7887, and 7888

of Article Three (3), Chapter Forty-two (42) of the Revised Statutes of the State of Missouri for the year 1929 and Sections 8157, 8158, 8159, and 8160 of Article Fifteen (15), Chapter Forty-two (42) of the Revised Statutes of the State of Missouri for the year 1929, be and the same are hereby repealed."

This act was passed without an emergency clause and went into effect September 6, 1937. Sections 7879, 7888, inclusive, supra, relate to poll taxes in those counties not under township organizations. Sections 8157, 8160, inclusive, supra, relate to the levying and collection of poll taxes in those counties having township organizations. The tax in both instances is collected the same way because Section 8158 provides that poll taxes in counties under township organizations shall be levied and collected in the same manner as in those counties not under township organizations.

The time and way in which the poll tax was to have been levied and collected is as follows: Section 7880, R.S. Missouri 1929, provides that the poll tax shall be levied by the County Court at the regular February term in each year. Section 7881, R.S. Missouri 1929, provides that if a poll tax is not paid thirty days after June 1, the amount may be recovered by a suit before any Justice of the Peace. Section 7786, R.S. Missouri 1929, provides that it shall be the duty of the road overseer to file suit before some Justice of the Peace not later than September 1 of each year, but that the failure of the road overseer to file suit before that time shall constitute no defense to same. Therefore, the poll taxes for 1937 were levied in February, 1937, and were due at that time. The taxpayer had until thirty days after June 1, that is, until July 1, 1937, in which to pay. After that time, the tax could be collected by a suit. The poll tax laws were repealed September 6, 1937.

61 Corpus Juris 1012 states: "the amendment or repeal of a statute providing for the levy and collection of taxes will not operate retrospectively as to affect unpaid taxes already due or pending proceedings for their collection."

To the same effect is Cooley on Taxation, Volume 2, page 1181:

"where taxes are levied under a law which is repealed by a subsequent act, unless it appears clearly that the legislature intended the repeal to work retrospectively, it will be assumed that it intended the taxes to be collected according to the law in force when they were levied."

The case of U.P. Railroad Company v. Board of Commissioners, 217 Fed. 540, is similar to the instant case. The Circuit Court of Appeals through Judge Amidon said:

"Under these statutes the tax for 1912 was complete on the 1st day of January, 1913. The rights and duties of the public and of taxpayers were fixed at that time. This being the case, the remedies which the law then afforded ought to follow the tax until it is collected. The statute of which Section 5 above quoted is a part was not approved until May 1, 1913, five months after the tax of 1912 became complete. It should be given a prospective operation only. That is the cardinal rule of construction, which cannot be departed from except in obedience to the express language of the statute. Union Pacific R.R. Co. v. Laramie Stock Co., 231 U.S. 190, 34 Sup. Ct. 101, 58 L. Ed. 179. The statute here involved contains no language of that import. As a rule, statutes relating to taxation are thus construed. Lewis' Sutherland on Statutory Construction, para. 645; Matter of Miller, 110 N.Y. 216; American Investment Co. v. Thayer, 7 S.D. 72, 63 N.W. 233; Hall v. Perry, 72 Mich. 202, 40 N.W. 324. Statutes in force at the time a tax is levied continue in force for its collection, notwithstanding their amendment or repeal. City of Indianapolis v. Morris, 25 Ind. App. 409, 58 N.E. 510; Leonard v. Indianapolis, 9 Ind. App. 262, 36 N.E. 725; Oakland v. Whipple, 44 Cal. 303; Smith v. Kelly, 24 Or. 464, 33 Pac. 642;

Smith v. Humphrey, 20 Mich. 398;
Blakemore v. Cooper, 15 N.D. 5,
106 N.W. 566, 4 L.R.A. (N.S.) 1074,
125 Am. St. Rep. 574; Cooley on
Taxation, (3d Ed.) p. 499."

In answer to your second question, Section 8181, R.S. Missouri 1929, relates to special road districts in counties under township organization provides for a poll tax. Such section was not repealed by Laws of 1937, page 440, and therefore is still in effect.

CONCLUSION

It is, therefore, the opinion of this department that Laws of Missouri 1937, page 440, repealing certain sections relating to poll taxes which went into effect September 6, 1937, does not affect those taxes levied for the year 1937 under authority of the statutes that were repealed. It is further the opinion of this department that Section 8181, R.S. Missouri 1929, providing for a poll tax in special road districts under township organization was not repealed by Laws of 1937, page 440, and is still in effect.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

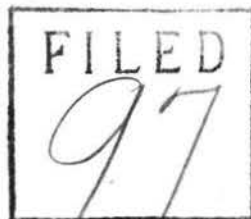
APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

AO'K:VAL

CATTLE AND HOGS) duty of brand inspector to inspect.
INSPECTION OF))

November 13, 1937



Hon. Carl E. Williamson
Prosecuting Attorney
Ripley County
Doniphan, Missouri

Dear Sir:

This department is in receipt of your letter of October 4, 1937, in which you request an opinion as follows:

"I should like an interpretation of Section 12778, P. 224, Laws of Missouri, 1937, referring to the inspecting of cattle and hogs in counties having open stock range.

This section provides for inspection by the brand inspector of the county, providing for a penalty in the following section for a violation, but my question is as to whether it is the duty of the sheriff to make this inspection on all outgoing shipments of livestock, or only in instances where inspection is requested.

It may have been the intention of the legislature when the first act of this nature was passed in 1921 to require all persons to have livestock inspected to guard against theft. The 1935 act simply adds hogs to the list of livestock to be inspected. I have never known of the act being enforced, if it does mean all such livestock leaving the confines of the county, but if it does mean that, then it may go a long way toward curbing thefts of such animals in counties such as this."

Section 12778, R.S. 1929, as reenacted Laws 1937, page 223, is as follows:

"All persons, firms or corporations shipping, driving or permanently moving any neat or horned cattle or hogs from any county in this State or subdivision thereof, having free stock range, to any point or destination outside the confines of such county, shall, before removing the same, have such cattle and/or hogs, duly inspected by an authorized brand inspector whose duty it shall be to inspect the same and make a record of all brands, marks, labels or other means of identification and to furnish a certificate thereof to the effect that such cattle and/or hogs, have been duly inspected, to such person, firm or corporation applying therefor, and such brand inspectors certificate shall be legal authority to procede in the removal of such cattle within the meaning of this Article, Provided, that nothing in this Article shall prevent persons or individuals from driving or removing their own cattle from their range as defined in Section 12, 818 of the Revised Statutes of the State of Missouri, for the year of 1929, to their own premises."

Section 12778a, R.S. 1929, as enacted Laws 1937, p. 224, is as follows:

"Any person violating any of the provisions of Section 12,778, shall be deemed guilty of a felony and upon conviction, be punished by imprisonment in the Penitentiary for a term of not less than two years or more than ten years or by fine of not less than \$100.00, and imprisonment in the County jail for a term of not more than one year or by a fine of not less than \$100.00."

Section 12778, R.S. 1929, Laws 1937, p. 223, is exactly the same as it originally was except for the addition of the words "hogs" and "and/or hogs" in the places where these words appear in said section. Article II, Chapter 88, R.S. 1929, relates to the inspection of cattle in counties having free stock range and provided for the inspection of cattle under certain conditions. The reenactment of Section 12778 of this article and chapter provided also for hogs to be inspected. However, by the reenactment of this section, the legislature did not expressly incorporate hogs in the balance of the sections of said article which provides for the furnishing of certificates of inspection by the brand inspector, the duties of said inspector and the fee to which he is entitled for making the inspection. They only mention cattle as being the animal to be inspected and that the certificate of inspection on cattle be furnished to certain persons and that the fee for said inspection is to be five cents per head for all cattle inspected. We merely desire to point out the above fact before we proceed to answer your question as to whether the statute requires the brand inspector to make said inspection only upon request or upon all cattle and hogs so shipped, moved or transported.

In State ex rel Ellis v. Brown, 33 S.W. 2nd 1.c. 107, the court in construing a statute said:

"There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory."

November 13, 1937

In *Ousley v. Powell*, 12 S.W. 2nd 1.c. 103, the court has said:

"When a statute provides what results shall follow a failure to comply with its terms, it is mandatory and must be obeyed."

In *State ex rel Stevens v. Wurdeman*, 246 S.W. 1.c. 194, it is said:

"Usually the use of the word 'shall' indicates a mandate, and unless there are other things in a statute it indicates a mandatory statute."

With the above principles of construction in mind, it is to be noticed that Section 12778, *supra*, provides that "all persons, firms or corporations * * * * * shall, * * * have such cattle and/or hogs duly inspected" by the brand inspector, "whose duty it shall be to inspect the same * * *, and to furnish a certificate thereof * * * , to such person, firm or corporation applying therefor." In short, this section requires that before cattle or hogs may be moved out of certain territory defined, the person moving the same must have them inspected, and that it is the duty of the brand inspector to so do.

Section 12778a, *supra*, provides a penalty for violation by any person of Section 12778.

CONCLUSION

Therefore, it is the opinion of this department that Section 12778, *supra*, is mandatory and makes it the duty of the brand inspector to inspect all cattle and hogs moved or shipped out of the territory defined in said statute, whether requested to do so or not by the person, firm or corporation desiring to move said cattle or hogs.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

CRIMINAL PROCEDURE -
COURTS

Special judge selected by
Prosecuting Attorney and Defendant to
try criminal case, cannot parole con-
victed defendant.

December 21, 1937.

Hon. W. P. Wilkerson,
Prosecuting Attorney
Scott County,
Sikeston, Missouri.

Dear Mr. Wilkerson:

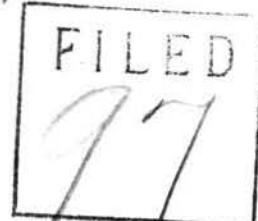
This department is in receipt of yours
of the 18th instant in which you submit the follow-
ing inquiry:

"Will you please advise me whether
a special Judge may parole a person
who has plead guilty to a felony,
where the parole follows immediately
after the plea, allocution, judgment
and sentence and before the special
judge leaves the bench?"

From the data furnished with your letter
we note that your inquiry is directed to the power
of a special judge selected by agreement of the
prosecuting attorney and defendant in a criminal
case in accordance with the provisions of Section
3649 R. S. Mo. 1929.

The powers of a special judge so selected
are defined in Section 3650 R. S. Mo. 1929, which
reads as follows:

"The special judge elected as pro-
vided in the next preceding section
shall immediately after his election
take an oath to support the Constitu-
tion of the United States and of the
state of Missouri, and to hear and
try the particular cause or motion
pending without fear, favor or
partiality; and such special judge
shall possess during such trial or
hearing, and in relation thereto
only, all the powers, perform the



duties, and be subject to the same restrictions as the judge of said court, but shall have no power whatever in any other cause than the one specified in the order of record; and upon the conclusion of the trial of said cause in said circuit or criminal court, his power and duties as such special judge shall instantly cease and determine."

It will be noted that the powers of such special judge are expressly limited to the "trial and hearing" and to matters "in relation thereto only". The question, therefore, is: Is the granting of a parole to a convicted defendant a part of the "trial and hearing" of a case or a matter in relation thereto?

We think this question has been definitely answered in the case of State ex rel vs. Kelly, 309 Mo. 465 l. c. 472, wherein it is held:

"In other words the special judge is invested with all the powers of a trial judge which are necessary or adequate for the judicial ascertainment of the fact of defendant's guilt or innocence. When that fact is so determined his power ipso facto ceases. (State v. Shea, 95 Mo. 85; Ex parte Clay, 98 Mo. 578; State ex rel. v. Wofford, 111 Mo. 526.)

"Of course the special judge may pass on the motion for a new trial, grant an appeal, settle the bill of exceptions, etc. This because such matters, being but procedural steps to be taken in arriving at the ultimate determination of defendant's guilt or innocence, are so related to the trial of the cause as to be deemed incident thereto. But the granting of a parole has naught to do with the

ascertainment of guilt or innocence. It presupposes the defendant's guilt. An application for parole cannot be entertained until after a judgment of conviction has been rendered (Secs. 4156 and 4157, R. S. 1919), and that judgment has become a finality. (Sec. 4167, R. S. 1919.) The granting of a parole, therefore, whether it be deemed a conditional suspension of sentence, or a conditional pardon, is no part of the trial of a cause which culminates in a judgment of conviction, nor is it in any way incident thereto. No appeal lay from the judgment entered on the pleas of guilty of defendants Morgan and Burnett. It was a final determination of the cause. When Judge Ing rendered that judgment his powers and duties as special judge came to an end."

In the foregoing case, the court was discussing the power of a judge of another court who had been called in to try a particular case, but reference to the powers of such other judge under such circumstances, as set forth in Section 3651 R. S. Mo. 1929, will show that such powers are clearly as broad as the powers of a special judge selected by the prosecuting attorney and defendant as defined in Section 3650. It is not reasonable to assume that the legislature intended to invest an attorney elevated to the office of special judge of a particular case, by agreement of the prosecuting attorney and defendant, with greater powers than those granted to a regular judge of another court who had been called in to try a particular case.

Furthermore, the power to grant paroles to convicted persons is vested by Section 3809 R. S. Mo. 1929, as follows:

"The circuit and criminal courts of this state, and the court of criminal correction of the city of St. Louis, shall have power, as hereinafter provided, to parole persons convicted of a violation of the criminal laws of this state."

It will be noted such power is vested in certain "courts". In the case of *State ex rel. v. Woodson*, 161 Mo. 444 l. c. 453, the Supreme Court of Missouri defined a court as follows:

"A court is a judicial assembly. The judge of the court is its presiding officer. While the judge is often called the "court", yet he is only so rightly called when the tribunal over which he presides is in session. Bouvier gives to the word "court" this definition: 'A body in the government to which the public administration of justice is delegated. The presence of a sufficient number of the members of such a body, regularly convened in an authorized place at an appointed time, engaged in the full and regular performance of its functions.'"

Section 3811 R. S. Mo. 1929, in setting forth the cases in which paroles may be granted, reads, in part as follows:

"* * *the court before whom the conviction was had, if satisfied that such person, if permitted to go at large, would not again violate the law, may in his discretion, by order of record, parole such person and permit him to go and remain at large until such parole be terminated as hereinafter provided: * * *"

Again Section 3812 provides, among other things, that:

" * * * the court granting said parole or the judge thereof in vacation may terminate said parole at any time without notice to such person by * * *"

Likewise Section 3815 R. S. Mo. 1929 requires the person paroled:

"* * * to appear at each regular term of the court granting the parole or at the court at which the judge granting the parole presides, during the continuance of such parole, and furnish, at his own expense, proof to the satisfaction of the court that he has, since his parole or since the last date at which such proof had been furnished, complied with all the conditions of such parole and conducted himself as a peaceable and law-abiding citizen."

Section 3816 gives to the court the power, "in its discretion, by order of record", to grant a final discharge to the paroled person.

From the above statutes relating to paroles, it is clear that the power to grant paroles to convicted persons is vested in the courts as Governmental Institutions and that such courts exercise the further power of supervision of such paroled persons, the power to terminate such paroles and the power to grant final discharge to the paroled person. If the regular judge of the court in which a person was convicted, by reason of his being disqualified to try the case, is also disqualified from granting and supervising a parole and of granting to the paroled person a final discharge, the question arises as to who would supervise the paroled person, revoke his parole or finally discharge him, if the attorney who happened to be the special judge in the trial of this case should die.

Under such a theory the whole system of paroles would be rendered ineffectual.

The use of the words, "may in his discretion, by order of record parole such person", may give rise to the question as to whether the judge is the one in whom the power to parole is vested, instead of the court. Some discussion of this question was had in the case of State ex rel. v. Kelly, supra, l. c. 473, 474, but we do not interpret that discussion as holding that the judge is the seat of the power to parole, instead of the court. In fact we think the discussion on this question definitely indicates a contrary holding.

CONCLUSION

It is, therefore, the opinion of this department that a special judge, selected by agreement of the prosecuting attorney and defendant in accordance with the provisions of Section 3649 R. S. Mo. 1929, to try a particular criminal case, does not have the power to grant a parole to the defendant who pleads guilty or is convicted in the hearing of such case.

Yours very truly,

APPROVED:

HARRY H. KAY,
Assistant Attorney General.

J. E. TAYLOR,
(Acting) Attorney-General.

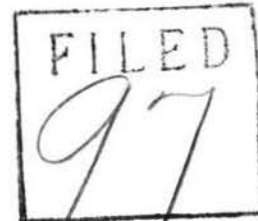
HHK:LB

FEEs: RECORDER AND CIRCUIT
CLERK

Recorder and Circuit Clerk
shall collect and account
for fees for taking acknowl-
ments and affidavits.

December 31, 1937

Mr. Carl E. Williamson,
Prosecuting Attorney,
Ripley County,
Doniphan, Mo.



Dear Sir:

This office acknowledges your request for an official
opinion dated December 27, 1937, which is as follows:

"Will you please advise this office
if it is required of the Recorder
of Deeds to turn into the County
Treasurer all fees collected for
acknowledgements, and if Circuit
Clerks are required to turn in
their fees for the same services,
such services being independent
from their duties as such officers
such as acknowledgements for
applications for marriage licenses,
acknowledgements of deeds, and
affidavits."

This request particularly refers to the fees collected
by the recorder for taking acknowledgments and by the Circuit
Clerk for taking acknowledgments and administering oaths and
whether or not the officers are required to account to the
proper officials for the collections they make for such
services. Section 11804 R.S. Mo. 1929 provides as follows:

"Recorders shall be allowed fees for
their services as follows:
* * * * *
For every certificate and seal-- 50¢
* * * * *"

Section 11562 R.S. Mo. 1929 is as follows:

"Hereafter whenever, under any law
of this state relating to the duties
of the recorder of deeds in any
county of this state, it becomes
necessary for any person to be sworn
to any statement, affidavit or other
papers of any kind, the recorder of
deeds shall be authorized to admin-
ister an oath to any person in matters

relating to the duties of his office, with like effect as clerks of courts of record: Provided, he use his seal of office to the jurat, as clerks of courts of record do. He shall receive the same compensation allowed by law for like service as clerks of courts are now allowed."

From the two foregoing sections of the statute, the recorder gets his authority to make charges for services for taking acknowledgments. Section 11568 R.S. Mo. 1929 requires the recorder to keep a full, true and faithful account of all fees of every kind received and make a report every year to the county court. If he receives an amount in an excess of four thousand dollars (\$4,000.00) for such fees, in any one year of his official term after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, then such excess shall be paid into the county treasury. While we do not find where the courts have passed upon this question as it applies to the recorders, but in view of the fact that the duties of the recorder in reporting fees and in charging fees are similar to those of the county clerk, we think the same rule which applies to the county clerks would apply to the recorder. In the case of State to the use of Jackson County v. Hickman, 84 Mo. 74, the court held that:

"Fees charged by the clerk of a county court for taking acknowledgments of deeds, granting certificates of pension papers, and certificates of authority of other officers to act, affidavits, etc., constitute a part of the fees of his office, and as such are to be accounted for by him in settling with the county court."

CONCLUSION

It is therefore the opinion of this office that in accordance with the provisions of the foregoing sections of the statute and following the ruling of the court in Jackson County v. Hickman supra, that it is the duty of the recorder to report and account to the county court for any and all fees which he collects for taking the acknowledgments which he is authorized by virtue of the provisions

of sections 11804 and 11562 R.S. Mo. 1929.

As to the duties of the Circuit Clerks to report these fees for taking acknowledgments for application for marriage licenses, acknowledgments of deeds and affidavits, etc., we find that by virtue of the provision of Section 11785 R.S. Mo. 1929:

"The Circuit Clerks shall receive in all civil proceedings the following fees for their services * * * * *
For acknowledgment of a deed and other cases ----- 50¢
For certificate and seal ----- 50¢
For oath and certificate to affidavit ----- 25¢
* * * * *

Section 11814 Session Acts of Missouri 1937, page 447 provides:

"It shall be the duty of the Clerks of all Circuit Courts to charge and collect for the County in all cases every fee accruing to their offices under the provision of Sections 11785, 11787 and 11788, or any other statute, * * * * *
Such Clerk shall, at the end of each month, file with the County Clerk a report of all fees paid and accruing to his office during such month, * * * * *

As the duties of the Circuit Clerk with the respect to collecting fees and accounting for fees are similar to those of the county clerks, we will treat them as within the same class. While we find no cases reported pertaining to the Circuit Clerk and his duties in respect to collecting and reporting these fees, however, we do find that in the case of State to the use of Jackson County v. Hickman, 84 Mo. 74, the court held that:

"Fees charged by the clerk of a county court for taking acknowledgments of deeds, granting certificates of pension papers, and certificates of authority

of other officers to act, affidavits, etc., constitute a part of the fees of his office and as such are to be accounted for by him in settling with the county court."

CONCLUSION

In accordance with the provisions of the foregoing statutes and following the ruling of the court in the case of Jackson County v. Hickman supra, this office is of the opinion that the fees charged by the Circuit Clerk for taking any acknowledgments, affidavits, etc., constitute part of the fees of his office and as such are to be accounted for by him in settling with the county court.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J.E. TAYLOR
(Acting) Attorney General

TWB:DA

FICTITIOUS NAME - Use of fictitious name as a violation of criminal law.

2-8
February 5, 1937.

Hon. Conn Withers,
Prosecuting Attorney of Clay County,
Liberty, Mo.



Dear Sir:

We have your letter of February 2, 1937, requesting our opinion supplementing our opinion to Hon. James S. Rooney, former prosecuting attorney of Clay County, of January 13, 1937, your letter being in the following terms:

By letter dated January 13, 1937, you gave an opinion in answer to a request by Mr. Rooney, dated November 28, 1936, Mr. Rooney, who was my predecessor in office, as appears by your opinion did not inform you of one fact which raises the most question as to whether or not the matter mentioned in your Opinion of said date constitutes a violation of the criminal statute, namely, that the name "New Butler Cafe" was used as soon as the purchase was made from John Butler by Cowling and as soon as this purchase was made all signs and literature, bills of fare, etc., bore immediately beneath the name "New Butler Cafe" the words "Cowling and _____ Richner, proprietors", so that all published material and signs showed who were actually proprietors of the place, thereby giving direct notice in all such places of the true names of the persons doing business.

I would appreciate your advice as to whether or not this additional fact varies the conclusion set out in your Opinion of January 13, 1937."

We do not believe that it can be doubted that even under the supplementary facts mentioned in your letter, that there is a technical violation of R. S. Mo. 1929, section 14342. Business is being transacted and done in the name of "New Butler Cafe", and this name is not the true name of the persons doing the business, even though their names appear on published material and signs as the proprietors. There is no exemption in the Act for persons doing business under fictitious name because of the fact that the names of individuals

Hon. Conn Withers

February 5, 1937.

are noted as proprietors of such business.

Almost all of the cases which we have examined dealing with the Missouri Statutes and the statutes of other states on this subject involved civil suits where the defense was raised that the plaintiff was operating under a fictitious name in violation of a statute. The most helpful Missouri case is Ditzell v. Shoecraft, 219 Mo. App. 436, 274 S. W. 880 (1925) from which we quoted in our opinion of January 13, 1937.

A representative case from another jurisdiction, is Hayes v. Providence Citizens' Bank & Trust Co., 218 Ky. 128, 290 S. W. 1028 (1927) in which the court, construing a statute similar to the Missouri statutes under consideration, said:

"The primary purpose of the statutory provision was to enable persons dealing with other persons under trade or assumed names to know or be able to ascertain the name or names of the persons with whom they were dealing. * * * after all, the fundamental purpose of the enactment was to enable one to identify the individual who was the owner of the business with which he proposed to deal, to the end that he might exercise his judgment in determining whether he was dealing with a responsible person. * * *

There is nothing inherently vicious in doing business under an assumed name. Such manner of doing business was lawful before the statute was passed. The statute does not undertake to prohibit that mode of doing business, but only seeks to regulate the manner in which such mode of business should be carried on. The statute being penal in its nature and in derogation of the common law, it should not be construed so as to include within its purview cases which do not clearly come within it."

If Messrs. Cowling and Richner are the sole proprietors of the New Butler Cafe, so that no one extending credit to their business could be misled as

Hon. Conn Withers

February 5, 1937.

to the identity of its owners, then it may well be that the statute was not necessary to give persons dealing with them the protection of knowing with whom they were dealing, but since the language of the statute is so plain in requiring registration of any fictitious name, we believe that the statute is being violated when the proprietors of this business fail to register the name under which they are operating.

In conclusion, it is our opinion that any person engaging in or transacting any business in this state under a name other than the true name of such person, without registering as required by R. S. Mo. 1929, section 14342-14346, is guilty of a misdemeanor, and as such subject to prosecution and fine or imprisonment, even though in connection with such fictitious name the name of the proprietor of such business appears on published material and signs, but in our opinion if the names of all the proprietors of such business appear in all cases where such fictitious name is used and in conjunction therewith, this fact would doubtless make a conviction more difficult, and if a conviction were had, would doubtless go far toward mitigating the fine or sentence.

Very truly yours,

EDWARD H. MILLER,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

RE: ESCHEATS FUND: PAYMENT TO NONRESIDENT

April 23, 1937.

FILED

98

Honorable R. W. Winn,
State Treasurer,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of April 19th relative to the power of the State Treasurer to make payment from the escheats fund to the attorney in fact for a recently located heir at law of Frank Krapeinger, deceased.

Section 623, R. S. Mo. 1929, provides:

"Proceedings to recover money from state treasury. - Within twenty-one years after any money has been paid into the state treasury by an executor or administrator, assignee, sheriff or receiver, any person who appears and claims the same may file his petition in the court in which the final settlement of the executor or administrator, assignee, sheriff or receiver was had, stating the nature of his claim and praying that such money be paid to him, a copy of which petition shall be served upon the prosecuting attorney, who shall file an answer to the same."

Section 624 provides:

"Court to order warrant to issue, when.- The court shall examine the said claim, and the allegations and proofs, and if it find that such person is entitled to any money so paid into the state treasury it shall order the state auditor to issue his warrant on the state treasurer for the amount of said claim, but without interest or costs; a copy of which order, under the seal of the court, shall be sufficient voucher for issuing such warrant."

If these two sections of our law are complied with, we see no reason why you may not make payment from the escheats fund

April 23, 1937.

to a person holding the proper power of attorney from the newly located nonresident heir at law.

Respectfully submitted,

JOHN W. HOFFMAN, JR., Assistant
Attorney General.

JWH:EG

APPROVED:



J.E.T. (Acting) ATTORNEY GENERAL

PLAN OF SCREEN: A lottery in violation of Section 4314 R. S.
Missouri 1929.

October 18, 1937

10-22
FILED
98

Honorable Conn Withers
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

We have your request of October 11, 1937, for an opinion relative to the game of "Screeno", which request in part is as follows:

"The manager of the theater which uses this plan contends furnishing of cards without cost by distribution around the town on which this game is played and which may be played by those listening to the announcements in front of the theater without the purchase of a ticket operates to destroy the element of consideration which would make it a violation of the gambling law. At his request the Amusement Company owning the patent sent to me a brief which I enclose herewith. Personally, I am inclined to doubt the correctness of its conclusion. The statement of the operation of the plan on the first page is essentially correct as I understand the majority of the tickets actually used in the playing are those received by the purchasers at the ticket window immediately before the ticket is handed to them."

The principle underlying all lottery law is that a lottery is a scheme or device wherein anything of value, is for a consideration, allotted by chance.

A lottery contains three essential elements, namely, prize, chance and consideration. State vs. Emerson, 1 S.W. (2d) 109; State ex rel. vs. Hughes, 299 Mo. 529; 253 S. W. 229; State vs. Becker, 248 Mo. 555, 154 S. W. 769.

The following summary as to what is essential to constitute a lottery is taken from 45 Harvard Law Review, page 1200:

"Variations in form are as immaterial as variations in substance. Of course, it is of no importance what the scheme is called; as the courts put it, it is the 'game' and not the 'name' which counts. Nor is any particular method of operation indispensable to the existence of a lottery. For example, a formal drawing by lot is not needed, although lotteries have often been associated with wheels of chance and drawings by lot, as the very terms indicate. That contestants write their own entrance tickets is unimportant. The situation is not affected materially even if tickets are dispensed with entirely. While the life of a contest, like any other form of advertising, is publicity, the lack of advertisement does not detract from its nature as a lottery. How the news that prizes are being awarded gets about is of no consequence, so long as it gets about somehow. In the last analysis, every aspect of the scheme is irrelevant, so long as people are induced to pay consideration for the possibility of receiving a prize distributed by chance."

The word "lottery" must be construed in its popular sense with the view of remedying the mischief intended to be prevented and to suppress all evasions for the continuance of the mischief. People vs. McPhee, 139 Mich. 687, 103 N.W. 174; 69 L. R.A. 505. State vs. Mumford, 73 Mo. 547, 650. State vs. Wersebe, 181 Atl. 299, 301.

The word is generic; no sooner is it defined by a court than ingenuity evolves some scheme within the mischief discussed but not quite within the letter of the definition given. People vs. McPhee, 139 Mich. 687; 103 N.W. 174; 69 L.R.A. 505. State vs. Clarke, 33 N.H. 329. This is made apparent from an examination of a large number of cases in which various methods of distributing money or goods by chance are examined and discussed.

The Court in Valhalla Hotel & Company vs. Carmona, 44 Phillipine 233, l. c. 242, said:

"While ingenuity is continually at work to evolve some scheme which is within the mischief but not quite within the letter of the law--we propose to go beyond the shell to the substance and to condemn the same."

A Minnesota Court in construing its lottery statute in State vs. Moren, 48 Minn. 555, l. c. 560, said:

"The statute is intended to reach all devices which are in the nature of lotteries, in whatever form presented, and the courts will tolerate no evasions for the continuance of the mischief."

Apparently it is conceded that a prize is given and that the winner is determined by chance under the game of "Screeno". This opinion therefore primarily turns upon the question of consideration. In this connection we quote Thomas on Non-Mailable Matter, Section 16, page 35, as follows:

"The general rule relative to the consideration in schemes of this class, deducible from the adjudged cases and the elementary principles, may be formulated as follows: Where a promoter of a business enterprise, with the evident design of advertising his business and thereby increasing his profits, distributes prizes to some of those who call upon him or his agent, or write to him or his agent, or put themselves to trouble or inconvenience, even of a slight degree, or perform some service at the request of and for the promoter, the parties receiving the prize to be determined by lot or chance, a sufficient consideration exists to constitute the enterprise a lottery though the promoter does not require the payment of anything to him directly by those who hold chances to draw prizes."

The mere free distribution of tickets or coupons or chances entitling the holders to participate in the distribution of prizes by lot or chance does not relieve "Screeno" from its lottery features. The distribution of such tickets, as everyone knows, is for the purpose of inducing or stimulating pay patronage, and the pay patronage thus induced constitutes a consideration and the enterprise is a lottery. This is true whether all or only a part of the holders become pay patrons, and this situation is not changed by the fact that a few may obtain the prize without a direct payment of money therefor. This is the law in England, *Willis vs. Young et al.* 1 K.B. 448 (1907), and the rule in the federal courts, *Central States Theatre Corp. vs. Patz*, 11 Fed. Supp. 566, *General Theatres vs. Metro-Goldwyn-Mayer Dist. Corp.* 9 Fed. Supp. 546, and is also the rule of the post office department, *George Washington Law Review*, May 1936, p. 482. It is likewise the holding in several state courts, *Glover vs. Malloska*, 238 Mich. 216; *State vs. Danz*, 140 Wash. 546, 250 Pac. 37; *Featherstone vs. Ind. Service Ass'n (Tex.)* 10 S.W. (2) 124; *City of Wink vs. Amusement Company (Tex.)* 78 S.W. (2) 1065.

Honorable Conn Withers

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October 18, 1937

It is therefore the opinion of this office that the plan known as "Screeno" is a lottery in violation of Section 4314 R. S. Missouri 1929.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

FUNDS: Transfer of funds at end of biennium in accordance with the Laws of Missouri 1933, Section 1, page 415.

November 17, 1937



Honorable Robert W. Winn
State Treasurer
Jefferson City, Missouri

Dear Mr. Winn:

We are pleased to submit herewith our interpretation of the Laws of Missouri 1933, Section 1, page 415, in compliance with your request.

The section hereinabove referred to provides as follows:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State, shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision hereof, shall be deemed guilty of a misdemeanor;

provided, that in the case of state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; appropriations, gifts or grants from the Federal Government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the Governor and biennially to the General Assembly."

The biennium of 1935-1936 having ended, and assuming all warrants on same have been discharged, the unexpended balance remaining in the following funds should in our opinion be transferred and placed to the credit of the ordinary revenue fund of the State by the State Treasurer:

1. Agriculture Fees Fund: Sec. 12355-a, p. 189, Laws of Missouri 1935.
2. Athletic Commission Fund: Sec. 12999, R. S. Mo. 1929.
3. Board of Accountancy Fund: Sec. 13712 R. S. Mo. 1929.
4. Board of Barbers Fund: Sec. 13525 R. S. Mo. 1929.
5. Board of Chiropractic Examiners Fund: Sec. 13550 R. S. Mo. 1929.
6. Board of Embalming Fund: Sec. 13542 R. S. Mo. 1929.
7. Board of Health-Licensure Fund: Sec. 9119 R. S. Mo. 1929.
8. Board of Health-Water & Sewage Fund: Sec. 9032 R. S. Mo. 1929.
9. Board of Nurses Fund: Sec. 13483 R. S. Mo. 1929.
10. Board of Optometry Fund: Sec. 13500 R. S. Mo. 1929.
11. Board of Osteopathy Fund: Sec. 13517 R. S. Mo. 1929.
12. Board of Pharmacy Fund: Sec. 13149 R. S. Mo. 1929.
13. Board of Veterinary Fund: Sec. 12562 R. S. Mo. 1929.

14. Building & Loan Fund: Sec. 5582 R. S. Mo. 1929.
15. Clerk of Supreme Court Fund: Sec. 11658 R. S. Mo. 1929.
16. Confederate Soldiers Home Fund: Sec. 8666 R. S. Mo. 1929.
17. Earnings of Missouri Penitentiary Fund: Sec. 8454
R. S. Mo. 1929.
18. Fruit Experiment Station Fund: Sec. 12385 to 12393
R. S. Mo. 1929.
19. Grain Inspection Fund: Sec. 13360 R. S. Mo. 1929.
20. Industrial Home for Girls Fund: Sec. 8666 R. S. Mo. 1929.
21. Industrial Home for Negro Girls Fund: Sec. 8666
R. S. Mo. 1929.
22. Insurance Department Fund: Sec. 5679 R. S. Mo. 1929.
23. Intermediate Reformatory Earnings Fund: Sec. 8505
R. S. Mo. 1929.
24. Kansas City Court of Appeals Fund: Sec. 11658 R. S.
Mo. 1929.
25. Labor & Industrial Inspection Fund: Sec. 13220 R. S.
Mo. 1929.
26. Lincoln University Fund: Sec. 8666 R. S. Mo. 1929.
27. Marshal of Supreme Court Fund: Sec. 1886 R. S. Mo. 1929.
28. Mining Department Fund: Sec. 13652 R. S. Mo. 1929.
29. Missouri School for Blind Fund: Sec. 9694 R. S. Mo. 1929.
30. Missouri School for Deaf Fund: Sec. 9694 R. S. Mo. 1929.
31. Missouri State Sanatorium Fund: Sec. 8666 R. S. Mo. 1929.
32. Missouri Training School (Marshall) Fund: Sec. 8666
R. S. Mo. 1929.
33. Missouri Training School for Boys Fund: Sec. 8666 R. S.
Mo. 1929.

34. Missouri Workmen's Compensation Fund: Sec. 3362 R. S. Mo. 1929.
35. Poultry Experiment Station Fund: Sec. 53, p. 24, Laws of Mo. 1927.
36. Private Warehouse Inspection Fund: Sec. 13385 R. S. Mo. 1929.
37. School of Mines of Metallurgy Fund: Sec. 9665, Sec. 9717 R. S. Mo. 1929.
38. St. Louis Court of Appeals Fund: Sec. 11657 R. S. Mo. 1929.
39. State Dental Board Fund: Sec. 13573 R. S. Mo. 1929.
40. State Department of Education Fund: Sec. 9407 R. S. Mo. 1929.
41. State Fair Fund: Sec. 12475 R. S. Mo. 1929.
42. State Finance Department Fund: Sec. 5295 R. S. Mo. 1929.
43. State Hospital No. 1 Fund: Sec. 8666 R. S. Mo. 1929.
44. State Hospital No. 2 Fund: Sec. 8666 R. S. Mo. 1929.
45. State Hospital No. 3 Fund: Sec. 8666 R. S. Mo. 1929.
46. State Hospital No. 4 Fund: Sec. 8666 R. S. Mo. 1929.
47. State Park Fund: Laws of Missouri 1937, p. 520.
48. Central Missouri State Teachers College Fund: Sec. 8666 R. S. Mo. 1929.
49. N. E. Missouri State Teachers College Fund: Sec. 8666 R. S. Mo. 1929.
50. N. W. Missouri State Teachers College Fund: Sec. 8666 R. S. Mo. 1929.
51. S. E. Missouri State Teachers College Fund: Sec. 8666 R. S. Missouri 1929.
52. S. W. Missouri State Teachers College Fund: Sec. 8666 R. S. Mo. 1929.

53. University of Missouri Fund: Sec. 8666 R. S. Mo. 1929.

The following funds being collected and expended by virtue of the provisions of the Constitution of this State are in our opinion excepted from the terms of the above statute:

1. Blind Pension Fund: Article 4, Sec. 47, Missouri Constitution.
2. Escheat Fund: Article 11, Sec. 6, Missouri Constitution.
3. Game Protection Fund: Secs. 642, 9712, R. S. Mo. 1929; Article 5, Sec. 26, Missouri Constitution.
4. Soldier Bonus Fund: Article 4, Sec. 44d, Missouri Constitution.
5. Soldier Bonus Interest & Sinking Fund: Article 4, Section 44d, Missouri Constitution.
6. State Building Fund: Article 4, Sec. 44d, Missouri Constitution.
7. State Building Interest & Sinking Fund: Article 4, Section 44d, Missouri Constitution.
8. State Interest Fund: Article 4, Sec. 43, Missouri Constitution.
9. State Public School Fund: Article 10, Sec. 26, Article 11, Sec. 9, Missouri Constitution; Sec. 9712 R. S. Mo. 1929.
10. State School Moneys: Article 10, Sec. 26, Missouri Constitution; Sec. 9712 R. S. Mo. 1929.
11. State Highway Department Fund: Article 4, Sec. 44a, Missouri Constitution. Sec. 8144 Laws of Mo. p. 319.
12. State Road Fund: Article 4, Sec. 44a, Missouri Constitution. Sec. 8147, Laws of Missouri, page 320.
13. State Road Interest & Sinking Fund: Article 4, Sec. 44a, Missouri Constitution. Sec. 8145 Laws of Mo, page 320.

14. State Seminary Monies: Article 10, Sec. 26, Missouri Constitution. Sec. 9717 R. S. Mo. 1929.
15. State Seminary Fund: Article 10, Sec. 26, Missouri Constitution. Sec. 9717 R. S. Mo. 1929.

The following fund by virtue of an opinion rendered by this department under date of March 20, 1935, to Honorable R. B. Caldwell, President Board of Law Examiners, is excepted.

1. Board of Law Examiners Fund: Sec. 11693 and Sec. 11701 R. S. Mo. 1929.

The following are appropriations, gifts or grants from the Federal Government and excepted under statute.

1. Employment Service Fund, Federal.
2. Old Age Assistance Fund, Federal.
3. Federal Highway Building Fund.
4. Federal Soldiers Home Fund.
5. Vocational Educational Fund, Federal.
6. Vocational Educational Fund, Interest, Federal.
7. Vocational Rehabilitation Fund, Federal.
8. Vocational Rehabilitation Fund, Interest, Federal.
9. Vocational, Geo. Ellzey Fund, Federal.
10. Vocational, Geo. Ellzey Fund, Interest, Federal.

The Capitol Building Tax Fund was created as a sinking fund, provided by a tax on all taxable property in the state, the receipts to be used in the payment of capitol building bonds and the interest accruing thereon until the same are paid and cancelled. All of said bonds and interest we understand have been paid and cancelled and there has been no tax levy since 1924. Receipts of said fund are

November 17, 1937

from collections of delinquent capitol building tax.

Laws of Missouri 1917, Section 7, page 425, provides as follows:

"There is hereby created a fund to be known as the capitol decoration fund, which shall consist of all moneys that shall accrue in the capitol tax fund each year in excess of the legal obligations against said capitol tax fund for such year until and including all moneys that shall accrue to and remain in the capitol tax fund after all the capitol building bonds and interest thereon shall have been paid. And said sums are hereby appropriated for the purpose of carrying into effect the provisions of this act."

The capitol decoration fund is no longer in existence, the purposes for which the fund was created having been fulfilled. We are therefore of the opinion that the remaining funds in the Capitol Building Tax Fund should be transferred to the ordinary revenue fund.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:MM

a Surety Company bond be accepted by the County for the remainder of his said term of office? It is understood that if said Collector is entitled to so give such Surety Company bond for the remainder of his said term that the consent and agreement of the County Court approving a particular Surety Company qualified under the provisions of said law can be easily reached and obtained.

"Since the County Court will soon have to decide this point they would appreciate as early a reply as is conveniently possible."

If we understand your question correctly it is, under the facts as stated in your letter: May the county collector, upon his request, compel the county court to accept a surety company bond for the remainder of his term even though he has an acceptable bond duly approved by the county court on file with the proper officers to protect the funds in his hands? If such surety bond is given by the county collector for the remainder of his term, is it the duty of the county to pay the premium on said bond?

Laws of Missouri, 1937, page 190, provides in part as follows:

"Whenever any officer of this state * * * or any officer of any county of this state * * * shall be required by law of this state * * * to enter into any official bond, or other bond, he may elect, with the consent and approval of the governing body of such state, department, board, bureau, commission, official, county, * * * or other political subdivision, to enter into a surety bond, or bonds,

Dec. 20, 1937.

with a surety company or surety companies, authorized to do business in the State of Missouri and the cost of every such surety bond shall be paid by the public body protected thereby.

"All laws in conflict with the provisions of this act are hereby repealed, insofar as such laws are in conflict with the provisions of this act."

We think that under the provisions of the above statute that if the county collector or other officers mentioned in this statute elect to enter into a surety bond or bonds and same is done with the consent and approval of the governing body, which in this case would be the county court, then, in that event, the county court would be required to pay the premium on such surety bond. In other words, if the collector in this instance elects to give a surety bond he must have the consent and approval of the county court to give such bond, then, in that event, it is incumbent on the county court to pay the premium on the bond. Conversely, if the county court does not consent to the officer giving a surety bond it is not required to pay the premium.

It is, therefore, our opinion that under the provisions of this Act that the county collector must first elect to give a surety bond and then it must be done with the consent and approval of the county court, and if those two things concur it is the duty of the county court to pay the premium on the bond.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

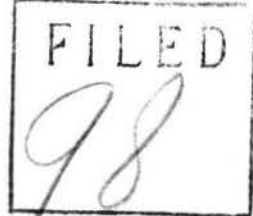
J. E. TAYLOR
(Acting) Attorney-General

CDU:EC

SHERIFFS:

Fees in reference to non est
returns on search and seizure
warrants.

December 22, 1937



Mr. Conn Withers,
Prosecuting Attorney,
Liberty, Mo.

Dear Sir:

This will acknowledge receipt of your letter request-
ing an official opinion under date of December 1, 1937, which
reads as follows:

"There have been several instances where upon a complaint signed by myself as Prosecuting Attorney a search warrant was issued by one of the Justices of the peace of this county pursuant to the provisions of Section 3783, R.S. of 1929, which warrant was thereafter executed by the sheriff or some other officer with power to execute it requiring traveling of a good many miles and sometimes the employment of assistance in an endeavor to make the search effective with the result that no property whatever as described in the warrant was found or that such as might be found did not contain sufficient money to pay the costs of the officers or even a part of their bare expenses.

Under facts as outlined above I would appreciate and do hereby request the opinion of your office as to whether or not it is proper for the Justice to make up a transcript of the proceedings of the search warrant and certify it for the payment of costs by the County in the same manner as would be the case where an individual would be prosecuted in the Justice Court upon a charge of misdemeanor. If this method is not proper, will you please outline the proper procedure in order that these officers may recover their costs."

In answer to your request will say that Section 11791 R.S. Mo. 1929, sets out specifically the fees to which a sheriff is entitled to in criminal cases. Section 11777 sets out the fees which a constable is entitled to in criminal cases. Both of these sections are strictly construed by the courts.

Under Article 18, Chapter 29 which described the costs in criminal cases, Section 3827 reads as follows:

"When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

Section 3830 in the same act reads as follows:

"When such prosecutions are commenced by a public officer whose duty it is to institute the same, and the defendant is acquitted, the county shall pay the costs; if he is convicted, and unable to pay the costs, the county shall pay all the costs, except such as were incurred on the part of the defendant."

Reading the two sections together it is necessary that the defendant be sentenced to imprisonment in the county jail or assessed with a fine, or both, or the defendant be acquitted, before the county is liable for the costs. There is no other section which provides that the county pay the costs except the two above described sections. In order that the sheriff should be allowed fees for services of a search warrant, there must be a conviction or an acquittal before the county would be authorized in paying any fees.

Under Sections 11791 and 11792, the exact fees are set out by both sections to which the sheriff would be entitled. Section 11793 of the Revised Statutes of Missouri, 1929, provides:

"No sheriff or ministerial officer in any criminal proceeding shall be allowed any fee or fees for any other services

than those in the two preceding sections enumerated, or for guards not actually employed."

In the case of Aldridge v. Zorn, 287 S.W. 650, a civil suit was brought by a sheriff against the defendant who was the owner of a newspaper seeking to recover damages for libel. A defendant set up as his defense that the article was true. Among other things the newspaper charged that the sheriff had been guilty of accepting money for services that was not allowable under the law. The sheriff asked for an instruction to the effect that he was entitled to other compensation except the fees allowed under the statute. The trial court gave the following instruction:

"The court instructs the jury that plaintiff had a right as sheriff of Howell county to accept the sum of \$500.00 paid him through the prosecuting attorney's office for services that he had rendered and expenses incurred therein."

The appellate court held:

"There is no law to support these instructions. Learned counsel for plaintiff make no attempt in their brief to defend these instructions. Nor do they cite any statute or case to support the theory that the \$500 was lawfully received by plaintiff when he was sheriff. All the pertinent law we have been able to find is to the contrary. Section 8 of article 14 of our constitution provides that the compensation or fees of no state, county, or municipal officer shall be increased during his term of office. Section 3196, R.S. 1919, among other things, provides that every officer who shall by color of his office unlawfully and willfully exact, demand, or receive any fee or reward to execute or do his duty, shall be adjudged guilty of a misdemeanor. Section 10999 and 11000, R.S. 1919, fix the fees of sheriffs in criminal cases, and section 11001 prohibits the receipt of any other fees in criminal proceedings except for guards *****."

Section 11001 of the Revised Statute of 1919 mentioned in this opinion is now Section 11793 of the Revised Statutes of 1929.

Under Section 3841 of the Revised Statutes of Missouri, 1929, the clerk of the court in which any criminal cause shall

shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of service and the fee therefor.

Section 3851 reads as follows:

"Whenever the state or county shall be liable under the provisions of this article, or any other law, for costs incurred in any examination of any felony, or in the trial of any misdemeanor before any justice of the peace, it shall be the duty of such justice to make out, certify and return to the clerk of the circuit or criminal court of the county a complete fee bill, specifying each item of service and the fee therefor, together with all the papers and docket entries in the case; and it shall thereupon be the duty of such clerk to make out a proper fee bill of such costs, which shall be properly and legally chargeable against the state or county, which shall be examined by the prosecuting attorney, and proceeded with in all respects as a fee bill made out for costs incurred in such court of record."

Under Sections 3841 and 3851, the clerk or the justice of the peace can only allow fees allowed by the statute and specifically set out, to the constable or sheriff.

In the case of State ex rel. Troll, Sheriff, v. Brown, et al., Auditor, Appellants, 146 Mo. 401, the court, in their opinion, stated:

"It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed. v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to

no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 545."

In the syllabus the court stated that no officer is entitled to fees of any kind for any service unless they are provided for by statute, and statutes allowing such fees must be strictly construed. In this case the court also held in their opinion that:

"If the sheriff was not entitled by statute to the fees claimed, neither the certificates of the judges of the criminal courts, nor of the court of criminal correction could create such right in him. Nothing short of statutory enactment could do so. These certificates were therefore without authority, and of no binding force upon the city."

As suggested in your letter that the justice of the peace make a transcript of the proceedings of the search warrant and certify it for the payment of the costs by the county. This action would be null and void and under the decision in State v. Brown, it would be of no effect. That the statute in regard to fees of a sheriff or constable or any other officer should be strictly construed was also held in the case of Sanderson v. Pike County, 195 Mo. 598, and in their opinion at page 605:

"It is well-settled law in this State that the right to compensation for the discharge of official duties is purely a creature of the statute, and that the statute which is claimed to confer that right must be strictly construed. The right of a public officer to compensation is derived from the statute, and he is entitled to none for services he may perform as such officer, unless the statute gives it. (State ex rel. v. Adams, 172 Mo. 1-7; Jackson County v. Stone, 168 Mo. 577; State ex rel. v. Walbridge, 153 Mo. 194; State ex rel. v. Brown, 146 Mo. 401; State ex rel. v. Wofford, 116 Mo. 220; Givens v. Daviess Co., 107 Mo. 603; Williams v. Chariton Co., 85 Mo. 645; Gammon v.

Lafayette Co., 76 Mo. 675.)"

This opinion was also held in *King v. Riverland Levee District*, 218 Mo. 490 where in their opinion the court at page 493 said:

"It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law, and then is incidental to the office. (State ex rel. Evans v. Gordon, 245 Mo. 12, 1.c. 27, 149 S.W. 468; Sanderson v. Pike County, 195 Mo. 598, 93 S.W. 942; State ex rel. Troll v. Brown 146 Mo. 401, 47 S.W. 504.) Furthermore our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking v. McCracken, 60 Mo. App. 1.c. 565, to the effect that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same. (State ex rel. Evans v. Gordon, supra.)"

In view of the fact that the statute does not allow fees to a sheriff it is strictly construed, where there is no conviction or acquittal of the defendant. The legislature is empowered to provide and regulate fees under Article 9, Section 12 of the Constitution of Missouri. This section reads as follows:

"Fees of County Officers--How Provided for.

The General assembly shall, by a law uniform in its operation provide for and regulate the fees of county officers, and for this purpose may classify the counties by population."

In the case of State ex rel. Buder v. Hackman, 305 Mo. 342, the court held:

"The words 'he and his deputies shall be entitled to receive their actual

December 22, 1937

necessary expenses incurred in the performance of their duties,' fall far short of constituting clear and satisfactory authority for the payment by the State of clerk hire for assessors.

The argument of hardship and that an officer should not be compelled to incur a financial loss, in performing the duties incident to his office, cannot be considered by the courts in passing upon the rights of relator, as fixed by the statute. Failure to provide a salary or fee for a duty imposed upon an officer by law does not excuse his performance of such duty. (State ex rel. v. Brown, 146 Mo. l.c. 406.) It may be that an assessor actually sustains a financial loss in the performance of his duties under our State Income Tax Law. But such fact is for consideration by the Legislature, and not by the court."

In your letter you asked this office to outline the proper procedure in order that these officials may recover their costs and all that we can say in this respect is to refer you to the above case, State v. Hackman, in which they state that it is for consideration by the legislature and not by the courts.

CONCLUSION

It is the opinion of this office that it is not proper for the justice of the peace to make up a transcript of the proceedings of the search warrant and certify it for the payment of costs by the county where a defendant has not been convicted or acquitted in accordance with Section 3827 and Section 3830 of the Revised Statutes of Missouri, 1929.

Respectfully submitted

W.J. BURKE
Assistant Attorney General

APPROVED:

J.E. TAYLOR
(Acting) Attorney General

WJB:DA

CEMETERIES:

TAXATION:

Land owned by cemetery company and
not used for burial purposes is
subject to taxation.

January 8, 1937



Mr. Guy Wood
Clerk, County Court
DeKalb County
Maysville, Missouri

Dear Sir:

We wish to acknowledge receipt of your request for an
official opinion under date of January 2, 1937, which reads
as follows:

"Is the real estate of a cemetery
company not used for burial grounds
exempt from taxation?

"The above question has arisen in
this county in connection with a
forty acre farm acquired by a ceme-
tery association by virtue of a
deed or foreclosure. That is the
association loaned a certain sum
of money that they had acquired by
subscription to be used as a trust
fund to take care of the expense
of the cemetery.

"After acquiring the farm, which,
of course is not adjacent to the
burial grounds, they rented the
farm and returned the net profits
to the treasury of the association."

Section 6 of Article X of the Missouri Constitution
reads, in part, as follows:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation."

In the case of State ex rel. v. Casey 210 Mo. 235, 1. c. 248, the court held that the constitutional tax exemption of a cemetery association applies only to lands used for cemetery purposes, and not to the personal property of a cemetery association. The court said:

"It is quite clear that, under section 6 of article 10 of the Constitution, and section 9 of relator's charter, all of the land held by it for cemetery purposes is exempt from taxation for general purposes, but does it necessarily follow that its personal property and moneys on hand acquired from the sale of lots are also exempt from taxation? As a rule, all property is subject to taxation, and, therefore, laws exempting property from taxation are to be strictly construed, and the right of exemption established beyond a reasonable doubt. (Fitterer v. Crawford, 157 Mo. 51.) An exemption from taxation exists only where it is expressed in explicit terms, and it cannot be extended beyond the plain meaning of these limits. (State v. Wilson, 52 Md. 638.)"

In the case of State ex rel. v. Wesleyan Cemetery Association, 11 Mo. App. 560, suit was brought to collect taxes for the year 1877 which were assessed against certain lands of the Wesleyan Cemetery Association. The court said:

"This is correct. The constitutional provision in question recites that 'the property, real and personal, of

Mr. Guy Wood

-3-

January 8, 1937

the state, counties, and other municipal corporations, and cemeteries, shall be exempt from taxation.'

"The court must have found that the property in question was, during the year 1877, used as a cemetery, and no other finding could have been made under the evidence."

In the above case, the court declared the law to be that since the premises were used as a cemetery at the time the taxes sued for were assessed, the plaintiff could not recover for the constitutional exemption was effective and eliminated the tax liability.

In your letter you state that the land in question belonging to the cemetery association is not adjacent to the burial grounds, and that said land is being rented by the association and profits are returned to the association.

CONCLUSION

It is the opinion of this Department that the land owned by the cemetery company and not used for burial purposes is subject to taxation. There was no intent in the constitutional exemption to exempt property of a cemetery association other than that real property used solely as a burial ground.

Yours very truly,

Wm. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

ARH:HR

COUNTY COURTS: May employ and dismiss assistants under Section
8020, R. S. Mo. 1929.

January 21, 1937

1-29



Mr. Guy Wood,
Clerk of the County Court,
DeKalb County,
Maysville, Missouri.

Dear Sir:

This department is in receipt of your request for
an opinion under date of January 12, 1937, wherein you state
as follows:

"The County Court of DeKalb County has
requested an opinion from the Attorney
General's office in the following mat-
ter. Does the County Court have the
authority to employ all of the men who
work on the construction of county
bridges?

"This question has arisen in this county
by the attempt of the County Court to
select the men who are to work under
the supervision of the County Highway
Engineer. The County Highway Engineer
contends that he has the authority to
select and employ these men as well as
dismiss them if their work is not
satisfactory.

"The Court takes the position that they
have the authority to select and dismiss
these workers. However, they have agreed
to abide by the decision of the Attorney
General as to who has the authority to
employ these workers."

Section 8019, R. S. of Mo. 1929, provides the manner in which the county may dispose of the county highway engineer law, and we are informed that the County of DeKalb has availed itself of this section and voted out the county highway engineer law.

Section 8020, R. S. of Mo. 1929, provides as follows:

"In all counties in this state that may vote against the county highway engineer law in the manner prescribed in section 8019 of this article, all matters relating to roads and highways and the expenditures of the public funds thereon shall be governed by the laws then in force in such counties, except that part of the law pertaining to the appointment of the county highway engineer. In all counties wherein the services of a county highway engineer are dispensed with, as provided by section 8019 of this article, the county surveyor shall be ex officio county highway engineer, and, as such, shall perform such services pertaining to the working, improvement, repairing and maintenance of the roads and highways, and the building of bridges and culverts as provided by this article to be done and performed by the county highway engineer, or as may be ordered by the county court; and for his services as ex officio county highway engineer he shall receive such compensation as may be allowed by the county court, of not less than three dollars nor more than five dollars for each day he may be actually employed or engaged as such county highway engineer. The county court may empower the county highway engineer, or the county surveyor when acting as county highway engineer, to employ such assistants as may be deemed necessary to carry out the court's orders and at such compensation as may be fixed by the court, not to exceed the sum of four dollars per day for deputy county highway engineer nor more than three dollars per day for each other assistant for each day they may be actually employed."

The construction of the highway engineer law as pertains to those counties where the highway engineer is abolished and the surveyor becomes ex-officio county highway engineer (and we understand DeKalb County has abolished same) was before the appellate court in *Spurlock v. Wallace et al.*, 204 Mo. App. 674, where the court said:

"The first road and highway law of Missouri that we find, governing counties such as Douglas, for a county highway engineer, appears in Session Acts of 1907, page 401. Under this act there was no election given to the people to determine for themselves whether there would be a county highway engineer. This law was amended in the 1909 act, which did give the people of the county the right to determine for themselves whether such an officer was desired. The Law of 1907 provided that the compensation for a highway engineer would be not less than \$300, nor more than \$2000, per year, while the Amendment of 1909, under section 10572, permits the county court to make a per diem charge.

"If the contention made by appellant should be upheld, then we must necessarily hold that to vote under section 10571, and to thereunder abolish the highway engineer act, meant simply a change of the manner and amount of compensation to be paid to the party acting as highway engineer, as the appellant is contending that he is duty bound to perform exactly the same service that the highway engineer would have performed even though the people have voted out this law. We cannot lend sanction to this narrow construction, as it would appear that the purpose of sections 10571 and 10572, Revised Statutes 1909, was to permit the people of a county to abolish the office of highway engineer yet to leave it possible for the surveyor to perform the duties that the highway engineer would have performed had the law not been voted out, provided he acted under the orders and direction of the county court. The general intent of section 10571 was to permit the people of a

1/21/37

county to vote out a highway engineer and to abolish the duties of such engineer, and that more was intended by said section than to merely give them the right to change the form and amount of compensation.

* * * * *

"The duties required of a highway engineer by section 10558, Revised Statutes 1909, are by the very terms of section 10571, when the people have voted against the highway engineer act, abolished, and the county court may, under section 10481, Revised Statutes 1909, order warrants drawn to road-overseers. The provision in the last section, that the construction of bridges and culverts shall be under the direction and supervision of the county highway engineer, is by the terms of section 10571 dispensed with when the people vote against the act."

In an opinion rendered by this department under date of July 30, 1935, to Hon. James H. Pettijohn, Prosecuting Attorney, Oregon, Missouri, a copy of which is enclosed, it is held that where the county highway engineer law is no longer effective in a county, the county surveyor as ex-officio county highway engineer "performs his duties under the orders and directions of the county court."

The question then arises whether such authority also vests the county court with the power to employ the men who are to aid and assist the engineer in his duties.

Although there has been no decision in this state defining or interpreting the word "assistants" as used in the above statute, we find the following definition in Corpus Juris, Vol. 5, at page 1327:

"Assistant - One who helps, aids or assists; one who stands by and helps or aids another. The word is susceptible of considerable variety of meaning, to be made definite in each case by the aid of the context, the circumstances, and other materials of interpretation. It has been held to include an agent, or servant, and a deputy."

The above definition would indicate that the county court may empower the county highway engineer to employ such persons as may be deemed necessary to aid, help and assist him in fulfilling his duties under the statutes, which includes that of building bridges.

In DeKalb County the county surveyor is acting as county highway engineer, and the county court may empower him to employ such assistants as may be deemed necessary to carry out the court's orders, and at such compensation as may be fixed by the court.

Is the word "may" as used in Section 8020, supra, to be construed as mandatory upon the county court to empower the county highway engineer to employ assistants, or is it merely directory upon the court, so that in its discretion it may withhold such power to itself?

In the case of State ex rel. v. Blair, 245 Mo. 680, l. c. 693, the court in construing the term "may", said:

"The word 'may' is sometimes construed as mandatory, but more frequently otherwise."

And in the case of In re Bank of Mt. Moriah v. Mt. Moriah, 226 Mo. App. 1230, l. c. 1231, the court in holding that where the statute merely requires certain things to be done but nowhere prescribes the result that shall follow if such things are not done, such statute should be construed as directory and not mandatory, said:

"If a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory. The rule thus stated is in harmony with that other well-recognized canon that statutes directing the mode of proceedings by public officers are to be held to be directory and are not to be regarded as essential to the validity of a proceeding unless it be so declared by law. (State v. Cook, 14 Barb. 259.) By this we mean that if a fair consideration of the statute shows that unless the Legislature intended compliance with the proviso to be essential to the validity of the pro-

ceeding, which nowhere appears, then it is to be regarded as merely directory.' (State ex inf. Frank W. McAllister v. Bird et al., 295 Mo. 344, 351, 352.)"

It is to be noted that the statute doesn't prescribe the result to follow if the county court doesn't empower the county highway engineer with the power to employ such assistants, and we are therefore of the opinion that the word "may" as used in Section 8020, supra, is merely directory, and that the county court may reserve such power to itself.

It is therefore our opinion that the county court may empower the county surveyor, when acting as county highway engineer, to employ the necessary assistants to carry out the court's orders, at such compensation as may be fixed by the county court, or it may reserve that power unto itself to select and dismiss the employees who are to work under the supervision of the county highway engineer.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

HABITUAL CRIMINAL ACT; Sections 4461 and 4462, R. S. 1929.
Principal charge may be based on a
"mixed felony" and be punished under
"Habitual Criminal Act."

March 27, 1937.

3-27



Honorable Claude T. Wood
Prosecuting Attorney
Pulaski County
Waynesville, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of March 19th, relating to facts with reference to the prosecution of one Curtis Locke for various felonies committed in Pulaski County, Missouri.

In the last paragraph of your letter you request the opinion of this Department on a question which, if we understand you correctly, is this: Whether or not you may prosecute Locke under the "habitual criminal act," Sections 4461 and 4462, R. S. Mo. 1929, in an information or indictment in which the principal charge is for the prosecution of stealing a motor vehicle under the provisions of subdivision "(a)", Section 7786, R. S. Mo. 1929, wherein the penalty is provided that the offender shall be punished by imprisonment in the Penitentiary for a term not exceeding twenty-five years, or by confinement in the county jail not exceeding one year, or by fine not exceeding \$1,000.00, or by both such fine and imprisonment, wherein the principal offense is what might be termed "a mixed felony."

Your inquiry evidently turns on the question as to the construction to be given the following language, in Section 4461, supra, viz.:

"* * second, if such subsequent offense be such that, upon a first conviction, the offender would be punished by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense; * * *"

Mar. 27, 1937.

There is no question but that a prosecution under sub-division "(a)", Section 7786, supra, is a felony under many decided cases, and, in the event of the conviction and appeal, the appeal would be to the Supreme Court of Missouri, notwithstanding the penalty inflicted might run down to a fine or jail sentence. We do not find that the point raised by the court in your case has been definitely passed on by our Supreme Court, but we do find cases wherein prosecutions have been had under the "habitual criminal act," where the principal offense is what might be termed "a mixed felony."

In the case of State v. Long, 22 S. W. (2d) 809, the prosecution was under the provisions of Section 4066, R. S. Mo. 1929, stealing chickens in the night time, wherein the penalty runs down to a jail sentence and a fine, and the conviction in this case under the "habitual criminal act" was affirmed by the Supreme Court. We find that State v. Compton, 61 S. W. (2d) 967, was a case which was a prosecution under the provisions of Section 4500, R. S. Mo. 1929, for selling intoxicating liquors, commonly called, "moonshine," "corn whiskey" and "hooch," wherein the punishment may be for not less than two years in the Penitentiary or by a fine of \$500.00 or imprisonment in the county jail for a term of not less than three months nor more than twelve months, or both, and wherein the defendant was prosecuted under the "habitual criminal act" and received the punishment as therein provided.

In view of these cases, we must conclude that a prosecution may be had under the "habitual criminal act," notwithstanding the fact that under the principal charge the punishment might be graded down to a fine or a jail sentence. From the peculiar wording of Section 4461, supra, in the "habitual criminal act" there may be some merit in your court's construction of this statute. It is, however, our opinion that a prosecution may be maintained under the "habitual criminal act", based on the main charge of larceny of a motor vehicle, under the provisions of sub-division "(a)", Section 7786, supra.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

CRH:EG

APPROVED:

J. E. TAYLOR

ROADS AND BRIDGES: County Court may not appoint road overseer under Section 7870 for special road districts created under Section 8061, R. S. Mo. 1929.

April 13, 1937.

Honorable Carl F. Wymore
Prosecuting Attorney
Cole County
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your letter of February 25, 1937, in which you request an opinion which reads as follows:

"Will you kindly give me your opinion as to whether the County Court may appoint road overseers under Section 7870, Revised Statutes of Missouri, 1929, of Special Road Districts Benefit Assessments in counties not under township organization, organized under Section 8061, Revised Statutes of Missouri, 1929?"

In School District v. Day, 43 S.W. (2d) 428, 1. c. 432, the Court in construing the Statutes said:

"It is a companion section to section * * * both being a part of the same act * * *, and they should be construed together.

Chapter 42, Article X, R.S. Mo. 1929, provides the manner in which special road districts, in those counties not under township organization, are formed and maintained. Section 8061 authorizes their formation, and Section 8063, a companion section to 8061 provides as follows:

"At the term of court in which such order is made, or at any subsequent term thereafter, the court shall appoint three commissioners, who shall be residents of the district and owners of land within the district, who shall hold their office until the first Tuesday after the first Monday in January thereafter; and on said date the

voters of the district, at an hour and place to be filed by said commissioners, shall elect three commissioners, one of whom shall serve one year, one for two years and one for three years, and on the first Tuesday after the first Monday in January each year thereafter they shall elect a commissioner to take the place of the one whose term is about to expire, who shall serve three years. No person shall be elected or appointed commissioner who is not a resident of the district and an owner of land in the district. Any vacancy caused by resignation, death, removal from the district of a commissioner or sale of all land owned by him in the district shall be filled for the unexpired term by election by the voters of the district. All commissioners shall qualify by taking, subscribing and filing with the county clerk the oath prescribed by the Constitution of this state, and that they will faithfully, honestly and impartially discharge their duties as commissioners according to law. If for any reason the board of commissioners hereinbefore mentioned shall fail to call an annual or other prescribed election to fill a vacancy or vacancies caused by the expiration of the term of any one or more of the commissioners, then the county court is hereby authorized and required to call an election to fill said vacancy and to fix the time therefor within fifteen days after making the order for such election."

Setting forth the manner in detail for the selection of commissioners of the district formed under Section 8061. Under the ruling in the School District v. Day case, supra,

Hon. C. F. Wymore

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April 13, 1937.

these are companion sections, both being a part of Chapter 42, Article X, R.S. Mo. 1929, and should be construed together.

Part of Section 8065 of Chapter 42, Article X, R. S. Mo. 1929, is as follows:

"* * * *Said commissioners shall have
all the power, rights and authority
conferred by law upon road overseers,
* * * *."

thus replacing the office of road overseer with the commissioners selected under Section 8063, R. S. Mo. 1929.

Therefore, Section 7870, R. S. Mo. 1929, can not be invoked to give the county court power to appoint road overseers for special road districts created under Section 8061 R. S. Mo. 1929. Section 7870 is under Chapter 42, Article III, relating to public roads and their maintenance, and can hardly be construed a companion section to Section 8061, because these sections relate entirely to different subjects. The means by which commissioners (overseers), for those road districts created under Section 8061, R. S. Mo. 1929, are to be selected, is provided in Section 8063 R. S. Mo. 1929, and must be followed in their selection.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

LLB:H

May 24, 1937.



Hon. Claude T. Wood,
Prosecuting Attorney,
Richland, Missouri.

Dear Sir:

We have your request of May 21st, 1937, for an opinion,
which is as follows:

"Will you please furnish me your official opinion
as to whether the game of "Win-O" is in violation of the
criminal statutes of this state?

"The game of "Win-O" as now being conducted at
the Crocker Theater, at Crocker, Missouri, is played
about as follows:

"Patrons of the theater upon entering the theater
are each given a card with several numbers upon it. Dur-
ing the evening and at the end of the first show, the lights
are turned on in the theater. A large dial, with a revol-
ving hand upon it, is placed in the front of the theater.
The hands upon this dial are electrically controlled. The
management of the theater carries a long electric cord to
and from about the house, having various patrons to press
the button upon the cord. This causes the hand upon the
dial to revolve. Each time the button is pressed by a
patron, the number on the dial at which the hand stops
is called out and same noted by every patron playing the
game. This is continued until an entire row of numbers
on one patrons card has been called at which time this
patron calls out "Win-O" and for this, said patron re-
ceives a cash prize from the management of the theater.
No extra price is charged for the numbered card, same be-
ing given to the patron with his ticket. Neither is there
any increase in the price of the admission ticket---the ad-
mission tickets being sold for the regular price of twenty-
five cents. The winning patron not only gets to see the
picture but also gets his cash prize in addition and all for
the single price of a regular admission. The management of
the theater stated to the writer that the purpose of the
game was to stimulate attendance at the theater and that the
same had greatly increased the attendance at the theater.

5-24-37.

Persons not buying admission tickets and attending the show are not given "Win-O" cards and not allowed to play the game.

"I shall greatly appreciate having this opinion at your earliest possible convenience."

The proposed scheme of "Win-O" involves a distribution of prizes, for consideration, which are awarded by the spin of the wheel, or by chance. These are the three essential elements of a lottery. 4314 R. S. Mo. 1929; State v. Emerson, 1 S.W. (2d) 109.

There does not have to be any increase in the admission price of the ticket in order to establish consideration in this case for lottery. The admission price paid by the patrons of the theatre pays for both the right to see the show and the chance they get in this game. No additional payment is required. Featherstone v. Independent Service Station (Texas) 10 S.W. (2d) 124; City of Wink v. Griffith Amusement Co. (Texas) 100 S.W. (2d) 695.

This office in previous opinions has held that such games as "Hollywood" "Screeno" "Pay-Off" "Bank Night" "Suit Clubs" "Rocket Machines" "Whiffle Boards" and "Ball Machines" are all violations of the criminal code of this state, in that they attempt to award prizes for consideration by chance.

It is, therefore, the opinion of this office that the game of "Win-O" is prohibited by the criminal code, and is a lottery.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

FEB/LD

JONES-MUNGER LAW:
PUBLICATION :

It is not necessary under Section 9952b, 1935
Session Acts for the Collector to make any
certification to be embodied in the publication.

October 13, 1937



Mr. Roland C. Woods
Collector of Revenue
Washington County
Potosi, Missouri

Dear Mr. Woods:

This Department is in receipt of your letter of
October 5th, wherein you make the following request for
an opinion:

"There has been a question raised in
this county as to the legality of my
publication of lands offered for sale
under the Jones-Munger law. The
publisher, to whom I gave this copy,
failed to insert at the bottom of the
list, my certificate on his first pub-
lication but later, when the mistake
was discovered made an additional run
including this certificate but as I
understand it, did not mail this entire
run to his subscription list.

Will you please render your opinion as
to whether this publication is illegal
due to the fact that the Collector's
certificate was omitted from the first
publication, with the exception of an
additional run which was not circulated
to his entire subscription list. In
your opinion, please advise what my
position should be with reference to
continuing the sale.

Apparently if this publication is
illegal, the sale of tax lands in this

county will have to be postponed this year unless some provision can be made to legalize a publication. As the time for offering this land for sale is drawing near I would appreciate your prompt advice in this matter."

Section 9952 of the Session Acts of 1933, provides in part as follows:

"It shall be the duty of the county clerk and county collector to compare the collector's record of such list of delinquent lands and lots as corrected with the corrected 'delinquent land list' made pursuant to sections 9938 and 9942, and the county clerk shall certify in the 'delinquent land list' on file in his office that same has been properly recorded in the collector's office and shall attach a certificate at the end of the record of such list of delinquent lands and lots in the collector's office that such record contains a true copy of the 'delinquent land list' on file in his office.***** such 'back tax book', and the recording of same by the collector and certification by the county clerk as herein provided, shall be construed as a making of such 'back tax book' of delinquent real estate, lands and lots."

Section 9952a, Session Acts 1933, page 430, provides in part as follows:

"All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this act on the first Monday of November of each year, and it shall not be necessary to include the name of the owner, mortgagee, occupant or any other person or corporation

owning or claiming an interest in or to any of said lands or lots in the notice of such sale;*****The entry of record by the county collector listing the delinquent lands and lots as provided for in this act shall be and become a levy upon such delinquent lands and lots for the purpose of enforcing the lien of delinquent and unpaid taxes, together with penalty, interest and costs."

Section 9952b of the 1933 Session Acts was amended by a Section of the same number in the 1935 Session Acts at page 403 and is as follows:

"The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November. And it shall only be necessary in the printed and published list to state in the aggregate the amount of taxes, penalty, interest and cost due thereon, each year separately stated, and the land therein described shall be described in forty-acre tracts or other legal subdivision, and the lots shall be described by number, block, addition, etc.; Provided, however, that if a part or parts of any forty-acre tract or other legal subdivision or lot is assessed on the tax books to two or more parties as owners thereof, then as to such land or lots, such list shall be so prepared and separated. To such list shall be attached and in like manner so printed and published a notice that so much of said lands and lots as may be necessary to discharge the taxes, interest and charges which may be due thereon at the time of sale will be sold at public auction at the courthouse door of such county, on the first Monday in November next thereafter, commencing at

ten o'clock of said day and continuing from day to day thereafter until all are offered. The county collector shall, on or before the day of sale, insert at the foot of such list on his record a copy of such notice and certify on said record immediately following such notice the name of the newspaper of the county in which such notice was printed and published and the dates of insertions of such notice in such newspaper. The expense of such printing shall be paid out of the county treasury and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed one dollar for each description, which cost of printing at the rate paid by the county shall be taxed as part of the costs of the sale of any land or lot contained in such list."

The collector shall cause to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November; first, a copy of such list of delinquent lands and lots, second, such list shall state in the aggregate the amount of taxes, penalty, interest and costs due thereon, each year separately stated, third, the land described therein shall be in forty-acre tracts or other legal subdivision, and the lots shall be described by number, block, addition, etc; provided, however, that if a part or parts of any forty-acre tract or other legal subdivision or lot is assessed on the tax books to two or more parties as owners thereof, then, as to such land or lots, such list shall be so prepared and separated; fourth, to such list shall be attached and in like manner so printed and published a notice that so much of said lands and lots as may be necessary to discharge the taxes, interest and charges which may be due thereon at the time of sale will be sold at public auction at the courthouse door of such county, on the first Monday in November next thereafter, commencing at ten o'clock of said day and continuing from day to day thereafter until all are offered; fifth, the county collector shall on or before the day of sale, insert at the foot of such list on his record a copy of such notice and certify on said record immediately following such notice the name of the newspaper of the county in which such notice was printed and published and the dates of insertions of such notice in such newspaper.

October 13, 1937

The above are the only requirements as to what shall be done in regard to the publication of the list of delinquent lands in said Section 9952b.

The said certification referred to in said Section 9952 by the County Clerk was required in making the back tax book of delinquent real estate, lands and lots.

The entry of record by the county collector listing the delinquent lands and lots in said Section 9952a, became a levy on such delinquent lands and lots for the purpose of enforcing the lien of delinquent and unpaid taxes, penalty, interest and costs. The above clause in this summary proceeding constituted due process.

Thereafter, all that had to be done to enforce the tax lien was to publish the same under said Section 9952b, and in this section we find no provision for a certification by the collector except that certification provided for in Subdivision 5 supra, and such certification as therein mentioned did not require the collector to make certification before publication but rather after publication and on or before the day of sale.

We understand from your letter that you considered it to be necessary to make a certification that was to be embodied in the publication but we are unable to find any law requiring such to be done.

CONCLUSION

It is therefore the opinion of this Department that in case there was embodied in the publication the requirements of said Section 9952b as set out in the five subsections supra, the publication will be good.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. A. TAYLOR
(Acting) Attorney General

SVM:MM

ELECTIONS---St.Louis election board authorized to appoint deputy commissioners for purposes of registration.

November 4, 1937

Mr. W. H. Woodward, Chairman
Board of Election Commissioners
City of St.Louis
208 South Twelfth Boulevard
St.Louis, Missouri



Dear Sir:

We have your request of November 2, 1937, for an opinion of this office, which request is as follows:

"The Board would like a ruling from you on the question as to whether it can appoint Special Deputies to act as Registration Officers to take registrations and administer the oath required at the time of such registration, as set forth in Section 16 of the new permanent registration law applicable to the City of St.Louis.

We might refer you specifically to the following sections, which may be helpful to you: Sections 3, 4, 14, 17 and 86.

Would it be possible for you to let us have your opinion by Friday, at which time the Board will meet, as time is becoming a very important factor in the preparation of our work for the taking of registrations under this law."

Since your request involves a construction of the 1937 election law, Laws 1937, page 235 et seq., consisting of ninety sections, it will be necessary to refer briefly to the language used in that act and to rely upon the plain and ordinary meaning of the language therein used since the act has received no judicial construction.

Section 3 provides that the Board of Election Commissioners "shall have the right to employ such assistants from time to time as may be necessary to promptly and correctly perform the duties of the office, under the direction of the Board."

Section 4 in part provides:

"Any two members of the Board of Elections Commissioners shall have power to appoint before or upon any day of registration or election such number of deputy commissioners as they may deem necessary.* * * * * Such deputy commissioners shall serve for such time as the Board may determine, and may be dismissed summarily by the Board.

The duties of such deputy election commissioners with reference to registration are set out in the above section.

Section 14 provides:

"The Chief Clerk and other employees designated by the Board are hereby authorized to act as registration officers,* * *"

Section 15 also provides:

"Registration shall be conducted at the office of the Board throughout the entire year, except as hereinafter provided, upon the usual business days and at the regular office hours, and at additional hours in the discretion of the Board."

Section 17 provides:

"Any two assistants, or other employees, of opposite politics may take the registration of any person."

Mr. W. H. Woodward

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CONCLUSION.

It is therefore the opinion of this office that the Board of Elections Commissioners of the City of St. Louis has authority to appoint deputy election commissioners to act as registration officers; to take such registrations and administer the oath required at the time of such registration.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

FER:MM

BOARD OF ELECTION
COMMISSIONERS

)That part of Section 36 which provides that
)the information required to be typewritten on
affidavit forms is to be taken from registration
books is directory.

November 22, 1937

11-22



Hon. J. E. Woodmansee
Chairman
Board of Election Commissioners
Kansas City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of November 18, 1937, requesting an opinion from this Department, as follows:

"The Board of Election Commissioners for Kansas City is under the necessity of having your opinion with regard to Section 36, which commences at page 317 of the Laws of Missouri, 1937, which section is part of an act relating to registration for cities of 300,000 to 700,000, the act appearing at pages 294 to 341.

Said Section 36 provides: 'Affidavit forms shall be prepared in the office of the Board of Election Commissioners for all voters who are registered at the time this act takes effect.' The section otherwise indicates that the information shall be taken from the present registration books, and when the voter registers additional information 'which could not be provided from the registration books' shall be given. Further, the section contemplates that as to a voter who has changed his address, he may transfer his registration, and further, that a voter who has not previously registered may register.

After much consideration, the Board is un-animously of the opinion that the method pre-scribed by Section 36 is futile and expensive.

This is the opinion of the Board for the following reasons:

First, the present registers of voters do not contain all of the information required by other provisions of the registration act and especially Section 24 thereof, hence it will be impossible to complete the information upon the affidavit of registration without securing some of the same from the voter. This would mean that it would be necessary to conduct two operations upon the affidavit of registration in the typewriting machines, that is, typing the information from the old registers and then typing the additional information procured from the voter in person.

Second, a very high percentage of the present registration is erroneous, due to deaths, removals from the city, changes of address, and other reasons, so that these facts would involve the useless preparation of cards which would never be required, which would cost both the time to type such cards and the materials used, and beyond that absorb time that is most precious at this period when there is so much to be done and such a short time in which to do it.

If, in your opinion, Section 36 is directory and not mandatory, then the Board feels that much expense and time can be saved by disregarding that section and preparing at once applications for registration which will be, except for the affidavit prescribed by Section 24, replicas of the affidavit of registration. These applications can be filled out by the voters, filed with the Board, the affidavits typed therefrom and the voter can then come to the places of registration and make his affidavit.

This will avoid the erroneous preparation of cards and will enable the Board to complete affidavits of registration with one typewriter operation.

November 22, 1937

For the foregoing reasons the Board desires to know whether or not, in your opinion, it is obliged to prepare affidavit forms as required by Section 36, or whether said Section 36 is directory only, leaving the Board free to invite applications for registration which will contain all the necessary data correctly set forth from which affidavits of registration may be prepared by the Board and executed by the voter.

We shall be greatly obliged to you for your opinion upon this matter as early as we may have the same.

* * * * *

P.S. The purpose of the Board to check the applications for registration if the same are used against the present registers of voters and this we have thought might be deemed to comply with the provisions of Section 36, requiring the information to be taken from the register."

Section 36 of the Registration Law applicable to Kansas City, Laws of Missouri 1937, page 317, provides in part:

"Affidavit forms shall be prepared in the office of the board of election commissioners for all voters who are registered at the time this act takes effect. The board shall have typewritten on such forms all information required, such information to be taken from the registration books as they exist at such date, except that the spaces for the signatures of the voter and of the registration officer and for the voting record shall be left blank. Between the date when this act takes effect and the date of the close of registration before the first election thereafter, such voters may present themselves at the office of the board, or at branches hereinafter provided for, for the purpose of subscribing to the affidavits of registration so prepared. At the same time, they shall give any information called for on the affidavit forms which could not be provided from the registration books.* * * *"

It will be noted from a reading of the above section that the word "shall" which ordinarily but not necessarily denotes a mandatory duty is used in connection with the Board having typewritten on the affidavit forms all information required, and such mandatory language is not found in the clause stating that the information shall be taken from the registration books. Said section however states "such information to be taken from the registration books as they exist at such date." The question for our determination is whether or not said provision is mandatory or merely directory.

The general rule in regard to whether or not the duties of public officers are mandatory or not is stated in 59 Corpus Juris, page 1076, as follows:

"Generally statutes directing the mode of proceedings by public officers designed to promote method, system, uniformity and dispatch in such proceedings will be regarded as directory."

The law is stated in 20 Corpus Juris, Section 6, page 87, as follows:

"It is a general rule that statutes prescribing the power and duties of registration officers should not be so construed as to make the right to vote by registered voters dependent on a strict observance by such officers of minute directions of the statute, thereby rendering the constitutional right of suffrage liable to be defeated through the fraud, caprice, ignorance, or negligence of the registrars."

Cooley's Constitutional Limitations, Eighth Edition, Volume 2, pages 1396, 1937, states:

"Election statutes are to be tested like other statutes, but with a leaning to liberality in view of the great public purposes which they accomplish; and except where they specifically provide that a thing should be done in the manner indicated and not otherwise, their pro-

visions defined merely for the information and guidance of the officers must be regarded as directory only."

In the case of State ex rel. Ellis vs. Brown, 326 Mo. 627, the Supreme Court at page 633 quoted from Ruling Case Law with approval as follows:

"A mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding. Directory provisions are not intended by the Legislature to be disregarded, but where the consequences of not obeying them in every particular are not prescribed the courts must judicially determine them. There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory." (25 R.C.L. Sec. 14, pp. 766-7)"

As pointed out in the above case, in order to determine whether or not the provision in question is mandatory or directory, we must ascertain the legislative intention as disclosed by all the terms and provisions of the registration act. It is evident from a reading of Section 36 supra which provides the procedure to be followed for the first registration to be held under the new act that it is the duty

of the Board of Election Commissioners to prepare affidavit forms for all voters who are registered at the time of the effective date of said act, and to have typewritten on such forms all the information required to be sworn to by the voters. The provision that such information is to be taken from the registration books was undoubtedly an attempt on the part of the legislature to facilitate and expedite the first registration. From your letter we learn that the Board is unanimously of the opinion that the method prescribed by Section 36 for obtaining the information from the registration books is futile as well as expensive for numerous reasons which you pointed out. It is evident that the information contained in the registration books was not meant to be the sole source of information in filling out the affidavits, for it is specifically provided that the voters "shall give any information called for on the affidavit forms which could not be provided from the registration books." Certainly a voter could not be required to sign an affidavit prepared from the registration books if same contained any erroneous or false information. It is therefore evident that the important and essential thing is that the affidavit forms be prepared and contain the correct information required regardless from what source obtained, whether from the registration books, the application for registration or from the voter himself, and that the voters are given ample opportunity of subscribing to the affidavits of registration so prepared. Certainly it cannot be argued that the failure of the Board of Election Commissioners to obtain the information for the affidavits of registration from the registration books would void any election or deprive a qualified registered voter from casting his ballot at such election.

In *Yunker vs. Susong*, 173 Iowa 663, the registers in preparing the registration books instead of using the poll books of November 1912 as directed by the statute used the poll books of the City election held in March 1914. The Court at l. c. 683, 684, said:

"It must be admitted from this record that there was not a strict observance of the registration laws by the registration officers. But it is clear that such officers attempted to provide a means for ascertaining the citizens who shall be entitled to vote, and this is the purpose of the registration laws. It is not

claimed that there was any fraud or corruption on the part of any of the election officers. A registration of some sort was had and new names were added to the lists contained in prior poll books, and we think that there was a substantial compliance with the statute in so far as to ascertain and furnish a list of voters entitled to vote. So that, even if the officers whose duty it was to prepare the poll books and the voting lists did not strictly follow the statute, the voters were in no manner to blame, and they should not be deprived of their right to vote because of some mistake of the registration officers. It ought not be the law that each voter about to register, or who is entitled to have his name brought forward on a new list, must, at the peril of losing his right to vote, take an attorney with him to see that the registration officers perform their duty. We fail to see how anyone was prejudiced by the error, if any, of the registration officers."

The case of *People ex rel. Frost et al. vs. Wilson*, 62 N.Y. Rep. 186, was a quo warranto proceeding to oust defendant from the office of County Clerk because of irregularities of the inspectors in making and copying the registry as required by the registry act. One of the complaints was that they made the preliminary register from the register of the spring election instead of the poll list of the general election in the fall of 1872 as required by law. The Court in passing upon this question at l. c. 190 said:

"It is claimed by the learned counsel for the relator, and the judgment of the General Term proceeded upon the proposition, that the statute imperatively requires that inspectors of election in making a register shall use the poll-list of the next preceding general election, and enter in the new register all names appearing thereon. But we are of opinion, after a careful consideration of the provisions of the registry act, that while it authorizes the inspectors to use the poll-list of the last preceding general election in preparing

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the preliminary register, and for this purpose to take it from the office where it is filed, its use by them is not made imperative, and is not essential to the validity of the registry, and that the inspectors are not required to enter therein the names of all persons appearing upon the list."

And further at l. c. 191 it is stated:

"The duty of the inspectors in this case was to place on the preliminary register the names of all persons still residing in the second ward, whose names were on the poll-list of the fall election of 1872. If they were so placed upon it, the duty was performed, however they derived the information upon which they acted."

We think the above case is authority for holding that the Board of Election Commissioners will have substantially complied with the duty imposed upon them by law if affidavit forms are prepared for all voters who are registered at the time of the effective date of the new registration act and such forms have typewritten on them all information required to be sworn to by the voter regardless of from where they obtained such information.

CONCLUSION.

In view of all the above it is the opinion of this Department that that part of Section 36 of the Registration Act applicable to Kansas City which provides that the information required to be typewritten on the affidavit forms is to be taken from the registration books as they exist at the effective date of the present registration act is merely directory, and that if the Board of Election Commissioners have typewritten on such forms all the information required they will have substantially complied with Section 36 of the Registration Act regardless of whether the information was obtained from the registration books or from some other source.

APPROVED:

Respectfully submitted,

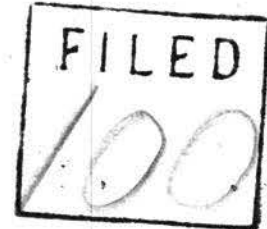
ROY MCKITTRICK,
Attorney General

J. E. TAYLOR,
Assistant Attorney General

JET:MM

FEES: SHERIFFS: For summoning petit jury and for apprehension of fugitives.

6-17
June 16, 1937.



Mr. J. A. Yadon,
Clerk, Grundy County Court,
Albany, Missouri.

Dear Mr. Yadon:

We wish to acknowledge your request for an opinion under date of June 10, 1937, wherein you state as follows:

"In a conversation over the telephone this morning with one of the chief clerks in your office, he thought best for us to write for the information we desire, which is as follows:

"A Petit Jury was summoned for the March Term of Circuit Court, and the Sheriff received \$8.40 and \$40.00 for mileage, and for summoning twenty-five extra Jurors @ 25¢ each, of which would be \$6.25, and \$40.00 mileage for that, then the Circuit Judge excused the Jury until the 26th of May, and the Sheriff called them back, and charged the \$8.40 for summoning them, and \$40.00 mileage, and we would like to know if he should be allowed the same as he did in the beginning, for the same Jury when they were only excused by the Circuit Judge, and not dismissed.

"We would also like to know if the Sheriff should be allowed mileage for the apprehension of a fugitive."

June 16, 1937

I.

In reply to your request, we enclose herein a copy of an opinion rendered by this department to Hon. John A. Eversole, Prosecuting Attorney of Washington County, wherein we pointed out that:

"Under the provisions of this section as we construe it, the Legislative intent was to allow the sheriff \$8.40 for summoning the petit jury and their alternates, and in addition to that allowance, when required to travel in excess of five miles from the place where court is held, he should be paid mileage as provided in said section."

Section 8775, R. S. Mo. 1929, provides for the summoning of other jurors when the panel is exhausted:

"In all cases, if a panel be exhausted by challenge or otherwise before the jury is sworn, the court shall order the sheriff or other officer to summon a sufficient number of other persons to complete the jury."

We assume that the panel was exhausted and that it was necessary to summon twenty-five extra jurors.

We have examined Section 11789, R. S. Mo. 1929, relating to fees of sheriffs and fail to find any provision made for compensation for such service, and therefore it was apparently the intention of the Legislature that same be included in the flat fee of \$8.40.

In the case of State ex rel. v. Brown, 146 Mo. 401, 1. c. 406, 47 S. W. 504, the court in holding that no officer was entitled to fees of any kind for any service unless they were provided for by statute, said:

"It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly

construed. State ex rel. v. Wofford, 116 Mo. 220; Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

However, Section 11789, R. S. Mo. 1929, does make provision "For executing and returning a special venire facias \$2.00", and "For each mile actually traveled in serving any venire summons, * * * when served more than five miles from the place where the court is held, * * * \$.10."

Absent such special venire, we are of the opinion that the sheriff would not be entitled to compensation for summoning the twenty-five extra jurors, and therefore was not entitled to mileage.

II.

Section 8754, R. S. Mo. 1929, provides when the jury list is to be prepared:

"The county court of each county at a term thereof not less than thirty days before the commencement of the circuit court or other court having civil and criminal jurisdiction, or civil or criminal jurisdiction, shall select names of not less than four hundred persons having all requisite qualifications of jurors; and the court in selecting such names shall select, as near as practicable, the same number from each township in the county according to the relative population, and shall determine

June 16, 1937

how many petit jurors and alternate petit jurors shall be selected from each township in said county and the names of such persons and the township from which they are selected shall be written on separate slips of paper of the same size and kind and all the names so selected from any one township shall be placed in a box with a sliding lid to be provided for that purpose and thoroughly mixed."

Under the above section it is contemplated that the jury list shall be prepared by the county court of each county for every term of court, and we are therefore of the opinion that it was the intention of the Legislature that the "standing jury" serve for the full term of court unless the petit jury shall have been discharged by the court before the end of the term.

Section 8760, R. S. Mo. 1929, provides that whenever the jury has been discharged, the court may order another petit jury at the same term or session of said court:

- "Courts having civil and criminal jurisdiction shall have power, whenever the grand or petit jury shall have been discharged, and it shall become necessary to have another jury, to order and require the sheriff, or other proper officer at the same term or session of said court, or at any adjourned or special term of such court, to summons from the citizens of the county having the requisite qualifications for jurors, a new panel of petit or grand jurors, and to order the sheriff or other proper officer to summon a standing petit jury whenever the county court shall have failed to select such petit jury; and whenever a greater number of petit jurors are required than the regular panel, or in case any juror shall fail to attend at the term required, the court may order the sheriff or other proper officer to summon a sufficient number of jurors as the occasion may require."

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We are of the opinion that if the jury had been discharged during the term of court, and the court had ordered a new jury, the sheriff would be entitled to the statutory fee of \$8.40 plus mileage, but that if the jury was merely dismissed for a date certain, as in the instant case, the sheriff would not be entitled to retain the statutory fee of \$8.40 nor mileage.

III.

Section 11792, R. S. Mo. 1929, sets out the mileage allowed sheriffs for their services in criminal cases:

"Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases and in all proceedings for contempt or attachment as follows: Ten cents for each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held: Provided, that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip."

From the foregoing, we are of the opinion that the sheriff would not be entitled to any mileage for the apprehension of a fugitive unless he be in possession of some writ or order of a court authorizing him to seek out the fugitive.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR